EMPLOYMENT TRIBUNALS

Claimant: Mr I Iyanda

Respondent: Viking Consultancy UK Limited

Heard at: Manchester **On:** 10 August 2018

Before: Employment Judge Aspden

REPRESENTATION:

Claimant: Mr B Henry, Counsel
Respondent: Mr P Maratos, Consultant

JUDGMENT having been sent to the parties on 29 August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant brought tribunal proceedings on 12 February 2018 containing the following:

   a. A claim under Employment Rights Act 1996 alleging that the respondent had made unauthorised deductions from wages in respect of commission, insurance and penalties.

   b. A claim under the Employment Rights Act 1996 alleging that the respondent had made unauthorised deductions from wages by failing to pay him the National Minimum Wage throughout his engagement.

   c. A claim under the Working Time Regulations 1998 (WTR) and/or part II of the Employment Rights Act 1996 (ERA) that the respondent had failed to pay him for annual leave taken by him

between the start of his employment in or around February 2016 and the date of the claim (12 February 2018).

d. A reference 'in respect to written particulars of employment under sections 11(1) and (2) of the ERA'.

2. The claimant contended at that time that he was still employed by the respondent.

3. In its response, the respondent denied that the claimant was a worker for the purposes of the National Minimum Wage Act 1998, the WTR or ERA.

4. A preliminary hearing was arranged to determine the issue of whether the claimant was a worker. At that hearing, before Employment Judge Sharkett, the respondent conceded that he was a worker. Employment Judge Sharkett's decision recorded that the respondent also conceded at that hearing that the claimant's claim of unlawful deductions from wages in respect of the national minimum wage was well founded and that the claimant's claim for holiday pay 'arising on termination of employment' was also well founded. The case was then listed for this remedy hearing on 10 August 2018 to determine remedy in respect of the minimum wage claim and the holiday pay claim.

5. At the outset of the hearing I discussed with the parties the issues to be determined at the hearing.

6. In relation to the unlawful deductions claim in respect of commission, insurance and penalties, Mr Henry explained that this fell away, being absorbed within the claim in respect of the minimum wage.

7. In light of the concessions made by the respondent at the preliminary hearing that the claimant's claim in respect of non-payment of the minimum wage was made out, it was a surprise to hear from Mr Maratos that he intended to submit that nothing was owing to the claimant in respect of the minimum wage. Asked to elaborate, Mr Maratos initially said the respondent's position was that the claimant was employed not by the respondent but by Consort Consultancy Services Ltd, the umbrella company referred to in its response and therefore no claim lay against the respondent. Mr Maratos could not explain how such an argument was sustainable in light of the concession that Judge Sharkett had recorded the respondent as having made at the preliminary hearing ie that the claimant was a worker in relation to the respondent and his claim in relation to the minimum wage was well founded. Mr Maratos then suggested that the respondent would submit that it had in fact paid a sum equivalent to (or in excess of) the minimum wage but that Consort had made deductions, which explained the shortfall. Again, Mr Maratos could not explain how such a submission could be squared with the respondent's concessions that the claim against it was well founded.

8. After discussing the matter further with his client, Mr Maratos confirmed to me that the claim in respect of the minimum wage was conceded in its entirety, that the respondent accepted that it owed the claimant the sum of £6749.14 in respect of the minimum wage and that judgment should be entered

in that amount. As both parties now agreed that the respondent had made an unlawful deduction in that amount, I entered judgment accordingly.

