

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 June 2015
Judgment handed down on 8 July 2015

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

MR J R PLUMB

APPELLANT

DUNCAN PRINT GROUP LIMITED

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR STUART BRITTENDEN
(of Counsel)
Instructed by:
Thompsons Solicitors LLP
Congress House
Great Russell Street
London
WC1B 3LW

For the Respondent

MR FERGUS MCCOMBIE
(of Counsel)
Instructed by:
British Printing Industries Federation
Unit 2 Villiers Court
Meriden Business Park
Copse Drive
Coventry
CV5 9RN

SUMMARY

WORKING TIME REGULATIONS - Holiday pay

Working Time Regulations - Annual Leave - Sick Leave - Whether Worker Entitled To Carry Over Periods of Annual Leave to Later Years If Absent On Sick Leave - Whether There Is Any Limit on the Period During Which Annual Leave May Be Carried Over

The Appellant was employed as a printer. On 26 April 2010 he suffered an accident. He was on sick leave from that date until his employment was terminated on 10 February 2014. He did not take paid annual leave for the 2010, 2011 and 2012 leave years. A leave year ran from 1 February to 31 January. The Appellant indicated he wished to take annual leave from 5 August 2013 whilst still on sick leave. The Respondent refused to allow the Appellant to take annual paid leave. On termination of the employment, the Appellant sought payment in lieu of annual leave for the 2010, 2011 and 2012 leave years. The Employment Tribunal dismissed the claim as the Appellant could not demonstrate that he was unable, by reason of his medical condition, to take annual leave during the period whilst he was on sick leave.

The Tribunal erred in concluding that an employee who was on sick leave needed to demonstrate that he was unable, by reason of his medical condition, to take annual leave. Article 7 of the Directive requires that an employee who is on sick leave, and who would be permitted to take paid annual leave during that sick leave, is not required to take annual leave but may choose to do so. Where, as in this case, the Appellant did not wish to take annual leave during periods of sick leave, he was entitled to take the annual leave at a later date. Regulation 13(9) of the **Regulations**, which provided that annual leave may only be taken in the leave year in respect of which it was due, would need to be interpreted accordingly in order to give effect to the Directive. Regulation 13(9) of the **Regulations**, however, had only to be

interpreted to the extent necessary to give effect to the Directive. EU law did not confer an unlimited right to carry over periods of annual leave to subsequent years. The Directive, at most, only required that employees on sick leave were able to take annual leave within a period of 18 months of the end of the leave year in respect of which the annual leave arose. Consequently, Regulation 13(9) of the **Regulations** was to be read as permitting a worker to take annual leave within 18 months of the end of the leave year in which it was accrued where the worker was unable or unwilling to take annual leave because he was on sick leave and, as a consequence, did not exercise his right to annual leave.

THE HONOURABLE MR JUSTICE LEWIS

Introduction

1. This is an appeal against a decision of Employment Judge Bedeau dismissing a claim for a payment in lieu of annual leave under the **Working Time Regulations 1998** (“the Regulations”).

2. In brief, the Appellant was employed as a printer by the Respondent company. He was absent from work on sick leave following an accident on 26 April 2010. He remained on sick leave until his employment terminated on 10 February 2014. He sought payment in lieu of annual leave under the **Regulations** for each of the years 2010, 2011 and 2012. The Employment Tribunal dismissed his claim as it was not satisfied that the Appellant would have been unable to take annual leave because of his medical condition.

3. Two principal issues arise on this appeal. First, is an employee on sick leave required to establish that he was not able to take annual leave by reason of his medical condition, or is it sufficient that he was absent on sick leave and did not choose to take annual leave when on sick leave? Secondly, is there any limitation on the period for which an employee may carry forward annual leave accrued in one year to later years?

The Facts

4. The Claimant began employment as a printer with the Respondent on 23 November 1987. The Respondent’s business involved the design and production of commercial printed materials.

5. It was a term of the contract of employment that the Claimant would be entitled to a certain number of days' holiday plus bank holidays and statutory holidays a year. A year for these purposes ran from 1 February to 31 January and is referred to in this Judgment as the leave year. The employee handbook provided that employees were not permitted to carry forward unused annual leave into the next leave year unless that was agreed in writing by the Respondent's general manager or managing director.

6. On 26 April 2010, the Claimant sustained an accident at work. He remained on sick leave until his employment terminated on 10 February 2014. The Claimant did not take annual leave during the period from 26 April 2010 to 31 January 2013. He did not express any wish to take any annual leave until the summer of 2013.

7. In June 2013, the Claimant asked the Respondent to clarify the position in relation to entitlement to paid annual leave. The Respondent wrote stating that the Claimant was only entitled to holiday if he requested it and only for the year in which it was requested. On 24 July 2013, the Claimant wrote in response and formally requested leave for the years 2011 and 2012, stating that he would like to take the leave from 5 August 2013. The Claimant subsequently wrote on 17 September 2013, indicating that he was requesting permission to take the annual leave that he had not taken since 2010. That included a period of 20 days for each of the years 2010, 2011, and 2012 (a total of 60 days). He also requested leave for 2013. The Respondent agreed to and did pay salary for annual leave due for the current year, that is 1 February 2013 to 31 January 2014 (an issue as to the precise number of days annual leave has been resolved and is no longer in issue between the parties). The Respondent refused to pay salary for annual leave referable to the 2010, 2011 and 2012 leave years. Following the termination of his employment, the Claimant brought a claim, amongst other things, for

payment in lieu of untaken annual leave for the 2010, 2011 and 2012 leave years under Regulations 14 and 30 of the **Regulations**.

The Decision of the Employment Tribunal

8. The essential reasoning of the Employment Tribunal is as follows:

“...Is the claimant entitled to payment in lieu upon termination for annual leave accrued but untaken due to sickness absence for the leave years 1 February 2010 to 31 January 2011, 1 February 2011 to 31 January 2012 and 1 February 2012 to 31 January 2013?”

15. I have come to the conclusion that the guiding case is NHS v Lerner. The Court of Appeal held that a person who is on sick leave will be entitled to carry over his or her leave with pay if they were either unable or unwilling to request leave by reason of their medical condition.

