Appeal No. UKEAT/0057/14/MC
UKEAT/0058/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 4 November 2014
Judgment handed down on 1 December 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

(SITTING ALONE)

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(1) THE SASH WINDOW WORKSHOP LTD — APPELLANTS
(2) MR R DOLLAR

MR C KING — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR JAMES WILLIAMS (Counsel) Instructed by: Goodman Derrick LLP 10 St Bride Street London EC4A 4AD

SUMMARY

CONTRACT OF EMPLOYMENT - Sick pay and holiday pay

AGE DISCRIMINATION

1. The Tribunal erred in law by assuming, without making any necessary findings, that the Claimant was unable to take paid leave because it would have been refused by the Respondent if he had asked for it. The conclusion that he was on that footing entitled to claim pay for holiday not taken over a 14 year period as a series of deductions from wages could not stand and would be remitted.

2. The Tribunal erred in assessing the proper award for injury to feelings for an unlawfully age discriminatory dismissal by:

(a) erroneously discounting such award on the basis that the Claimant could have been lawfully dismissed at any time; and

(b) failing to apply the 10% increase identified by **Simmons v Castle**

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. Mr King, the Claimant before the Employment Tribunal, was engaged as a commission only salesman by The Sash Window Workshop Ltd, the First Respondent, from June 1999 until the termination of his engagement on 6 October 2012, when he reached the age of 65. He was not paid for holidays or for absence by reason of sickness. A Tribunal, chaired by Employment Judge Griffiths, held (among other things) in a Judgment with Reasons sent to the parties on 12 September 2013 that:

> (i) Although not working under a contract of employment he was in employment under section 83(2) of the **Equality Act 2010** for the purposes of his complaint of unlawful age discrimination by reason of his dismissal; and that this dismissal was an act of unlawful age discrimination.
>
> (ii) He was during this engagement, a worker under section 230(3) **Employment Rights Act 1996** (the ERA) and regulation 2 of the **Working Time Regulations 1998** (the WTR) and accordingly that he was entitled to bring a complaint of unpaid holiday pay under the **WTR**, including an entitlement to pay for holiday not taken in previous years, claimed as a series of unlawful deductions from wages on a continuing basis.

2. Having upheld his claims under those heads, the Tribunal made an award for injury to feelings of £3000 for (i). It did so by reference to the guidelines set out in **Vento**. It made holiday pay awards under (ii) under three headings, only the third of which is in contention on this appeal, described as "Holiday Pay 3" relating to pay in lieu of untaken leave said to have accrued in previous years, an award of £9336.73 for which was made.

3. Against that Judgment both sides pursue appeals. I shall refer to the parties as the Claimant and the Respondent as they were before the Tribunal. Mr Williams who appeared on behalf of the Claimant below appears on his behalf on this appeal. The Respondent is represented by Mr Rees who did not appear below.

4. Since the preliminary hearing on 28 May 2014 before HHJ Peter Clark and following a response to questions under the **Burns/Barke** procedure from Employment Judge Griffiths and subsequent correspondence between the parties which have clarified certain matters, the parties are agreed that only two issues arise for determination by this Appeal Tribunal:

(i) whether the Employment Tribunal was wrong in law to hold that the Claimant was entitled to payment for Holiday Pay 3, in other words, holiday to which he was entitled under the **WTR** but did not actually take in any of the relevant years (the Respondent's appeal);

(ii) whether the Employment Tribunal was wrong in law in its assessment of the award made to the Claimant in respect of injury to feelings by reference to the failure to apply a 10% uplift and/or because the award was erroneously discounted on the basis of an irrelevant consideration (the Claimant's cross-appeal).

I deal with these issues in turn.

The appeal: Holiday Pay 3

5. There is no challenge to the finding that the Claimant was a worker as defined by section 230(3) **ERA** and therefore, because it is materially identical, a worker within the meaning of the **WTR**: see paragraph 23 of the Reasons. It followed from that finding that the Claimant was entitled during the course of his engagement with the Respondent, to paid holiday

under the **WTR** of 4 weeks each year and from 1 June 2009, to an additional entitlement of 1.6 weeks (pursuant to regulation 13A): see paragraph 40 of the Reasons. The Tribunal held that the holiday year ran from 1 June, being the anniversary of the Claimant's start date and that there was no suggestion that the commission payments received by the Claimant contained any element of rolled up holiday pay. Although not expressly stated because no express factual findings appear to have been made in relation to holiday, the Tribunal accepted the Claimant's schedule of loss which set out his asserted entitlement in relation to each category of holiday pay claimed, on the basis that the Respondent was unable to dispute or seriously challenge the calculations and total figures contained in the schedule.