9. Turning to the holiday pay claim, I drew the parties' attention to the fact that although the concession recorded and judgment entered by Judge Sharkett referred to a claim for holiday pay arising from termination, the claim form did not contain a claim alleging that the respondent had failed to pay a sum due to the claimant on termination. Indeed the claim form stated that the claimant's employment was on-going. Mr Henry and Mr Maratos agreed that the claimant's employment had ended on 14 February 2018 ie after the claim form had been presented. Mr Henry told me that no application had been made by or on behalf of the claimant, whether at or before the preliminary hearing (or after it for that matter), to amend his claim to add an allegation that the respondent had failed to pay to him a sum due on termination under the WTR. It was difficult to see, therefore, how the reference to such a claim had come about given that the original claim did not incorporate, and could not have incorporated, such a claim as at that time his employment had not terminated and yet neither representative suggested that Judge Sharkett had not correctly recorded the concessions made and agreement reached by the parties at that hearing. On speaking to Mr Henry and Mr Maratos it appeared to me that, at that earlier hearing, which took place after termination, both parties had simply proceeded on the basis that the claim included a claim that the respondent had failed to pay the claimant a sum due to him on termination under the WTR notwithstanding that no application to amend the claim had not been made – and indeed this was now the primary basis on which the claim in respect of holiday pay was being pursued.

10. After I explained to Mr Henry that I could not consider such a claim as it was not part of the claim as presented and no application to amend had been made and granted, Mr Henry formally applied to amend the claimant's claim to include a claim under WTR reg 30 and/or ERA section 26 that 'the respondent failed to pay to the claimant the sum or sums due to him under WTR reg 14 and/or reg 16 on or by virtue of the termination of his employment on 14 February 2018. Although in the claim form the claimant had said he had taken leave under the WTR during the course of his employment, Mr Henry sought to amend the factual basis of the claim to contend that any 'leave' taken by the claimant had not been leave under WTR reg 13 or 13A. After hearing the parties submissions I allowed the application, for reasons which I gave orally at the hearing.

11. It followed that the claims made by the claimant in respect of holiday pay were as follows:

a. A claim under WTR reg 30 and/or ERA section 26 that the respondent had failed to pay to the claimant the sum or sums due to him under WTR reg 14 and/or reg 16, in respect of untaken leave, on or by virtue of the termination of his employment on 14 February 2018.

b. In the alternative, if the tribunal found that the claimant had taken leave under WTR reg 13 or reg 13A, the claimant made a claim

under the Working Time Regulations 1998 reg 30 and/or ERA section 26 that the respondent had failed to pay him for annual leave taken by him between the start of his employment in or around February 2016 and the date of the claim (12 February 2018).

12. In respect of the claim alleging that pay was due on termination, Mr Henry expressly contended that the claimant was entitled not only to a payment in respect of leave that had accrued in the leave year in which the claimant's employment ended but also, in light of the CJEU decision in King v The Sash Window Workshop Ltd C-214/16 [2018] ICR 893, a payment in respect of leave that accrued in prior years. Mr Henry also submitted that, even if the claimant had in fact taken leave under WTR reg 13 and 13A, the CJEU's ruling in King required the tribunal to dis-apply the normal time limit for bringing a claim, whether such claim is brought under WTR reg 30(1)(b) or ERA s26, of three months from the date payment should have been made or, in the case of a claim under ERA involving a series of non-payments, three months from the last of those non-payments. Mr Henry also submitted that, in light of King, the ruling in Bear Scotland v Fulton [2015] ICR 221 (EAT), to the effect that a gap in underpaid holiday of more than three months interrupts the series of deductions, is no longer good law in so far as it relates to claims such as that pursued in these proceedings.

13. Mr Maratos conceded that the respondent had failed to pay to the claimant the sum due to him on termination under WTR r14 in respect of his final leave year. However, he denied that any further payment was due. The respondent's case as put by Mr Maratos, in summary, was that:

a. The respondent was not obliged to provide the claimant with paid holiday under the WTR until a Tribunal had declared him to be a worker, which had not happened until the preliminary hearing earlier this year.

b. If that was not accepted, the claimant's entitlement under r14 covered only pay in respect of holiday that accrued in the year in which the claimant's employment ended.