16. The relevant issue in this case having regard to Lerner is whether the claimant was “unable” to take his leave due to sickness. This is a question of fact and not law. “Unwilling” is not an issue.

17. I heard the evidence in relation to the claimant’s sickness. In a case of this kind I expected cogent and probative medical evidence in support of the claimant’s assertion that he was unable to take his annual leave, however, such documentary evidence was absent. His oral evidence was that his shoulder had been operated on three occasions between 2010 and 2011 and he was subsequently diagnosed as severely depressed. Yet he met with the respondent on 14 October 2010, 27 October 2011 and on 24 January 2012 following his accident. Of significance he continued to work 12 hours on weekends at his local B&Q store. He also went on a week’s holiday in 2012 in the UK.

18. In the Oxford Dictionary “unable” is defined as “lacking the skill, means or opportunity to do something”. I would add in the context of this case “because of the worker’s medical condition”.

19. In the absence of any medical evidence showing that the claimant was unable to take his leave, such as in Schulte where the claimant suffered a heart attack or in Lerner where the claimant was presumed to have been too ill to exercise her right to annual leave, I have come to the conclusion that the Claimant was able to take his annual leave during his leave years. His evidence was that it never entered his mind, notwithstanding the fact that he had access to a union for advice and assistance. The fact that he regularly worked weekends for the past seven years and was on a week’s holiday in 2012, severely damages his case.

20. Accordingly, his claim for holiday pay for the leave years 1 February 2010 to 31 January 2011, 1 February 2011 to 31 January 2012 and 1 February 2012 to 31 January 2013 is not well-founded and is dismissed.”

9. In the light of that conclusion, the Tribunal did not need to consider the question of whether or not there was a limit on the period for which an employee could carry forward unused annual leave. The Employment Tribunal did, however, express its views on that issue and said the following:

“21. I was invited by the parties, if I was to find that the claimant was entitled to carry forward his annual leave because of sickness, to set a time limit for the carry forward of such leave. This is now, having regard to my conclusion, of academic significance. I do, however, express an opinion. The Schulte case is particular on its facts as there was a collective

agreement prescribing the carry forward period to 15 months. The ECJ ruled that it was within the scope of the Directive for Member States to set such a time limit.

22. As the UK does not set a limit for annual leave entitlement in sickness absence cases, I agree with Mr Airey that guidance can be drawn from the ILO convention 132 which limits the carry forward period to 18 months referred to in the Schulte case. Although the UK government has not ratified the Convention it serves as a helpful guide to what is seen as an acceptable period as it provides the opportunity for the worker to enjoy his or her rest, relaxation and leisure within a reasonable time frame. There is, however, an argument for saying that this is entirely a matter for Parliament to legislate on. I could only reiterate that my views here, on this particular issue, is now obiter.”

The Legal Framework

The Relevant European Union Law

10. Council Directive 93/104/EC of 23 November 1993 concerning aspects of the organisation of working time (“the Directive”) deals with, amongst other things, annual leave.

Among the recitals are the following:

“Whereas account should be taken of the principles of the International Labour Organization with regard to the organization of working time, including those relating to night work;

Whereas, with respect to the weekly rest period, due account should be taken of the diversity of cultural, ethnic, religious and other factors in the Member States”.

11. Article 1 of the Directive provides, so far as material, that:

“1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.”

12. Article 7 of the Directive provides that:

“Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.”

13. For completeness, Article 31(2) of the Charter of Fundamental Rights of the European Union provides that every worker “has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave”.

The Regulations

14. The **Regulations** seek to implement the relevant provisions of the Directive. Entitlement to leave is provided for by Regulation 13 of the **Regulations** which provide, so far as material for present purposes, that:

“(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

...

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

(a) 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.”

15. Provision is made for entitlement to periods of additional leave by Regulation 13A of the **Regulations** but those provisions are not relevant for present purposes. Regulation 15 of the **Regulations** deals with the dates upon which leave is taken and provides, so far as material, that:

“(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).”

16. There is provision for the payment in lieu of annual in circumstances where a worker's employment is terminated during the course of the leave year and the employee is entitled to annual leave that he has not taken. Regulation 14 of the **Regulations** provides that:

“(1) This regulation applies 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 regulation 13 and 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.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.”

17. Finally, there is provision for remedies. Regulation 30 of the **Regulations** provides that:

“30.— Remedies

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

(a) has refused to permit him to exercise any right he has under–

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded;

(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

(iv) regulation 25(3), 27A(4)(b) or 27(2); or

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

(2) Subject to regulations 30A and 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented–

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

...

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.”

The Issues

18. Against that background, the issues as they arise from the grounds of appeal, and as developed in the written and oral arguments, are whether the Appellant was entitled to payment in lieu of untaken annual leave accrued during sickness absence for the 2010, 2011, 2012 leave years on termination of his employment? That in turn breaks down into the following two principal issues:

(1) is an employee on sick leave required to establish that he was not able to take annual leave by reason of his medical condition, or is it sufficient that he was absent on sick leave and did not choose to take annual leave during the period of sick leave? and

(2) is there any limitation on the period for which an employee may take unused annual leave accrued in one leave year in later years?

The First Issue - Entitlement to Annual Leave

19. The Appellant contends that an employee who is on sick leave during a leave year is entitled to defer taking the annual leave to a later period. He contends that the Employment Tribunal erred in considering that he was required to establish that he was physically unable to take leave by reason of his medical condition. Further, the Tribunal erred in considering that the question of whether the Appellant was unwilling to take annual leave did not arise. If the Appellant was absent on sick leave, then, he submits, the question of his willingness to take annual leave during a period of sick leave did arise. Unless he wished to take annual leave, he was not required to do so. In the present case, the Appellant had not indicated any wish to take annual leave while on sick leave. Consequently, the Appellant contends that he was entitled to take annual leave for the leave years when he was on sick leave.