6. The Claimant's schedule stated that he took time away from work in each year he worked for the Respondent other than in 1999 and was not at any time, paid for such holiday. This is accepted by the Respondent. The schedule sets out the holiday taken each year by reference to a document described as "document A" as follows:

1999 – nil

2000 – November 3 weeks

2001 – November/December 3 weeks

2002 – November/December 3 weeks

2003/2004 – December/January – three weeks. One week – April 2004

2004/2005 – December/January – three weeks. One week – October 2005

2005/2006 – December/January – three weeks. One week – April 2006

2006/2007 – December/January – three weeks. One week – September 2007

2007/2008 – December/January – three weeks

2009/2010– December/January – three weeks

2011 – one week (29/07 – 07/08)

7. On that basis, so far as Holiday Pay 3 is concerned, the Claimant claimed 24.15 weeks in respect of leave that was not taken between 1999 and 2012, broken down in relation to each holiday year running from 1 June to 31 May each year as follows:

99/2000: 4 weeks

00/2001: 1 week

01/2002: 1 week

02/2003: 1 week

03/2004: nil

04/2005: nil

05/2006: nil

06/2007: nil

07/2008: 1 week

08/2009: 4 weeks

09/2010: 1.95 weeks

10/2011: 5.6 weeks

11/2012: 4.6 weeks

8. No point was taken before the Tribunal that a distinction was to be drawn between entitlement to annual leave under regulation 13 **WTR** and entitlement to additional leave under regulation 13A. The Respondent has not sought to take any point by reference to this distinction on this appeal, and I therefore proceed on the basis that the two entitlements can be treated as one and in the same way.

9. As already observed, the Tribunal made no express findings of fact about the holiday taken by the Claimant or in relation to untaken holiday beyond accepting the schedule. At paragraph 13 of his witness statement (a statement which Mr Williams described as largely unchallenged save as to the issue of the Claimant's employment status, without demur from Mr Rees) the Claimant stated that he had to give adequate notice of his intention to be away on

holiday to ensure that there were not too many salesmen away at any one time; that he generally took a couple of weeks' holiday each year to visit family but tried not to take too much holiday because, if he was not able to do the work he would not get any commission; and that if he had been paid for holiday, he would have taken more than he did, but was unaware of his entitlement.

10. Against that background the Tribunal dealt with Holiday Pay 1 and 2 at paragraphs 41 and 42. Holiday Pay 1 involved a straightforward application of regulation 14(2) **WTR**, relating to proportionate holiday accrued but untaken at termination for the leave year 2012/13. Holiday Pay 2 related to pay for leave taken and requested by way of notification to the Respondent in previous years, claimed as a series of unlawful deductions from wages. The Tribunal upheld both claims on that basis and since there is no appeal by the Respondent in relation to either of these categories, the correctness of the award in respect of Holiday Pay 2 is not further addressed.

11. So far as Holiday Pay 3 is concerned, the Tribunal recognised that this was less straightforward, raising "a complex area," and that the Respondent disputed the Claimant's entitlement to this category in principle. The Tribunal reasoned in relation to this category, at paragraphs 44 to 47 as follows:

> **"44. We are grateful to the Claimant's counsel for taking us through the authorities which govern the position. Reliance is placed on *Canada Life Ltd v Gray* [2004] ICR 673 which suggests that a worker may be able to claim unpaid holiday as a series of deductions even if leave has not been requested or taken although in that case it was suggested that the position may depend on whether the workers employment had terminated when the claim was made. The position was resolved by the Court of Appeal in *NHS Leeds v Larner* [2012] IRLR 825 which confirms that a worker who has not had the opportunity to take annual leave because he has been on sick leave may carry over unused leave from one year to the next and on termination claim holiday pay due in respect of previous leave years.**
>
> **45. Counsel drew our attention to paragraph 91 of Lord Justice Mummery's Judgment where he indicated how Regulation 14 WTR should be read and interpreted so as 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.**
>
> **46. We note the reference to sick leave, which is not the position here, but see no difference in principle between being unable to take paid leave through sickness and being refused paid leave as would have been the position in this case had the Claimant asked for it the first Respondent wrongly thinking that the Claimant was not entitled to it (*Canada Life Ltd v Gray* ibid).**
>
> **47. We are satisfied therefore that there is an entitlement to the sum claimed as Holiday Pay 3 namely £9,336.73 the First Respondent again not being able to dispute the figures and total set out in the schedule of loss."**