c. In respect of previous years, the claimant took leave on the following dates: 3 weeks ending 19 June 2016; 4 weeks ending 11 July 2016; 3 weeks ending 5 June 2017; 2 weeks ending 31 July 2017; and 2 weeks ending 31 December 2017. Notwithstanding that the respondent had not paid the respondent for such time off, this was leave under reg 13/13A and, as such, any payment due to the claimant under reg 14 should have been claimed within three months of leave being taken and was now out of time. Mr Henry accepted that the claimant did not work of the dates identified by Mr Maratos but denied these periods constituted leave under WTR reg 13 or 13A.

d. Even if the claimant had not taken leave in previous years, the respondent did not accept that the case of King entitled the

claimant to carry forward that untaken leave to subsequent years and claim a payment in respect of that leave on termination.

14. The issues for me to determine, therefore, are:

a. Whether any of the claimant's periods away from work on the dates identified by Mr Maratos constituted leave under reg 13 or reg 13A of the WTR.

b. If so, whether the claimant's claims for payment in respect of such leave were time-barred.

c. Whether, in light of the CJEU's decision in King, the claimant was entitled to a payment on termination in lieu of untaken reg 13 and reg 13A leave that accrued in years prior to the leave year in which the claimant's employment ended, under WTR reg 14 or, if not, under reg 16.

Evidence and findings of Fact

15. I heard evidence from the claimant himself. For the respondent I allowed Mr Maratos to call Mr Wilson to give evidence, notwithstanding that a witness statement had not been prepared and sent to the claimant's representative in advance of the hearing.

16. The claimant worked for the respondent for around two years as a security guard, starting work on 10 February 2016. He was treated by the respondent throughout that time as a self-employed independent contractor and not a worker for the purposes of the Working Time Regulations 1998. I infer that the respondent treated other individuals who did the same job as the claimant in the same way ie as self-employed independent contractors.

17. Consistently with the position the respondent had taken in relation to the claimant and other individuals who did the same job as the claimant, the respondent did not provide the claimant or others with any opportunity to take paid leave. I find that if the claimant had asked to take paid leave, the respondent would not have provided it.

18. In the claim form the claimant said he was required to work and he needed to seek authorised leave if he wanted to take leave. That is also what he said in the witness statement he prepared for the preliminary hearing ie he thought he needed permission to absent himself from work.

19. This was, however, contradicted by Mr Wilson in his evidence. He told me that workers like the claimant and others doing the same job could simply decide not to offer themselves up for work whenever they liked and that the company did not recognise the concept of 'leave': there was simply no obligation to work; it was not a case of needing permission to be away from work. Mr Wilson's evidence as to the respondent's approach was consistent with the position the respondent had taken as to the status of these individuals. Their avowed perception was that these individuals were self-employed

contractors and could do as they pleased in terms of working hours. Mr Wilson's evidence to me was that the claimant was simply under no obligation to work.

20. I was not shown any terms and conditions that the claimant entered into. I noticed there was some form of contract in the bundle but I was not taken to it and in any event my copy was illegible so was not something that had any bearing on my decision.

30 What was clear from the evidence is that the claimant did have periods when he was absent from work by choice. There was a dispute over precisely when those dates were: the respondent had identified a number of dates on which the claimant was not at work but the claimant's evidence was that some of the dates suggested by the respondent were times when he wanted to work and was available for work but was not given any work to do. I did not need to resolve that dispute as to the precise dates on which the claimant was absent from work by choice for reasons which will become apparent. It is sufficient to observe that there were times when the claimant chose not to work and on some of those occasions he told managers at the respondent company that he wanted to take holiday and even sought their permission to do so. There was no suggestion that he was ever refused any such request and I infer that he was never refused; indeed Mr Wilson's evidence was effectively that he would not have been because individuals simply did not have to work if they did not want to.

21. I was referred to certain text messages concerning Bank Holidays which could be read as implying that permission was needed to take time off on such days. However, Mr Wilson described the texts as being simply a request to workers not to take time off rather than an insistence that they could not do so.