20. The Respondent contends that the case law, properly analysed, demonstrates only that an employee may defer taking periods of annual leave if the relevant legislation or contractual provisions prevent him from taking annual leave during a period of sick leave or, if he is allowed to take annual leave, he is unwilling to do so. The Respondent submits that it was open to the Employment Tribunal to decide as a matter of law that an employee who was entitled to take annual leave during a period of sick leave must show that he either physically unable to take the annual leave or was unwilling to do so. The Respondent contends that the Employment Tribunal was entitled on the evidence to conclude that the Appellant had not demonstrated that he was physically unable to take annual leave. Further, the Respondent contends that the Employment Tribunal was entitled to conclude that, on the pleadings, the Appellant was not alleging that he was unwilling to take annual leave during the period of sick leave.

Analysis

21. Article 7 of the Directive, as implemented by Regulation 13 of the **Regulations**, provides that an employee is entitled to paid annual leave of at least four weeks. Regulation 13(9) of the **Regulations** provides that annual leave may only be taken in the leave year in respect of which it is due. That provision, however, must now be read in the light of the case law of the Court of Justice of the European Union, as recognised by the Court of Appeal in **NHS Leeds v Larner** [2012] ICR 1389 (“**Larner**”). In cases where an employee is on sick leave during the leave year, the case law recognises that the employee may be entitled in certain circumstances to take annual leave accrued in respect of one year in a later year. It is necessary to separate out two separate questions. The first is the circumstances in which the employee may take paid annual leave outside the leave year and the second is whether, and if so when, that right comes to an end.

22. In relation to the first question, the Court of Justice held in Joined Cases C-520/06 and C-350/06 **Stringer v Revenue and Customs Commissioners Schultz-Hoff v Deutsche Rentenversicherung Bund** [2009] ICR 932 that the Directive does not preclude national legislation or practices which prevent an employee from taking paid annual leave during a period of sickness absence provided, however, that the worker has the opportunity to take annual leave at a later period. That emerges from paragraphs 29 and 30 of the judgment where the Court of Justice held:

“29 It follows, in those circumstances, on the one hand, that article 7(1) of Directive 2003/88 does not, as a rule, preclude national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave, provided however that the worker in question has the opportunity to exercise the right conferred by that Directive during another period.

30 According to the case law of the court, while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period: Federatie Nederlandse Vakbeweging v Netherlands State (Case C-124/05) [2006] ICR 962 , para 30.”

23. Equally, the Directive does not preclude national legislation or practices which allow a worker on sick leave to take paid annual leave during a period of sick leave: see paragraph 30 of the judgment in **Schultz-Hoff**. An employee who is permitted to take paid annual leave during a period of sick leave is not, however, required to do so. He may chose to take the annual leave during a later period. That reflects, in part, the fact that the purposes of sick leave and annual leave are different. Sick leave is provided to enable an employee to recover from a medical illness. Annual leave is intended to provide the employee with periods of actual rest for health and safety purposes. That aim can still be met if the employee takes the annual leave after the end of the leave year. That emerges from the decision of the Court of Justice in case C-44/08 **Pereda v Madrid Movilidad SA** [2009] ECR I-8405. There an employee had originally scheduled annual leave for a particular period. He then had an accident and was absent on sick leave. He did not wish to take his annual leave during the period of sick leave but wished to defer it to a later leave year. The Court of Justice held that the employee is entitled to do so. At paragraphs 20 and following, the Court of Justice held that:

“20 A worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that art.7(2) of Directive 2003/88 permits an allowance to be paid in lieu of paid annual leave (see, to that effect, with regard to Directive 93/104 , *BECTU* [2001] ECR I-4881 at [44], and *Merino Gómez* [2004] ECR I-2605 at [30]).

21 It is, moreover, common ground that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill (see *Stringer* [2009] ECR I- 932 at [25]).

22 It follows from the foregoing and, in particular, from that stated purpose of the entitlement to paid annual leave that a worker who is on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave. The scheduling of that new period of annual leave, corresponding to the duration of the overlap between the period of annual leave originally scheduled and the sick leave, is subject to the rules and procedures of national law which are applicable to the scheduling of workers' leave, taking into account the various interests involved, including overriding reasons relating to the interests of the undertaking.

23 If such interests preclude acceptance of the worker's request for a new period of annual leave, the employer is obliged to grant the worker a different period of annual leave proposed by him which is compatible with those interests, without excluding in advance the possibility that that period may fall outside the reference period for the annual leave in question.

24 According to the case law of the Court, while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period (see *Federatie Nederlandse Vakbeweging (FNV) v*

Netherlands (C-124/05) [2006] E.C.R. I-3423; *L.R. 46* at [30], and *Stringer* [2009] ECR I-179 at [30]).

25 Consequently, although Directive 2003/88 does not preclude national legislation or practices which allow a worker on sick leave to take paid annual leave during that sick leave (*Stringer* [2009] ECR I-179 at [31]), it follows from [22] of the present judgment that, where that worker does not wish to take annual leave during a period of sick leave, annual leave must be granted to him for a different period.”

24. The Court of Justice in Schulz-Hoff also considered the position where national law provided that an employee would lose the right to annual paid leave if the leave was not taken during the leave period or a prescribed period after the end of the leave year, referred to as a carry-over period. The Court considered first the position where sick leave lasted for the whole of the leave year and continued beyond the carry-over period and stated that:

“42 A provision of national law setting out a carry-over period for annual leave not taken by the end of the leave year aims, as a rule, to give a worker who has been prevented from taking his annual leave an additional opportunity to benefit from that leave. The laying down of such a period forms part of the conditions for the exercise and implementation of the right to paid annual leave and therefore falls, as a rule, within the competence of the member states.

43 It follows that article 7(1) of Directive 2003/88 does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the Directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the Directive.

44 It must therefore be held that a worker, who, like the claimant in the main proceedings in Case C-350/06 in relation to the year 2005, is on sick leave for the whole leave year and beyond the carry-over period laid down by national law, is denied any period giving the opportunity to benefit from his paid annual leave.

45 To accept that, in the specific circumstances of incapacity for work described in the previous paragraph, the relevant provisions of national law, and in particular those laying down the carry-over period, can provide for the loss of the worker's right to paid annual leave guaranteed by article 7(1) of Directive 2003/88, without the worker actually having the opportunity to exercise the right conferred on him by that Directive, would mean that those provisions undermined the social right directly conferred by article 7 of the Directive on every worker.