12. The compact reasoning of the Tribunal here is challenged by Mr Rees, on behalf of the Respondent, and in particular he challenges the Tribunal's conclusion that the Claimant was *unable* to take annual leave. He submits that this was not a case where he was prevented by circumstances beyond his control from doing so, and accordingly, the principle relied on by the Tribunal by analogy with sickness cases did not apply. He contends that the question whether a person is prevented by circumstances beyond their control from taking leave is a question of fact. Here, the Claimant took a large proportion of his annual leave entitlement each year and the Tribunal made no findings of fact to support a conclusion that the Claimant was prevented from doing so. Furthermore, Mr Rees submits that there must be some onus on an individual to enforce these provisions within the time limits specified by regulation 30 which is otherwise rendered redundant. Mr Rees also challenges the implicit conclusion that there was a series of unlawful deductions from wages properly payable by reference to the payments claimed for holiday that was never taken. Mr Rees makes the point that the Claimant continued working and earning and made no attempt to use the annual leave at the time.

13. Against that, Mr Williams who seeks to support the Tribunal's conclusion, submits that the right in question here is a single right to "paid annual leave" and that it is not possible to have one without the other. He accepts that **NHS Leeds v Larner** (relied on by the

Employment Tribunal) dealt with sick leave but contends that the principles it establishes can and should be applied to any case where an employee is prevented from taking leave (as this Tribunal decided). He submits that it is self-evident that a worker who is not getting paid for annual leave is liable to be deterred or prevented from exercising that right and that this is obviously by reason of circumstances beyond his control. He relies on **Lock v British Gas Trading Limited** [2014] ICR 813, where at paragraphs 21 and 23, the CJEU held that it would be contrary to the objective of Article 7 **WTD** for a worker to receive a reduced remuneration in the period following his annual leave where that is liable to deter him from actually exercising his right to take that leave. Here, he submits, the effect of being refused paid holiday means that the Claimant is to be treated as having been prevented from exercising his right to paid annual leave and treated as having suffered unlawful deductions from wages in each year because he worked for more weeks than he should have been required to work but for the same payment. He submits that the cost of the infringement by an employer of these important rights would be borne by the employee rather than the employer if these rights could not be enforced by way of claims for unlawful deduction. Finally he submits by reference to **Canada Life v Gray and another** [2004] ICR 673 (which he says once again represents a correct statement of the law following **Stringer** (see below) and **Larner**) that this case is on all fours with the conclusion in that case: that on termination under regulation 14(2) the applicants, commission only sales agents refused paid holiday, were entitled to pay in lieu of untaken leave for all previous leave years, that unpaid pay in lieu under regulation 14(2) is capable of giving rise to a claim for unlawful deductions, and that there was a continuous series of deductions from wages throughout the period from 1998 to termination in 2012. He particularly relies on the conclusion at paragraph 23 of **Canada Life** that

> **"following termination of the employment the provisions applied during employment, designed to regulate holiday arrangements between employer and worker, cease to be relevant…"**

and submits that without doing any violence to the language of the **WTR**, regulation 13(9) can be interpreted as ceasing to apply on termination.

The applicable legal principles

14. In order to understand and address the point raised on this appeal it is necessary to set out the relevant provisions governing entitlement to paid holiday. The starting point is Article 7 of the **Working Time Directive** 2003/88/EC, which has now been replaced by the **Working Time Directive** 93/104/ EC (the WTD). Article 7 provides:

> **"1. Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.**
>
> **2. The minimum period of paid annual leave may not be replaced by an allowance in lieu except where the employment relationship is terminated."**

15. That provision was implemented domestically by the **WTR**. Although Article 7(1) provides a composite entitlement to "paid annual leave", the **WTR** provides for entitlement to annual leave in regulation 13 and separately, in regulation 16, to an entitlement to pay in respect of annual leave to which a worker is entitled under regulation 13. The entitlement to annual leave arises in regulation 13(1) (and to additional leave in regulation 13A(1)) but there are restrictions on how the entitlement can be exercised (set out at regulation 15). Importantly, regulation 13(9) provides:

> **"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."**

16. It is this provision that gives rise to the so-called "use it or lose it" principle i.e. that leave must be taken in the course of the leave year in respect of which it is due so that untaken leave cannot be carried forward, and leave may not be replaced by a compensatory payment

instead, save where the employment is terminated. On that basis (and subject to any exceptions) if the right to annual leave is not exercised within the appropriate leave year then the entitlement to that leave expires: see to this effect, **NHS Leeds v Larner** [2012] ICR 1389 (Mummery LJ at 25).