22. What there is no dispute over is that the claimant was not paid when he chose not to work. Not only that, the company never showed any inclination to pay for those periods of absence: it never intended to as it did not think it needed to given that its perception was that the individuals were self-employed independent contractors. Similarly, there was never any expectation on the claimant's part that he would be paid when he chose not to work. The claimant says, and I accept, that he only found out he might be entitled to paid leave under the Working Time Regulations in December 2017. When he did take time away from work with the respondent, or choose not to make himself available for work, neither he nor the company thought that the claimant was exercising rights under the Working Time Regulations. The claimant did not know he had any rights and the respondent did not think he had any rights.

23. From the company's perspective they did not consider the claimant or others doing the same work as him were obliged to do any work. They did not keep any records of reasons why individuals chose not to work at a particular time; in their view there was no need to. They did not distinguish between periods of absence or the circumstances that led somebody not to be available for work.

24. Looking at the evidence in the round I prefer to the evidence of the respondent as to whether the claimant was obliged to work. I accept that the

claimant genuinely thought he was supposed to work, but I find that actually in reality there was no obligation on the claimant to make himself available to work and he did not need any authorisation if he did not want to work for any particular period. Notwithstanding the claimant's subjective belief that he was obliged to work and needed authorisation to absent himself from work, that did not in fact reflect what was agreed between the parties. The claimant was not obliged to work at any particular times nor make himself available for work. He was able to choose when he made himself available for work. That being the case, he was entitled to choose not to work whenever he wished and without giving notice to or obtaining permission from the respondent.

25. Given that the claimant chose to take time away from work on several occasions during his engagement notwithstanding that he had no expectation of being paid, I find that if the respondent had provided the claimant with the opportunity to ask for and take paid leave he would have availed himself of that opportunity.

Law

26. The Working Time Regulations 1998 (WTR) provide workers with a right to paid holiday. There are two elements to that right: a right to four weeks' leave in each leave year under reg 13 and, separately, a right to an additional 1.6 weeks' leave in each leave year under reg 13A.

27. The parties agree that the claimant's leave year for these purposes began on the date on which his employment began and each subsequent anniversary of that date ie 10 February.

28. Reg 13 provides as follows:

> 13(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.

29. A similar, albeit modified, 'use it or lose it' rule applies to the additional 1.6 weeks' leave under reg 13A. In respect of that additional leave reg 13A provides:

> 13A(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—(a) the worker's employment is terminated;…
>
> (7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

30. Provisions relating to the taking of leave under both reg 13 and 13A are contained in reg 15, which says '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).'

31. There is no prohibition on a worker taking leave at a time when he would not otherwise be obliged to work: Russell & Ors v Transocean International Resources Ltd & Ors (Scotland) [2012] ICR 185 (SC).

32. Payment for leave taken is dealt with by reg 16, which says:

> (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.
>
> (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

33. On termination of employment, a worker is entitled to a payment in lieu of leave that has accrued but remains untaken as at the termination date, by virtue of Reg 14. That provision says:

> 14(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.
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> (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).
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> (3) The payment due under paragraph (2) shall be—… (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 x B) – C
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> where—
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> A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;
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> B is the proportion of the worker's leave year which expired before the termination date, and
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> C is the period of leave taken by the worker between the start of the leave year and the termination date.

34. The EAT has held that the 'leave year' referred to in paragraph (1)(b) is the leave year in which the worker's employment is terminated and that, 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: The Sash Window Workshop Ltd & Anor v King [2015] IRLR 348 (EAT).

35. Regulation 30 of the WTR sets out remedies that are available to a worker who considers their rights under regs 13 – 16 have been breached. It says:

> 31 (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 … 13 or 13A;…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 … 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.

32 In the alternative, a worker who considers his employer has failed to pay him any sum due to him under reg 14 or 16 can bring a complaint under s23 of the Employment Rights Act 1996 (ERA) that the employer has made an unlawful deduction from wages. A claim that the employer has refused to permit the exercise of rights under WTR reg 13 or 13A cannot, however, be brought under ERA 1996: King (EAT).