46 Thus, although the court has accepted that member states are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, it has nevertheless made clear that member states are not entitled to make the very existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever: see, to that effect, *BECTU* [2001] ICR 1152, para 53.

47 According to the same case law, the court has stated that the requisite arrangements for implementation and application of the requirements of Directive 93/104 may display certain divergences as regards the conditions for exercising the right to paid annual leave, but that that Directive does not allow member states to exclude the very existence of a right expressly granted to all workers: *BECTU*, para 55.

48 It follows that if, under the case law cited in the previous paragraphs, the right to paid annual leave guaranteed to the worker by article 7(1) of Directive 2003/88 may not be undermined by provisions of national law which exclude the creation or existence of that right, a different result cannot be allowed in relation to provisions of national law which

provide for the loss of that right, in the case of a worker on sick leave for the whole leave year and/or beyond a carry-over period, such as the claimant, who has not been able to exercise his right to paid annual leave. As in the circumstances in *BECTU*, where the court held that the member states could not exclude the existence of the right to paid annual leave, in a situation such as that of the claimant the member states may not provide for the loss of that right.

49 It follows from the above that article 7(1) of Directive 2003/88 must be interpreted as meaning that it precludes national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole leave year and where his incapacity for work persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave. “

25. The Court of Justice also considered that the same principle applied where the absence on sick leave occurred for part of the leave year but persisted until the end of that year and for the carry-over period provided by national law: see paragraphs 50 to 51 of the judgment in **Schultz-Hoff**. As the employment had terminated in that case, the employee was entitled to payment in lieu of the accrued annual leave. The question of whether or not there were any limits on the period of time that an employee can carry-over accrued annual leave is considered further below in connection with the second issue.

26. The principles to be extracted from that case-law of the Court of Justice are summarised by Mummery LJ in the **Larner** case. There an employee began sick leave on 5 January 2009. She was dismissed on 6 April 2010. She had not taken any annual leave for the 2009-2010 leave year. She sought payment in lieu of the accrued leave for that year. Mummery LJ summarised the principles as follows:

“37 The preliminary rulings of the Court of Justice supported the workers' claims. I have extracted from the judgment of the court those general points that are potentially relevant to this case.

Purpose of annual paid leave

(1) The purpose of paid annual leave guaranteed by EU law is different from the purpose of entitlement to sick leave, which is not governed by EU law. The purpose of the former is to enable a worker to enjoy rest, relaxation and leisure: it is for the protection of health and safety. The purpose of the latter is to enable a worker to recover from illness: [2009] ICR 932, paras 23–27.

No derogation from principle of paid annual leave

(2) Paid annual leave “is a particularly important principle of Community social law from which there can be no derogations”. That is borne out by the terms of article 7(2), which only

permit payment in lieu on termination of the employment relationship: paras 22–23. The right is “granted to every worker, whatever his state of health”: para 54.

The “opportunity principle” and its limits

(3) While it is for the member states to lay down conditions for the exercise and implementation of the right, they must do so “without making the very existence of that right ... subject to any preconditions whatsoever”: paras 28, 46.

(4) As a general rule, national legislation and practices may provide that a worker on sick leave is not entitled to take paid annual leave during sick leave, “provided, however, that the worker in question has the opportunity to exercise the right conferred by that Directive during another period”: para 29. Equally, national legislation or practices may also allow a worker to take paid annual leave during sick leave: para 31.

(5) National legislation may also provide for the loss of the right to paid annual leave at the end of a leave year or of a carry forward period, “provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the Directive”: para 43. The “opportunity principle” is relied on by NHS Leeds in its submissions discussed later.

Right of sick workers to carry forward paid annual leave

(6) “It must therefore be held that a worker, who ... is on sick leave for the whole leave year and beyond the carry-over period laid down by national law, is denied any period giving the opportunity to benefit from his paid annual leave”: para 44. National legislation providing for the loss or extinction of the right in such circumstances at the end of the leave year and/or the carry forward period laid down by national law would undermine the social right directly conferred by article 7(1) : para 46. That would be the case “ even where the worker has been on sick leave for the whole leave year and where his incapacity for work persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave”: paras 49, 52, 55.

Payment on termination in lieu of taking paid leave

(7) After termination of the employment relationship, it is, of course, no longer possible for a worker to take paid annual leave for which that employer is liable: he has ceased to work for that employer. Provision is made in article 7(2) for entitlement to an allowance in lieu, but the article does not expressly lay down the way in which the allowance must be calculated: paras 56–57.

(8) “[W]ith regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship”: para 61, ie the worker's normal remuneration.”

27. The principal issue in **Larner** was whether an employee must make a request to take sick leave or carry it forward and whether, if no request was made, the annual leave was lost. The Court of Appeal held that no such request was required: see paragraphs 87 to 88 of the judgment. Observations were also made on the question of what constituted an opportunity to exercise the right to take annual leave. In particular, in the Employment Appeal Tribunal, the employer argued that where an employee was able to take annual leave during a period of sick leave, then the employee was not denied the opportunity to take annual leave and there was no

requirement that the employee be allowed to take annual leave after the end of the leave year.

The Employment Appeal Tribunal in **Larner** dealt with the argument and its conclusion at paragraphs 16 and 17 of its judgment at [2011] IRLR 894:

“16. [Counsel for the employer] draws a contrast between Mr Pereda’s case and Mrs Larner’s. Mr Pereda, who was ill during the period of his booked leave, was deprived of the opportunity to exercise the right to a holiday; Mrs Larner was not. She could have given notice to her employers at any time before the end of the leave year.

17. I accept [counsel for the employee’s] submission that the result of Stringer and Pereda is that there is no distinction between the two cases. Mrs Larner was signed off sick for the whole of the pay year 2009-2010. She is therefore presumed not to have been well enough to exercise what the Luxembourg court has described as her ‘right to enjoy a period of relaxation and leisure.’ So as a matter of law, contrary to what a layman might have thought, she did not have the opportunity at any time during 2009-2010 to take her annual leave. Instead, she had the right to have her leave entitlement under reg. 13 carried over to the following year; and she had that right, in my view, without having to make a formal request for the leave to be carried over. The right to be paid for that annual leave crystallised on the termination of her employment; as it happens, only a few days after the end of the pay year.