17. Regulation 14 provides an express exception to this principle. It provides:

> **"(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) …"**

18. It is clear from regulation 14 that "the leave year" referred to in paragraph (1)(b) is the leave year in which the worker's employment is terminated. The definitions provided in the formula for calculating the payments due under regulation 14(2) in paragraph (3) support this conclusion. Accordingly, the exception on the face of regulation 14 to the principle that the entitlement to leave not exercised in the appropriate leave year expires, is limited to the leave year in which the worker's employment is terminated.

19. Regulation 15(1) sets out a procedure for giving notice of the days elected for taking leave and provides:

> **"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)."**

Mummery LJ held in **Larner** (at 27) that this regulation does not contain a requirement for the worker to give notice nor that a worker is only entitled to take leave if he has given notice.

20. Regulation 16(1) provides for the entitlement to be paid in respect of any period of annual leave to which the worker is entitled under regulation 13 (and regulation 13A) and for the rate of payment. Again, as Mummery LJ observed at paragraph 31 (and as was expressly accepted by Mr Williams) entitlement to payment is dependent on entitlement to leave. If a worker's entitlement to leave in an earlier year is lost when that leave year expires, any entitlement to payment in lieu of that on termination would also be lost. Moreover, it seems to me that any payment in respect of leave not in fact taken would conflict with the ordinary reading of regulation 13(9)(b) **WTR**.

21. At paragraph 37 of **Larner** Mummery LJ extracted a number of general points from the rulings of the CJEU in **Stringer v Revenue and Customs Comrs** and **Schultz-Hoff v Deutsche Rentenversicherung Bund** (Joined cases C - 520/06 and C - 350/06) [2009] ICR 932, both of which concerned workers on long-term sick leave who had requests for paid annual leave refused by their employers, had their employments terminated either during the course of a leave year whilst on sick leave, or in the year afterwards, and whose employers contended that the entitlement to paid annual leave was extinguished and the right on termination to an allowance in lieu was lost:

> **"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 …**
>
> **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 derogation." That is borne out by the terms of Article 7(2), which only permit payment in lieu on termination of the employment relationship…. The right is "granted to every worker, whatever his state of health" …**
>
> **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" …**

(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" … Equally, national legislation or practices may also allow a worker to take paid annual leave during sick leave …

(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" …

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 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"…. 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)…. That would be the case "even where the worker has been on sick leave for the whole of the 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" …

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 …

(8) "With 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" … i.e. the worker's normal remuneration."

22. Leaving aside the dispute about whether having made no leave request before the leave year ended nor any request to carry it forward the entitlement was lost, at paragraph 48 of **Larner**, Mummery LJ summarised the effect of the CJEU rulings on paid annual leave as follows:

"(1) Article 7 has direct effect against NHS Leeds, as an emanation of the State, in the ET, the EAT and the courts.

(2) A worker absent on sick leave, as the claimant was, is still a "worker" (though not at work) and may, during absence on sick leave, accrue entitlement to paid annual leave.

(3) If a worker on sick leave is unable or unwilling to take paid annual leave because of sickness, as was the case with the claimant (in Larner), paid annual leave must be granted in another period, if necessary beyond the leave period concerned.

(4) A worker absent on sick leave throughout a leave year, as the Claimant was, does not lose entitlement to paid annual leave at the end of that year, or the right to take paid annual leave at another time when the worker is not sick.

(5) The carry forward period for paid annual leave must be substantially longer than the reference period.

(6) Any allowance on termination of employment in lieu of paid annual leave must place the worker in the same position as if he had exercised the right to take paid annual leave during employment and so must be calculated in accordance with the normal remuneration payable for the period of paid annual leave which the worker has not been able to take because of sickness".

23. On this basis the Court concluded that entitlement to paid annual leave is not lost in a case where the worker is prevented from taking paid annual leave by reason of sickness throughout that leave year. The only permissible option however, under the **WTD**, is to allow the worker to carry forward un-used paid annual leave entitlement into the following leave year. It would not be permissible to pay compensation in lieu of the leave lost. Such a payment could only be made on termination of the employment on the facts of **Larner**, where termination occurred in early April 2010 of the carry forward year, after which there was no longer any possibility of taking paid annual leave. So far as the carry forward period is concerned (see paragraph (5) above), in **KHS AG v Schulte** [2012] ICR D19 the CJEU held in relation to a collective agreement for forfeiture of leave not taken within 15 months of the end of the leave year, that a carryover period of 15 months only was not precluded by the **WTD** because it was longer than the one year reference period for taking annual leave, so that the worker lost the entitlement to carry over his right to paid leave because it lapsed on the expiry of the 15 month carry-over period. It seems to me that this ought to have a bearing on the interpretation to be given to regulation 13(9) **WTR** when reading it so as to give effect so far as possible, to Article 7 and the CJEU rulings.