33 The time limit for bringing a claim under ERA 1996 in respect of unlawful deductions from wages is dealt with in ERA s23, which provides that:

> 23(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…
>
> (3) Where a complaint is brought under this section in respect of (a) a series of deductions or payments, …the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may

consider the complaint if it is presented within such further period as the tribunal considers reasonable…

The Working Time Directive

34 Regulation 13 of the WTR implements within Great Britain what is now provided for by the Working Time Directive of 4th November 2003 (2003/88/EC, replacing Directive 93/104/EC) (the "WTD").

35 Article 7 of the WTD provides:

"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 of 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."

36 The Court of Justice of the EU has held that a worker who does not exercise his right to paid leave under the WTD because his employer refuses to pay for such leave must be permitted to carry over and accumulate such leave until termination of his employment relationship, whereupon he is entitled to a payment in respect of all such untaken leave: King v The Sash Window Workshop Ltd: C-214/16 [2018] ICR 893. This is the case even if the employer considered (wrongly) that the worker was entitled to paid annual leave. In its reasoning the CJEU emphasised that the WTD treats the right to annual leave and to a payment on that account as being two aspects of a single right and that the purpose of the requirement that the leave be paid is to put the worker, during such leave, in a position which is, as regards salary, comparable to periods of work. As the CJEU put it 'The very purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure … However, …, a worker faced with circumstances liable to give rise to uncertainty during the leave period as to the remuneration owed to him, would not be able to fully benefit from that leave as a period of relaxation and leisure, in accordance with Article 7 of Directive 2003/88.'

37 This ruling expanded on earlier CJEU decisions to the effect that a worker must be permitted to carry forward the leave provided by the WTD where he or she has been unable or unwilling to take it due to illness and is entitled to an allowance in lieu of such untaken leave on termination: Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] IRLR 214 (CJEU); Pereda v Madrid Movilidad SA [2009] IRLR 959 (CJEU).

38 In Marleasing S.A. v. LA Comercial Internacional de Alimentacion S.A. (Case C–106/89) [1992] 1 CMLR 305 the CJEU held '… in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third

paragraph of Article 189 EEC.' It follows that the WTR must be interpreted and applied compatibly with the WTD if it is possible to do so. Mr Maratos submitted that the CJEU's interpretation of the WTD in King does not become 'binding' until that case returns to the Court of Appeal (which made the reference to the CJEU). I have no hesitation in rejecting that submission, which was unsupported by any authority and contradicts the Marleasing interpretative obligation. I conclude that the right to four weeks' annual paid leave under the WTR – and to a payment in lieu of untaken leave on termination - must be interpreted, so far as possible, so as to conform with the WTD as interpreted by the CJEU in King.

39 The position is different, however, in relation to the right to additional leave under WTR reg 13A. The cases of Dominguez v Centre informatique du Centre Ouest Atlantique and another [2012] IRLR 321 and Neidel v Stadt Frankfurt am Main C-377/10; [2012] IRLR 607 (CJEU) confirm that there is no EU obligation on Member States to make a payment in lieu on termination of any leave in excess of the 4 week WTD minimum. In the case of Sood Enterprises Ltd v Healy [2013] IRLR 865 (EAT), the EAT cited these cases as authority for the proposition that it is for the national law to set requirements as it thinks fit for additional leave. Therefore, the treatment of r13A additional leave is purely a matter of domestic law. It follows that, in the absence of a relevant agreement, additional leave under r13A must be taken in the year in respect of which it is due and additional leave not taken in that year will be forfeit even if the worker is unable to take their leave: Sood Enterprises. The remedy available to the claimant who is denied the right to take their leave is to claim under WTR reg 30(1)(a) that the employer has refused to permit him to exercise his right under reg 13A.