18. The position might be different in the case of a fit employee who fails to make any request for leave during the whole of a pay year. He or she might then lose the right to take annual leave, certainly if the contract so provides, because that worker, unlike Mrs Larner, has in the words of the Court in Pereda ‘had the opportunity’ to exercise the right to leave.”

28. The Court of Appeal dealt with the issue at paragraphs 83 to 86 of its judgment in the following terms:

“83 First, the purposes of paid annual leave. The claimant did not lose her entitlement to paid annual leave for the year 2009–2010. By reason of her sickness throughout that leave year, as found by the tribunal, she was prevented from taking her paid annual leave in that year in order to benefit from those purposes for which entitlement to paid annual leave has been conferred. She was entitled to take paid annual leave at another time when she was not sick and, if necessary, beyond the year 2009–10 at a time when she could take advantage of the protective purposes.

84 Secondly, carrying forward. The only permissible option under the Directive would have been to allow the claimant to carry forward her unused paid annual leave entitlement into the 2010–2011 leave year. It would not have been permissible under article 7(2) for NHS Leeds to pay the claimant in the 2009–2010 leave year compensation in lieu of the leave lost. Such payment could only be made on the termination of the employment relationship, after which it would no longer be possible for the claimant to take paid annual leave. Termination occurred in early April 2010.

85 Thirdly, the opportunity principle. In view of rulings of the Court of Justice, as combined with the tribunal's findings of fact about the sickness situation of the claimant in 2009–2010, it is simply not open to NHS Leeds to take the point that the claimant had an “opportunity” in that year to take paid annual leave. As was said by the Employment Appeal Tribunal, it was to be “presumed” from the tribunal’s findings that the sick claimant was unable to exercise her right to take paid annual leave. As pointed out by Mr Ford there was unchallenged evidence that the claimant was unable to take leave in 2009–2010 because of her sickness.

86 Fourthly, none of the rulings lays down a requirement of a request to take paid annual leave or to carry it forward to another leave period. Indeed, on the facts of some of the cases, such as *KHS AG v Schulte* (Case C-214/10) [2012] ICR D19 and *Dominguez v Centre informatique de Centre Ouest Atlantique* (Case C-282/10) [2012] ICR D23, no prior request was made to take paid annual leave during a period of sick leave or to carry it forward into the following leave year. The request to take paid annual leave referred to in *Pereda v*

Madrid Movilidad SA (Case C-277/08) [2009] ECR I-8405 , para 22, was at a time when the worker was not sick.”

29. Finally, the Court of Appeal considered how those principles could be given effect to in domestic law. The Court of Appeal considered that the **Regulations** themselves could be interpreted if necessary, to give effect to the Directive both to ensure that annual leave could be taken in a later year and to ensure that compensation would be payable on termination of the employment for accrued annual leave. As Mummery LJ observed at paragraphs 89 to 91:

“if necessary, it would be possible to interpret the 1998 Regulations so as to be compatible with article 7 , as interpreted in the rulings of the Court of Justice. I did not understand [counsel for the employer] to dispute [counsel for the employee’s] suggested interpretation of the 1998 Regulations to comply with article 7 . The issue between them is about the requirement of a prior request and the absence of such a request from the claimant.

90 First, in relation to the carrying forward of unused annual leave, regulation 13(9) would be construed to read as follows:

Leave to which a worker is entitled under this regulation may be taken in instalments, but— (a) it may only be taken in the leave year in respect of which it is due, save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave”.

91 Secondly, in relation to payment on termination of employment, regulation 14 would be read and interpreted to include the following insertion:

(5) Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under regulation 16 for the period of untaken leave.”

Conclusion

30. It is against that background that the question arises as to when an employee who is absent from work on sick leave is entitled to annual leave. In my judgment, the position is as follows. First, if the employee is not permitted by the relevant national legislation or by contractual agreement to take annual leave during a period of sick leave which coincides with a leave year, the employee is entitled to take annual leave in a subsequent leave year. Second, if the employee is permitted to take annual leave while on sick leave, he has a choice. He may take annual leave during the period of sick leave if he wishes but he is not required to do so. If he does not wish to take annual leave during a period of sickness leave, he may take the annual

leave at a later date. In particular, an employee who is absent from work on sick leave is not required to demonstrate that he is physically unable to take annual leave by reason of his medical condition. It is in that sense that the phrase “unable or unwilling to take annual leave because he was on sick leave and as a consequence did not exercise his right to annual leave” was used by Mummery LJ in **Larner**. I reach that conclusion for the following reasons.

31. First, that conclusion accords with the case-law of the Court of Justice. That case-law recognises that an employee may be permitted to take annual leave during a period of sick leave but cannot be required to do so. That is the logic of the decision in **Schultz-Hoff** and, in particular, **Pereda**.

32. Secondly, the conclusion accords with the purpose underlying sick leave and annual leave. Sick leave is intended to enable an individual to recover from an illness. Annual leave is intended to enable a worker to enjoy actual periods of rest and relaxation for reasons of health and safety. It would not be consistent with the underlying purposes of the two rights to compel a person who is absent from work by reason of sickness to take annual leave at the same time if he did not wish to do so.

33. Thirdly, the conclusion is consistent with **Larner** and is certainly not precluded by it. The issue did not in fact arise for decision in that case. The Employment Appeal Tribunal did, however, consider how to reconcile the principle of ensuring that the employee had to have the opportunity actually to exercise the right to annual leave with the situation where a person on sick leave was in principle able to take annual leave during that period. The Employment Appeal Tribunal considered that where an employee was absent on sick leave, the employee was presumed not to be well enough to exercise the right to enjoy a period of relaxation and

leisure. The Court of Appeal dealt with the matter differently at paragraph 85 of its judgment. Mummery LJ held that the employer could not rely upon the argument that the employee had had the opportunity to take annual leave whilst she was on sick leave in “view of the rulings of the Court of Justice, as combined with the sickness situation of the Claimant in 2009-2010”. The next sentence refers to the decision of the Employment Appeal Tribunal where it was “presumed” from the Tribunal’s finding of fact that the sick Claimant was unable to exercise the right to sick leave. The final sentence of paragraph 85 refers to the “unchallenged evidence” that the employee was unable to take leave in 2009-2010 because of her sickness (and reference to the evidence is made at paragraph 14 of the Judgment).