24. So far as the leave request point was concerned, in **Larner** the Court of Appeal held that Article 7 provides, without qualification, that every worker is entitled to paid annual leave and there is no requirement for a leave request if the worker wishes to take the leave while off sick or to carry the leave forward into another leave period because of absence on sick leave.

25. Although not necessary for his judgment in circumstances where the employer in question was an emanation of the state, Mummery LJ considered that it would be possible to interpret the **WTR** so as to be compatible with Article 7 as interpreted in the rulings of the CJEU. He concluded so far as regulation 15 **WTR** is concerned, that where a sick worker recovers and returns to work, the worker must serve a regulation 15 notice in order to take annual leave, but that regulation 15 could have no application where a worker has not recovered or returned from sick leave and has had no opportunity to take paid annual leave at another time. So far as regulations 13 and 14 are concerned, Mummery LJ stated:

> **"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.""***

26. These conclusions (although strictly obiter) are highly persuasive and I (like Lady Stacey in **Sood Enterprises Ltd v Healy** [2013] ICR 1361 at 37 to 40) respectfully agree with this analysis of the way in which the **WTR** can be read so as to give effect to the wording and purpose of the **WTD** and the CJEU rulings (subject only to the additional point by reference to paragraph 23 above).

27. The remedy for a failure to permit a worker to exercise a right to paid holiday or for a failure to pay holiday pay is provided for under the **WTR** by regulation 30 which (so far as relevant) provides:

> **"(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) or 13 (1);

… 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) 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."

28. Following the decision of the House of Lords in **Revenue and Customs Comrs v Stringer** [2009] ICR 985, it is also possible to enforce holiday pay claims under section 23 of Part II **ERA** as unlawful deductions from wages in contravention of section 13 **ERA**. Section 23(2) contains a time limit of three months for presenting a complaint of unlawful deduction from wages but there is an extended time limit provided for by section 23(3) where a complaint is brought in respect of "a series of deductions or payments" when time starts running from the "last deduction or payment in the series". A tribunal may extend time for such further period as it considers reasonable if it is satisfied that it was not reasonably practicable for a complaint to be made within these time limits.

Application to this appeal

29. Mr Williams contends on behalf of the Claimant that the present case falls squarely within the ratio of **Canada Life**, which he submits, although subsequently disapproved of in **Fraser v St George's Mental Health Trust** [2012] ICR 403, remains good law following **Larner**. Given the developments in relation to holiday pay jurisprudence since **Canada Life** and the comprehensive judgement of the Court of Appeal in **Larner** it is unnecessary for me to determine whether or not he is right about that. I prefer to approach this appeal on the basis of the proper construction of the **WTR** as interpreted in **Larner**.

30. In the present case, without any reference to regulations 13 or 16 **WTR**, the Tribunal focused on regulation 14 alone. That was an error. It should have started with regulation 13 and in particular regulation 13(9) as construed in **Larner**. Had it done so, it would have had to consider the entitlement to leave under regulation 13, which is separate from the entitlement to pay under regulation 16. Whilst I accept Mr Williams' argument that these are two aspects of a single right, the Claimant's case had to come within the **WTR** because he had no right to rely directly on Article 7.

31. Accordingly the Tribunal was required to consider in the first instance, the requirement in the **WTR** to take leave within the relevant leave year in question, and, critically, the prohibition on carrying forward such leave, 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." Accepting that sick leave may not be the only circumstance that would act as an impediment, the Tribunal should accordingly, have considered whether the Claimant was *unable or unwilling because of reasons beyond his control, to take annual leave and as a consequence did not exercise his right to annual leave.*

32. The Tribunal made no findings whatever of any restriction on the Claimant's ability or willingness for reasons beyond his control, to take annual leave in any of the leave years in question. He did in fact do so, as Mr Rees contends, and indeed, for four years between 2003 and 2007 took his full four week holiday leave entitlement, and makes no claim for Holiday Pay 3 at all in respect of those years. There is no evidence that he was ever prevented from exercising that right. Rather, despite having the opportunity to do so every year, he chose not to do so. Nor indeed is there any finding that he could not afford to do so, although there is evidence that he would have taken more holiday entitlement had he been paid for it, and I accept the proposition advanced by Mr Williams that non-payment is liable to deter. Nevertheless, despite the Claimant's clear evidence that he gave notice of his intention to take annual leave (that would have complied with regulation 15) in respect of the holiday he took each year between 1998 and 2012, there is no evidence that the Claimant ever gave any notice, as he could have done on this same basis, of an intention to take holiday that was refused.