40 Returning to reg 13 leave, the question is whether the WTR can be read so as to conform with the WTD.

41 In relation to leave that has not been taken, the principal issue here is that, on its face, reg (9) prevents untaken leave from being carried forward. In the case of NHS Leeds v Larner [2012] ICR 1389, a case involving leave untaken due to sickness absence, the Court of Appeal considered that the WTR could be interpreted to give effect to the WTD 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. Mummery LJ observed at paragraphs 90-92:

> 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".
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> 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."

42 This approach was followed by the EAT in Plumb v Duncan Print Group Ltd [2016] ICR 125 (EAT). The EAT there also considered 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 and held 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.

43 I can see no reason why the same approach should not be taken to leave under reg 13 that has not been taken because the employer refuses to pay for such leave. The WTR can be interpreted to give effect to the WTD, as interpreted by the CJEU in King, by construing reg 13(9) as permitting such untaken leave to be carried forward, construing reg 14 as requiring an employer to make a payment in lieu of any such leave as remains untaken on termination, and construing reg 30 as including claims for non-payment of such lieu pay. Such an interpretation does not go against the grain of the WTR and is, therefore, one I should adopt in light of Marleasing.

44 A separate question is whether a worker who exercises their right to take leave under reg 13 but does not receive any payment for such leave can rely on the CJEU's ruling in King to dis-apply the normal time limit for bringing a claim, whether such claim is brought under WTR reg 30(1)(b) or ERA s26, of three months from the date payment should have been made or, in the case of a claim under ERA involving a series of non-payments, three months from the last of those non-payments. Related to that is the question of whether, in light of King, the ruling in Bear Scotland v Fulton [2015] ICR 221 (EAT), to the effect that a gap in underpaid holiday of more than three months interrupts the series of deductions, is still good law in so far as it relates to claims such as that pursued in these proceedings. In light of my conclusion that the claimant did not in fact exercise his right to take paid leave under the WTR I have not had to answer those questions.

Conclusions

45 The first issue I consider is whether any of the periods identified by Mr Maratos during which the claimant was away from work constituted leave under reg 13 or reg 13A of the WTR.

46 As I have noted above, although both parties accepted that the claimant did not work during the periods identified by Mr Maratos, the claimant denied that this was a because he chose not to work on each occasion. Nevertheless, the claimant did accept that he chose not to work during at least some of the periods identified.

47 WTR regulation 15 provides that an individual may take leave to which they are entitled on such days as they may elect. The question is whether the claimant elected to take leave on the dates on which he chose not to work.

48 In considering this issue I bear in mind my finding that the claimant was not under any obligation to work or make himself available for work at any particular time or to work any minimum number of hours. Although the Transocean case makes it clear that an individual can take leave under the WTR during periods when he or she would not otherwise be under any obligation to work, it cannot be the case that an individual who is free to work or not as he chooses is deemed to elect to take leave under the WTR by virtue simply of electing not to work. In cases such as this it is a question of fact whether an individual has elected to take leave under the WTR rather than simply electing not to work or electing to take some other kind of leave.

49 In this case the claimant had no knowledge of his right to take paid leave under the WTR. That being the case, when choosing not to work he certainly cannot consciously have been electing to take his entitlement to leave under the WTR. Furthermore, although there were times when the claimant said he wished to take holiday and even sought permission to take leave, neither he nor his employer had any intention or expectation that he would be paid for any of the periods during which he chose not to work: the respondent's position was that paid time off was not available – it did not recognise the claimant as having any rights to leave under the WTR; similarly, he claimant had no knowledge of his rights under the WTR, at no time asked for paid time off and had no expectation of being paid during the periods he chose not to work. Moreover, the claimant was entitled to take as much time away from work as he wished and, as such, did not need to ask if he wanted 'time off'.

50 Taking all these factors into consideration, I find that although there were times during his employment when the claimant elected not to work, the claimant did not, at any time during his employment, elect to take leave under reg 13 or 13A of the Working Time Regulations.