34. I recognise that, on the facts in Larner, it may well have been the case that the evidence made it clear that the employee could not, physically, have taken annual leave. However, assuming that was the case, the Court of Appeal was not, in my judgment, seeking to lay down any principle of law that an employee must be able to demonstrate that he is physically unable to take annual leave before he is to be treated as being unable to exercise the right to rest and relaxation encompassed within the right to take annual leave. The language used in the Judgment simply reflects the factual situation in that case.

35. Fourthly, in my judgment, the real underlying concern in the case-law is that an employee should not be able to accrue annual leave over a number of years and then seek to take that leave many years later even when the taking of annual leave no longer reflected the aim of ensuring that a person had a period of rest and relaxation from work for health and safety purposes. As explained below, national law is entitled to impose certain limitations on the ability of an employee to carry over periods of accrued annual leave. This problem is, in my judgment, properly to be addressed by a consideration of the limitations that may be

imposed on carrying-over leave, not by the adoption of a restrictive approach to the circumstances governing the acquisition of the entitlement to take annual leave.

36. Applying those principles to the present case, the Employment Tribunal did err in law. It erred in considering that the Appellant was required as a matter of law to demonstrate that he was unable to take annual leave by reason of his medical condition. It erred in considering that “unwillingness” was not issue in the case. In particular, it is not possible to separate out “unwillingness” to take annual leave during a period of sick leave. If the employee is on sick leave but can, if he chooses, take annual leave during that period, the question of whether he wishes to do so necessarily arises.

37. The correct position is that the Appellant was on sick leave during the 2010, 2011 and 2012 leave years. He would have been permitted to take annual leave but he could not be required to do so. If he did not wish to take annual leave during those leave years he would be entitled to take that annual leave at a later date. In the present case, there is nothing to suggest that the Appellant did wish to take annual leave he was on sick leave during those years. He did not request any annual leave. His first request for annual leave was not made until July 2013 when he asked to take annual leave for 2011 and 2012 starting on 5 August 2013. If he had wanted to take annual leave earlier he would have had to give notice electing the days upon which he wished to take annual leave pursuant to Regulation 15 of the **Regulations** (see paragraph 87 of the Court of Appeal judgment in **Larner**). No such notice was given in respect of the annual leave arising during the 2010, 2011 and 2012 leave years until July 2013. In those circumstances, the only inference that could possibly be drawn was that the Appellant did not wish to take annual leave during those years. In the circumstances, therefore, the Appellant remained entitled to annual leave for the 2010, 2011 and 2012 leave years and would

be entitled to take the leave at a later date (or receive payment in lieu if his employment terminated) subject to the question of whether there is any limit on the period in which annual leave accrued in one leave year can be carried over to later years.

The Second Issue - The Carrying-Over of Unused Annual Leave

38. The next issue, therefore, is whether there is any limitation on the period in which he could carry over untaken annual leave. The Appellant accepts that, in the light of subsequent case law of the Court of Justice, Article 7 of the Directive does not preclude national law or contractual provisions from imposing certain limits on the period during which leave may be carried over. However, he submits that domestic law in the United Kingdom has not imposed any limits and there are no contractual provisions applicable in the present case limiting the period of carry-over. The Appellant submits that it is not open to the courts or tribunals to create rules imposing such a limit. Furthermore, the Appellant accepts that Article 9(1) of the Holidays with Pay Convention adopted by the International Labour Organisation contemplates limits on the period within which annual leave must be taken. The Convention is, however, an international treaty and does not amount to a provision of national law enforceable in the domestic courts of the United Kingdom.

39. I accept that the fixing of a period within which accrued annual leave must be taken would need to be done by primary legislation or rules made under such legislation (or by contractual provisions applicable to the employment in question) and not by rules made by courts or tribunals. I further accept that the provisions of the International Labour Organisation Convention form part of an international treaty which has not been incorporated into domestic law so that its provisions are not themselves enforceable in the domestic courts: see, e.g. **J H Rayner (Mincing Lane) Ltd v Department of Trade** [1990] 2 A.C. 418; **R (SG) v Secretary**

of State for Work and Pensions [2015] UKSC 16, per Lord Reed at paragraph 82, Lord Carnwarth at paragraph 115 and Lord Hughes at paragraphs 137 to 139. The provisions of the Convention cannot, therefore, be used themselves to fix any carry over period in domestic law.

40. In my judgment, however, that is not in fact the situation which arises in the present case. Here, the relevant national rule, that is Regulation 13(9) of the **Regulations**, does fix a period when annual leave must be taken. It provides that annual leave must be taken during the leave year. That provision must, however, be interpreted, as far as possible, in the light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive: see case C-106/89 **Marleasing SA v La Comercial Internacional de Alimentacion SA** [1990] ECR I-4135. It was for that reason that the Court of Appeal in **Larner** sought to interpret Regulation 13(9) of the **Regulations** as it did, in order to give effect to the Directive by reading the Regulation in such a way that it included an exception for persons on sick leave and who were unable or unwilling to take annual leave during the leave year. Exceptions to the provision in Regulation 13(9) of the **Regulations**, however, need only be read into the Regulation to the extent necessary to give effect to the requirements of EU law. In the present case, in my judgment, it is clear from the wording and purpose of the Directive and the case law of the Court of Justice, that national law is not required to permit unused leave to be carried over and claimed in subsequent years without limit. Rather, it is clear that, *at most*, the Directive requires that employees who are on sick leave during a leave year may if they wish to take their annual leave within 18 months of the end of the leave year in which it is accrued (and national law may impose shorter periods). Consequently, Regulation 13(9) of the **Regulations** need only be read as permitting a worker to take annual leave within 18 months of the end of the leave year in which it accrued where the worker was unable or unwilling to take annual leave because he was on sick leave and, as a consequence,

did not exercise his right to annual leave. I reach the conclusion on the requirements of EU law for the following reason.