33. The Tribunal's findings about the Claimant's status provide some explanation as to how this situation arose. The Tribunal found that the Claimant worked as a self-employed salesman, paying his own tax and National Insurance and was not paid for holidays or sick leave (paragraph 9). In 2008 the Claimant had significant surgery and given that during 2008 the Respondent recognised that it employed different classes of workers (some of whom were employed pursuant to a contract of service and others who were self-employed) he was offered an employed contract. The Tribunal found that he elected to remain self-employed and signed a contract on 7 November 2008 to that effect, continuing to work on a self-employed commission only basis (paragraph 10). It appears from his witness statement that he was not aware of any "worker" status or entitlements that might flow from such status and there is nothing to suggest that he ever raised this or sought to challenge the Respondent until after termination.

34. In these circumstances and in the absence of any findings of fact to support a conclusion that the Claimant was prevented by reasons beyond his control from taking annual leave (albeit unpaid) the Tribunal was not entitled to conclude that the Claimant's entitlement under regulation 14 **WTR** (as interpreted in **Larner**) had been established simply on the basis that there was no difference in principle between being unable to take paid leave through sickness and being refused paid leave as it assumed would have happened had the Claimant asked for it. These are questions of fact that required findings based on evidence and not assumptions.

35. Furthermore, the entitlement to pay under regulation 16(1) **WTR** is to pay for periods of leave taken without any general right to a payment in lieu for the reasons already described. The exception provided by regulation 14 (subject to **Larner**) applies only to the proportionate holiday entitlement lost by a worker in the leave year in which his or her employment terminates. This is consistent with the purpose of the **WTR** and the **WTD**, that the annual leave entitlement is a health and welfare benefit and any more general right to a payment in lieu would create an incentive not to take holiday: see to this effect **Fraser v St George's Mental Health Trust** at 26 and 27. Even if the Claimant was as a matter of fact prevented from taking annual leave, it is clear that he worked the periods in question and was paid in full. To receive holiday pay for the same period is double recovery and not consistent with that legislative purpose.

36. If the Claimant was not in fact prevented from taking annual leave each year so that at the end of the relevant leave year his entitlement to leave was lost in accordance with regulation 13(9) then any entitlement to pay under regulation 16 would equally be lost. There is nothing in the wording of regulation 14 (subject to **Larner**) that requires the revival of claims for

holiday entitlement not taken in previous years. I do not accept Mr Williams' argument that regulation 13(9) simply ceases to apply on termination.

37. There is another difficulty with the Tribunal's reasoning. The Tribunal's conclusion in paragraph 46 indicates that it viewed this claim (for Holiday Pay 3) as based on the Respondent's refusal to permit the Claimant to take paid leave. Whilst it is undoubtedly the case that claims for non-payment of holiday pay due under regulation 16(1) or for non-payment of pay in lieu of holiday not taken in the termination year under regulation 14(2) can be brought as claims for unlawful deductions from wages properly due (**Stringer**, particularly at 29 and 31), the same conclusion does not obviously follow in relation to a complaint based on refusal to permit a worker to take annual leave in accordance with regulation 13.

38. Here, the Claimant was paid his wages for the periods he would otherwise have taken as annual leave. What he lost was not wages but the health and welfare benefits of taking annual leave. Regulation 30 **WTR** recognises the difference. Under regulation 30(5) where a Tribunal finds that there has been a failure to pay in accordance with regulation 16 (1) (or on termination 14(2)) the remedy is an order requiring the employer to pay the worker the amount found to be due to him in that regard. However, where the complaint is based on a refusal to permit the exercise of these rights, an award of compensation on such basis as is considered just and equitable shall be made, having regard both to the employer's default in refusing to permit that exercise and to any loss sustained by the worker as a consequence. Such an award of compensation cannot in my judgment be regarded as "wages" within section 27(1) **ERA**. It is not paid as part of the consideration for work done or to be done under the contract but rather as unliquidated damages for the refusal to allow a right to be exercised or in respect of leave that has not been taken. Whilst a remedy for such a complaint is expressly afforded by regulation

30 **WTR**, a remedy based on unlawful deduction from wages under section 23 **ERA** is not available on such a complaint.