51 I reach this conclusion based on my interpretation of the WTR in their own right and their application to the facts of this case. Although I have not felt the need to have recourse to the jurisprudence of the CJEU in reaching that conclusion, my belief that this is the correct decision is fortified by a consideration of the CJEU's case law in this area. In particular, the CJEU has repeatedly stressed that the right to pay and leave under the WTD are effectively bound up as one right; see for example paragraph 35 of the King judgment paragraph 44, where the Court of Justice makes it plain that if an employer grants only unpaid leave that is a denial of the right to leave under the WTD. The claimant in this case had no means of taking paid leave. That being the case, I conclude that when he did take time away from work that time away from work could not constitute paid leave for the purposes of the WTD. Given the need to interpret and apply the WTR in a way that conforms with the WTR, this reinforces my belief that, in electing to take periods of time away from work, the claimant did not elect to take leave under the WTR.

52 As the claimant did not take any leave under WTR, the next question I must consider is whether, in light of the CJEU's decision in King, the claimant was entitled to a payment on termination in lieu of untaken leave under reg 13 and 13A.

53 This is a case in which the claimant did not exercise his right to paid leave under the WTD. There is no dispute that the respondent did not make any paid leave available to the claimant and I am satisfied that if the claimant had asked to take paid leave, the respondent would not have provided it. Given that the claimant chose to take time away from work on several occasions during his engagement notwithstanding that he had no expectation of being paid, I am also satisfied that if the respondent had provided the claimant with the opportunity to ask for and take paid leave he would have availed himself of that opportunity. That being the case I am satisfied that the reason the claimant did not exercise his right to paid leave was because his employer refused to pay for such leave. As such, the claimant was prevented from exercising his right to paid leave under the WTR.

54 The CJEU in King has ruled that, so far as the four weeks leave provided for by the WTD is concerned, a worker in such circumstances must be permitted to carry over and accumulate such leave until termination of his employment relationship, whereupon he is entitled to a payment in respect of all such untaken leave.

55 As recorded above, I hold that the WTR can and should be interpreted to give effect to the WTD, as interpreted by the CJEU in King, by, in circumstances such as these, construing reg 13(9) as permitting untaken reg 13 leave to be carried forward, construing reg 14 as requiring an employer to make a payment in lieu of any such leave as remains untaken on termination, and construing reg 30 as including claims for non-payment of such lieu pay.

56 The position in relation to the additional leave under reg 13A is different, however. There was no relevant agreement providing for leave to be carried forward in this case. Therefore, as noted above, any additional leave under r13A not taken in the year it was due was forfeit. This is so even though the claimant was unable to take paid leave. The claimant's remedy was to bring (within the relevant three month time limit) a claim for compensation under WTR reg 30(1)(a). No such claim was brought in this case.

57 The claimant's employment terminated just a few weeks into a new leave year. It follows that the claimant was entitled, under WTR r14, on termination of employment to a payment in lieu of holiday comprising:

a. whatever proportion of leave under regulations 13 and 13A had accrued in his final leave year;

b. four weeks' of leave for each of the previous years of employment.

58 I reject Mr Maratos' submission that the right to a remedy or the right to leave did not crystalize until the Tribunal determined that he was a workers.

There is no legal basis for that submission. The claimant was a worker all along, notwithstanding that the respondent had not recognised him as such. Therefore, he was entitled under the WTR to paid holiday. As the European Court of Justice said in King at paragraph 63, in circumstances such as this where the employer does not allow an individual to take paid leave because they do not think they are entitled to it, it is the employer that must bear the consequences.

59 In light of my conclusions the parties agreed that the sum owing to the claimant in respect of annual leave was £3856.68.

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Employment Judge Aspden

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Date: 13 December 2018

REASONS SENT TO THE PARTIES ON

20 December 2018
FOR THE TRIBUNAL OFFICE