41. First, Article 1 of the Directive provides that the purpose is to lay down “minimum safety and health requirements for the organisation of working time”. Article 7 of the Directive requires that Member States shall ensure that a worker “is entitled to paid annual leave of at least four weeks.”

42. Secondly, the purpose of that requirement appears from recital 8 to the Directive. Annual periods of rest, amongst other things, are required “to ensure the safety and health” of workers. The purpose is to ensure that the worker receives “actual rest, with a view to ensuring effective protection of his health and safety”: see paragraph 23 of the judgment of the Court of Justice in **Schultz-Hoff** [2009] ICR 932.

43. Furthermore, recital 9 to the Directive does expressly provide that account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time. The Convention on Holiday Pay is therefore relevant to the interpretation of the Directive. Article 9(2) of the Convention recognises that an uninterrupted two week period of annual leave must be taken within one year of the end of the year in which it has arisen and the remainder must be taken no “later than eighteen months, from the end of the year in respect of which the holiday entitlement has arisen”. The principles adopted by the International Labour Organisation, therefore, recognise that annual leave is not capable of being accrued and taken indefinitely. At the very least, annual leave will have to be taken within 18 months of the end of the year to which it relates (and, in some respects, it is anticipated that part of the annual leave must be taken sooner).

44. Thirdly, the Court of Justice has recognised in case C-214/10 **KHS AG v Schulte** [2012] IRLR 156 that the principle that an employee on sick leave must be permitted to take annual leave after the end of the leave year, and that national law cannot provide for the right to annual leave to lapse without the employee having the opportunity to benefit from the right, must be qualified in certain circumstances:

“29 Otherwise, a worker, such as the applicant in the main proceedings, who is unfit for work for several consecutive reference periods, would be entitled to accumulate, without any limit, all the entitlements to paid annual leave that are acquired during his absence from work

30 A right to such unlimited accumulation of entitlements to paid annual leave, acquired during such a period of unfitness for work, would no longer reflect the actual purpose of the right to paid annual leave.

31 The right to paid annual leave, as laid down in art.31(2) of the Charter of Fundamental Rights of the European Union and in art.7 of Directive 2003/88 , has the dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (see *Schultz-Hoff* [2009] E.C.R. I-179 at [25]).

32 In this connection, it is true that the Court has stated that, while the positive effect of paid annual leave for the safety and health of the worker is deployed fully where that leave is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period (*Federatie Nederlandse Vakbeweging (FNV) v Netherlands (C-124/05)* [2006] E.C.R. I-3423; [2006] 2 C.M.L.R. 46 at [30], and *Schultz-Hoff* [2009] E.C.R. I-179 at [30]).

33 Nonetheless, it should be pointed out that the right to paid annual leave acquired by a worker who is unfit for work for several consecutive reference periods can reflect both the aspects of its purpose, as set out in [31] above, only insofar as the carry-over does not exceed a certain temporal limit. Beyond such a limit annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure.

34 In consequence, in light of the actual purpose of the right to paid annual leave directly conferred on every worker by EU law, a worker who is unfit for work for several consecutive years and who is prevented by national law from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period.

35 With regard to the carry-over period beyond which the right to paid annual leave may lapse where entitlements to paid annual leave are accumulated during a period of unfitness for work, it is necessary to assess, in the light of art.7 of Directive 2003/88 and taking the above considerations into account, whether a period for carrying over entitlement to paid annual leave set at 15 months under national provisions or practices, such as collective agreements, may reasonably be described as a period beyond which paid annual leave ceases to have its positive effect for the worker as a rest period.

36 In that context, the following points are to be noted.

37 The right to paid annual leave is, as a principle of EU social law, not only particularly important, as noted in [23] above, but is also expressly laid down in art.31(2) of the Charter of Fundamental Rights of the European Union , which art.6(1) TEU recognises as having the same legal value as the Treaties.

38 It follows that, in order to uphold that right, the objective of which is the protection of workers, any carry-over period must take into account the specific circumstances of a worker who is unfit for work for several consecutive reference periods. Thus, the carry-over period must inter alia ensure that the worker can have, if need be, rest periods that may be staggered, planned in advance and available in the longer term. Any carry-over period must be substantially longer than the reference period in respect of which it is granted.

39 That carry-over period must also protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail.

40 In the present instance, the carry-over period laid down in the third subpara. of para.11(1) of the EMTV is 15 months, which is longer than the reference period to which it relates, a factor which distinguishes the present case from *Schultz-Hoff* [2009] E.C.R. I-179 , where the carry-over period was six months.

41 It should also be noted in that regard that, under art.9(1) of Convention 132 of the International Labour Organisation of June 24, 1970 concerning Annual Holidays with Pay (revised), the uninterrupted part of the annual holiday with pay must be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than 18 months, from the end of the year in respect of which the holiday entitlement has arisen. That rule may be construed as being based on the consideration that when the periods for which it provides expire the purpose of the leave entitlement may no longer be fully achieved.

42 Therefore, in view of the fact that, according to recital 6 in its preamble, Directive 2003/88 took into account the principles of the International Labour Organisation with regard to the organisation of working time, calculation of the carry-over period should take into consideration the purpose of the right to annual leave as resulting from art.9(1) of that convention.”

45. In my judgment, it is clear that in cases where a worker is absent from work on sick leave, the provisions of Article 7 of the Directive requiring Member States to take the measures necessary to ensure that a worker is entitled to 4 weeks annual leave are satisfied if, as a minimum, annual leave can be taken within 18 months of the end of the leave year in which it accrued. Indeed, as appears from **KHS AG Schulte**, itself, it is possible that a shorter period (there 15 months after the end of the leave year) may be justified. In interpreting Regulation 13(9) of the **Regulations**, therefore, it is not necessary for a national court to go further than ensuring that the exception that has to be read into that Regulation permits annual leave to be taken in sickness cases for a period of 18 months after the end of the year in which the annual leave accrues. The required result can be achieved by a modest alteration to the words that the Court of Appeal considered needed to be read into Regulation 13(9) of the **Regulations** so that it reads (with the exception read in by the Court of Appeal in italics and the additional words reflecting the extent of the exception underlined):

“(9) Leave to which a worker is entitled under this regulation may be taken in instalments but, - (a) it may only be taken in the leave year in respect of which it is due, *save that it may be taken within 18 months of the end of that year where the worker was unable or unwilling to take it because he was on sick leave and, as a consequence did not exercise his right to annual leave.*”

46. For completeness, I note that this issue did not arise in **Larner** as the employee there did seek to take the annual leave within 18 months of the end of the leave year in which the annual leave was accrued. The annual leave accrued during 2009 and 2010 and the employment was terminated with effect from 8 April 2010, that is within 18 months from the end of the year in which was accrued and the employee was therefore entitled to compensation in lieu of annual leave.