39. If that is correct, the Claimant was not entitled to rely on a "series of deductions" to extend the ordinary time limits available for a complaint based on the **WTR**. But even if the extended time limit was available to the Claimant under section 23 **ERA**, the Tribunal did not at any stage address the requirement for a "series of deductions". At the very least it ought to have considered the fact that there were no "deductions" on any view, between 2003 and the end of the holiday year in 2007, and the effect this would have had on any series of deductions it identified. Moreover, any future consideration of this question would have to take account of the conclusions of Langstaff P in **Bear Scotland Ltd and others v Fulton and others** UKEAT 0047/13BI (handed down on 4 November 2014) that, properly construed in its context, any series of deductions within the meaning of section 23(2) and (3) **ERA** where the gap between deductions is of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint: see paragraph 81.

40. For all these reasons, the decision of the Employment Tribunal in relation to Holiday Pay 3 cannot stand and must be remitted for reconsideration.

The cross-appeal: award for injury to feelings

41. The cross-appeal against the level of award for injury to feelings is pursued on two main grounds. First, although the Tribunal's short summary of the test to be applied for considering whether to make an award for injury to feelings based on the principles set out in **Vento**, is substantially correct according to the Claimant, he argues that the Tribunal failed to make reference to the 10% uplift in personal injury awards set by the Court of Appeal in **Simmons v**

Castle [2013] 1 WLR 1239. Secondly, Mr Williams submits that the Tribunal's assessment is wrong in law because it considered irrelevant factors in making its award and failed to consider relevant factors.

42. I take each of those points in turn, starting with the wider point.

43. The single act of unlawful age discrimination found established by the Tribunal was the Claimant's dismissal - see paragraph 30. In concluding that a sum of £3000 for damages for injury to feelings was appropriate the Tribunal, having referred to **Vento**, stated as follows (paragraph 33):

> **"We have, as we must, focused on the effect upon the Claimant of the discrimination surrounding his dismissal. We do not think it was considerable. We believe that he was perfectly content with what he believed, until he took advice, to be his self-employed status. He enjoyed the relative freedom and tax advantages of that status. We place it in the bottom band and we award a figure of £3000 for damages for injury to feelings."**

44. In subsequent correspondence Employment Judge Griffiths clarified that observation, stating that it was because the Claimant knew that his services could be terminated at any time (and in this sense was a self-employed person) and not because of his employment status per se that the Tribunal concluded that it was hard to see how there could be any significant injury to his feelings.

45. The challenge made on the Claimant's behalf to paragraph 33, and indeed to the subsequent clarification given by Employment Judge Griffiths, is that it was irrelevant when considering the appropriate level of award that the Claimant was content with his self-employed status. The mere fact that he could be dismissed at any time was irrelevant to his right not to be dismissed for an unlawfully discriminatory reason and the hurt suffered as a consequence of that treatment.

46. That is plainly right, and while Mr Rees formally contested this point, he did so with little enthusiasm. Compensation for injury to feelings is designed to compensate for the injury based on knowledge that less favourable treatment was on a proscribed ground. Such an award is to be quantified by reference to the anger, upset, and/or humiliation that flows from an act based on unlawful discrimination.

47. In **Vento** the Court of Appeal held at paragraph 51 that "although incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms" and that a sensible assessment must be made even though such an assessment is not an exact science. The assessment in any case can be a difficult one, but the courts have identified a number of general principles that inform the proper approach: (i) compensation for injury to feelings should be compensatory and not punitive; (ii) it should not be set at so low a level as to diminish respect for the policy of the anti-discrimination legislation; (iii) it should bear some similarity to the range of awards in personal injury cases; (iv) in exercising their discretion Tribunals should remind themselves of the value in everyday life of the sum they had in mind. The **Vento** judgment established three bands of award, subsequently uprated in line with inflation as measured by the RPI in **Da'Bell v NSPCC** [2010] IRLR 19 (at 44).

48. The evidence of the Claimant relevant to this assessment was that he wished to continue working at least until the age of 70. His premature dismissal, the manner of that dismissal and his failure to find alternative work has caused hurt and has led to increased stress levels, associated health issues and lack of confidence. He has become increasingly worried that he will have to retrain in a new field. He describes how aggrieved he felt by the meetings with Mr Dollar and he pursued a grievance against the decision and his "forced retirement". The Claimant also describes an incident in December 2012 when he was taken to hospital with

shortness of breath and chest pains. In the absence of any identifiable problem, he was told that these symptoms were more than likely to be caused by stress (paragraph 66 of his witness statement). Furthermore he describes a flare-up of his psoriasis symptoms during this period; and that his dermatologist told him that this was likely to be stress-related (paragraph 67). Whilst the Tribunal was entitled to conclude, in the absence of medical evidence, that no award should be made for personal injury in this regard, this evidence was indicative of the level of distress and upset suffered by the Claimant but appears to have formed no part of the assessment at all.

49. Against that background I am satisfied that the approach adopted by the Tribunal in assessing injury to feelings was in error. The Tribunal erred in law by discounting the hurt feelings suffered by the Claimant as a consequence of his forced retirement on grounds of age, on an impermissible basis; and failed properly to assess the anger, upset, humiliation and stress felt by him, arising from the loss of his job because of unlawful age discrimination.

50. So far as the 10% uplift point is concerned, there is no longer any dispute but that the Tribunal was referred to this point in argument. In **Simmons v Castle** Lord Judge CJ explained the background to the 10% uplift at paragraphs 7 to 13 in the context of the general reforms to costs in civil proceedings. He described the recommendation as "forming part of a coherent package of reforms, one element of which is that general damages should rise by 10% …" Later at paragraph 14 he said, "the increase in general damages we are laying down here extends to tort claims other than personal injury actions." That was reiterated at paragraph 20 when the position was summarised as follows:

> **"… We take this opportunity to declare that, with effect from one April 2013, the proper level of general damages for (i) pain suffering and loss of amenity in respect of personal injury (ii) nuisance (iii) defamation and (iv) all other torts which cause suffering, inconvenience or distress to individuals, will be 10% higher than previously."**

51. As Mr Williams submits, discrimination is a statutory tort and by reference to section 124 **Equality Act 2010**, the amount of compensation that may be awarded for this statutory tort corresponds expressly by virtue of section124(6) to the amount which could be awarded by a County Court. Some support for his argument that the 10% uplift therefore applies to injury to feelings awards in discrimination cases is found in a recent decision of this Appeal Tribunal by HHJ Eady QC in **Ozog v Cadogan Hotel Partners** where the point was conceded but the EAT stated that the concession was rightly made and observed that for those cases in which an injury to feelings award is made after 1 April 2013 there is a requirement to apply the 10% uplift laid down in **Simmons v Castle**.

52. Against that Mr Rees contends that injury to feelings awards in Employment Tribunals can be distinguished from awards for torts in other jurisdictions because of the decision in **Da'Bell** uprating the **Vento** bands in line with inflation and significantly in excess of 10%. He submits that these guidelines are unique to the Tribunal jurisdiction and that accordingly the **Simmons v Castle** uplift is already accounted for. Moreover he submits that the justification for the 10% uplift included the fact that the level of general damages was generally low (see **Simmons v Castle** at 27 and 37) and that this is not the case for Tribunal awards. Finally he submits that the Court of Appeal did not have Employment Tribunals in mind in **Simmons v Castle**.

53. I do not accept the argument put forward by Mr Rees. In my judgment there is no basis for limiting the 10% increase to all torts save for the tort of discrimination. Section 124(6) **Equality Act 2010** serves to emphasise the point against him, as Mr Williams submitted. In any event **Da'Bell** was in 2010 and we are now in 2014.

54. In the result, the cross-appeal must be allowed and the award for injury to feelings quashed. The Tribunal made two errors. First, it erred in its assessment of the injury to feelings suffered by the Claimant in this case by wrongly discounting the award made on an irrelevant and inappropriate basis. Secondly, it erred by failing to apply a 10% uplift to the award made by reference to the uprated **Vento** guidelines.

Conclusion

55. Both the Appeal and the Cross Appeal are accordingly allowed. The parties agreed that this Appeal Tribunal should substitute its own assessment of the appropriate award for injury to feelings in this case if the Cross Appeal were allowed. That is a course I would have been prepared to adopt in exercise of powers under section 35 **Employment Tribunal's Act 1996**, in order to save costs and to deal with the appeal proportionately in accordance with the overriding objective. However, given that the question of any entitlement to an award in respect of Holiday Pay 3 will have to be remitted to the Employment Tribunal in any event, it seems to me that the better course in the circumstances is to remit the injury to feelings award for reconsideration in accordance with the principles identified above.

56. There was no suggestion that these issues should be remitted to a different Tribunal rather than to the original Tribunal which dealt with this case. Accordingly, the question of the Claimant's entitlement to an award in respect of Holiday Pay 3 and for the injury to feelings he suffered as a result of his unlawfully discriminatory dismissal are remitted to the same Tribunal for reconsideration. It will be for the Employment Tribunal to determine whether it would be appropriate to have a directions hearing to identify what, if any evidence, will be appropriate, and to provide case management directions for the exchange of skeleton arguments.