47. Applying the exception to the facts of this case, the Appellant was on sick leave in the leave years 1 February 2010 to 31 January 2011, 1 February 2011 to 31 January 2012 and 1 February 2013. He did not wish to take annual leave during any of those years. He would have been entitled to take accrued annual leave in subsequent years, provided that he sought to do so within 18 months of the end of the leave year. As his employment terminated, he was entitled to compensation in the form of payment in lieu for any leave year which carried over under Regulation 13(9) of the **Regulations** (see the additional provision that the Court of Appeal considered needed to be read into Regulation 14 at paragraph 91 of **Larner** set out above). In the present case, annual leave for 1 February 2010 to 31 January 2011 and 1 February 2011 to 31 January 2012 leave years did not carry over as the Appellant only sought to take the annual leave in respect of those years more than 18 months after the end of the leave years in respect of which the annual leave had accrued (that is after the end of 31 July 2012 and 31 July 2013 respectively). He requested that the annual leave start on 5 August 2013. The Appellant was entitled to compensation for the 1 February 2012 to 31 January 2013 leave year as annual leave for that could be taken until 18 months after that date, that is until 31 July 2014. That leave would therefore have carried over under Regulation 13(9) of the **Regulations** as it must be interpreted to give effect to EU law. As his employment was terminated on 10 April 2014, he was entitled to payment in lieu of the annual leave that had been carried over and not taken.

Ancillary Matters

Remedies

48. The parties drew attention to the fact that the Court of Appeal in **Larner** considered that Regulation 14 of the **Regulations** had to be interpreted to include a new Regulation 14(5) (set out at paragraph 29 above) providing for payment where the employment is terminated but the worker remained entitled to leave in respect of a previous year which had carried over under Regulation 13(9)(a) because of sick leave. The Court of Appeal did not, however, address the interpretation of Regulation 30(1)(b) and 30(5) of the **Regulations** which is the means by which a remedy is given in respect of a failure to pay a worker payment in lieu of unused annual leave. The Court of Appeal intended, in my judgment, to ensure that the **Regulations** were interpreted in a way that gave rise to a right to payment in lieu on termination of employment in cases involving sick leave. To achieve that, it is also necessary to interpret Regulation 30(1)(b) and 30(5) of the **Regulations** as if they included the words “14(5)” after 14(2) in each sub-regulation.

Disposal

49. In the present case, the Appellant is entitled to payment in lieu of annual leave in respect of the 1 February 2012 to 31 January 2013 leave year and, to that extent, this appeal is allowed. He is not entitled to payment in lieu for the 1 February 2010 to 31 January 2011 leave year, nor the 1 February 2011 to 31 January 2012 leave year and, to that extent, the appeal is dismissed. The precise amount of the payment in lieu will need to be determined by the Employment Tribunal so the matter will need to be remitted to the Tribunal for reconsideration in accordance with this Judgment.

50. The Appellant also seeks an order pursuant to Rule 34A(2) of the **Employment Appeal Tribunal Rules 1993** to recover the fees for issuing and for a hearing of the appeal, which amount to a sum of £1,515. The relevant principles governing the exercise of the discretion to make such orders are set out in **Horizon Security Services Ltd. v Ndeze and the PCS Group** [2014] IRLR 854. The Appellant succeeded in respect of only part of his claim, namely entitlement to a payment in lieu for the 1 February 2012 to 31 January 2013 leave year. It was, however, necessary for him to appeal in order to establish his entitlement to annual leave and to establish that any limit on the carry over period did not prevent his recovering payment in lieu for that year. The appeal was resisted. No additional costs were incurred in respect of the issue on which the Appellant won in part and the Respondent won in part (that is, the question of the length of the carry over period for untaken annual leave). In the circumstances, it is appropriate to order the Respondent to pay to the Appellant a sum of £1,515 to reflect the costs to the Appellant of the issue and hearing fee.

51. Permission to appeal to the Court of Appeal is given to the Appellant in respect of the dismissal of the appeal in respect of the 1 February 2010 to 31 January 2011, and 1 February 2011 to 31 January 2012 leave years and to the Respondent in respect of the decision to allow the appeal in respect of the 1 February 2012 to 31 January 2013 leave years. The issues of entitlement to annual leave are important to both workers and employers alike. The issues that arise are arguable and involve complex questions of law in an area where EU law, in particular, is evolving.

Conclusion

52. The Employment Tribunal erred in concluding that an employee who was on sick leave needed to demonstrate that he was unable, by reason of his medical condition, to take annual

leave. Article 7 of the Directive required that an employee who is on sick leave, and who would be permitted to take paid annual leave during that sick leave, is not required to take annual leave whilst on sick leave but may choose to do so. Where, as in this case, the Appellant did not wish to take annual leave during periods of sick leave, he was entitled to take the annual leave at a later date. Regulation 13(9) of the **Regulations**, which provides that annual leave may only be taken in the leave year in respect of which it is due, needs to be interpreted in order to give effect to the Directive. Regulation 13(9), however, needs only be interpreted to the extent necessary to give effect to the Directive. EU law does not confer an unlimited right to carry over periods of annual leave to subsequent years. The Directive, at most, only requires that employees on sick leave are able to take annual leave within a period of 18 months of the end of the leave year in respect of which the annual leave arises. Consequently, Regulation 13(9) of the **Regulations** is to be read as permitting a worker to take annual leave within 18 months of the end of the leave year in which it accrued where the worker was unable or unwilling to take annual leave because he was on sick leave and, as a consequence, did not exercise his right to annual leave.