# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **Respondent** |
|---|---|
| Mr Klicner | Guarding UK Ltd |

**AND**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Birmingham **ON** 11- 12 June
8 August 2019
(in chambers)

**EMPLOYMENT JUDGE** Harding

**Representation**
**For the Claimant:** In Person
**For the Respondent:** Mr Pollitt, Counsel

**RESERVED JUDGMENT**

1 The claimant's claim that the respondent refused to permit him to exercise his right to take annual leave contrary to Regulation 30(1)(a) of the Working Time Regulations 1998 is well founded.

2 The claimant's claim that the respondent has failed to pay him the whole or part of any amount due under Regulation 16 of the Working Time Regulations, contrary to Regulation 30(1)(b) of the Working Time Regulations 1998 is not well founded and is dismissed.

3 The claimant's claim that the respondent has made an unlawful deduction from his wages contrary to section 23 of the Employment Rights Act 1996 is not well founded, and is dismissed.

4 A remedy hearing will be listed in due course.

## REASONS

1 This is a claim bought by the claimant, Mr Klicner, against the respondent, Guarding UK Ltd. It is a claim about holiday pay. The basis on which the claimant pursued his claim was not entirely clear from his claim form. It appeared to be the case that he was asserting a right to be paid £837.39 in respect of accrued but untaken holiday for 2016 – 2017 and £735.05 for accrued but untaken holiday for 2017 – 2018. The claimant remains in employment with the respondent. The claimant also asserted in his claim form that he had made a protected disclosure, although he did not plead that he had suffered any detriment as a result of this. At a case management Preliminary Hearing held before Employment Judge Connolly on 15 November 2018 further clarity was obtained as to the basis on which the claimant was pursuing his case. It was identified that the claimant was pursuing the following claims;

(a) a claim under Regulations 13, 13A and 30(1)(a) of the WTR; that the respondent had refused to permit the claimant to exercise his right to take annual leave,

(b) a claim under Regulations 16 and 30(1)(b) of the WTR; that the respondent had not paid the claimant in respect of a period of annual leave at the rate of a week's pay in respect of each week of leave, and

(c) a claim under sections 13 and 23 of the Employment Rights Act 1996; that the respondent had made an unlawful deduction from wages in respect of payments for annual leave.

Employment Judge Connolly also confirmed with the claimant that, whilst his claim form referred to the making of a protected disclosure (the protected disclosure was said to be the claim form itself), the claimant was not claiming that he had been subjected to any detriment or dismissal because of the alleged protected disclosure. The claimant had also confirmed this to be the case in writing, see paragraph 4 of the Order.

### The Issues

The issues between the parties had been set out in detail at the Preliminary Hearing before Employment Judge Connolly. At the start of this hearing I went through the issues with the parties again and we were able to refine them as follows;

1.1 For the 2016 - 2017 holiday year it was agreed that the claimant had accrued 206 hours leave (using a calculation of 12.07% of hours worked) and had taken 198.5 hours holiday. The claimant confirmed that he did not dispute that calculating leave in this way for him gave a figure equivalent to the statutory entitlement for a full-time worker of 5.6 weeks. After discussion it was

agreed that the claimant had now been paid at the correct rate of pay in respect of the 198.5 hours holiday he has taken. This is because an additional payment has been made to the claimant by the respondent to take account, in the holiday pay calculation, of overtime payments. The parties were also in agreement that the claimant had accrued a further 7.5 hours of holiday for this holiday year which he had not taken.

1.2 For the 2017 - 2018 holiday year it was agreed between the parties that the claimant had accrued 286 hours leave, taken 190 hours holiday and had carried over into the next leave year 24 hours. It was agreed that he had now been paid at the correct rate of pay in respect of this holiday (an additional payment once again having been made to the claimant by the respondent to take account of overtime earnings). Whilst the respondent had initially calculated that the claimant had 72 hours of accrued but untaken leave and the claimant had calculated that he had 74 hours of accrued but untaken leave, the respondent confirmed that it was prepared to agreed the figure of 74 hours for the purposes of this case.

1.3 As set out above, whether or not the claimant had been paid in accordance with regulation 16 at the rate of a week's pay for a week's leave and/or had been paid the total amount of wages properly payable to him under section 13 of the ERA in respect of leave taken in the leave years 2016/2017 and 2017/2018, had been identified as claims that the claimant was pursuing in Employment Judge Connolly's order. However, before me it was agreed that in light of the payments that had now been made there was only one issue outstanding in respect of both of these claims. The claimant wished to argue that in calculating a week's pay the respondent should have applied a 52 week average of earnings rather than a 12 week average. The claimant told me that his argument in this regard was based on what he described as the Employment Rights Act Amendment Regulations of 2018, which he told me were due to come into force on 6 April 2020.

1.4 It was the claimant's case that he was entitled to carry over, and be paid for, the accrued but unused leave from 2016 – 2017 (7.5 hours of holiday) and the accrued but unused leave for 2017 – 2018 (74 hours). The right to carry over arose, the claimant asserted, because either the respondent had refused to permit him to take his leave or had not done enough to facilitate the taking of his leave. The claimant relied in particular on **Max-Planck_Gesellschaft_zur Forderung der Wissenschaften e. V. v Shimizu C-684/16, [2019] CMLR 1233**.

1.5 It was agreed that the principal complaint that I was now required to determine was a complaint under regulation 30(1)(a) of the WTR - refusal to permit the claimant to exercise his right to take annual leave. During this hearing the claimant confirmed in both evidence and submissions that this was an issue only in respect of the 2017 – 2018 leave year. It was agreed that the following

issues, which had been identified and agreed at the case management Preliminary Hearing before Employment Judge Connolly, were relevant to this.

1.6 It is the claimant's case that he gave the required notice under regulation 15 of the WTR to take leave and the respondent then;

1.7 Specifically refused permission in response to a request, and/or

1.8 Failed to allow him to exercise his right to take leave and/or put him in a position whereby he was unable to take leave which amounts to a refusal because;

1.8.1 He was required to give 28 days notice of any leave which was not practicable particularly given that he could be asked to work, and be cancelled, at short notice. It was clarified during this hearing, without objection, that it was the respondent's case that the requirement to give 28 days notice was contained within an annual leave policy which was a relevant agreement, as defined under the WTR.

1.8.2 The respondent had a policy that he was not permitted to take leave unless it had been accrued in full.

1.8.3. He was required to carry over the leave which he had accrued in the March of each holiday year and take it before the end of May the following year, and,

1.8.4 He was intimidated by Mr Smith during a phone call on 20 February 2018 in which Mr Smith said the claimant was making too many requests for holiday and that he should stop.

1.9 It was the claimant's case that he was not in any event required to give notice under Regulation 15 as a precondition to exercising his right to take annual leave, **Max-Planck** and **King v The Sash Window Workshop C-214/16**.

1.10 The respondent accepts that on occasion a request for leave was declined. The respondent's case is that this happened either because the claimant had failed to provide the 28 days notice required under the respondent's annual leave policy, which is said to be a relevant agreement, or because the claimant had accrued insufficient leave to take holiday. The respondent accepts that there were some occasions when a leave application was turned down when the claimant had accrued the leave and did give the correct notice. It is the respondent's case that on such occasions it gave a valid counter notice within the meaning of Regulation 15 of the WTR. It is argued that a valid Regulation 15 counter notice cannot amount to a refusal to permit the claimant to exercise his right to take annual leave.

1.11 Were the claimant's claims presented within the applicable time limits. In particular it was recorded by Employment Judge Connolly that any complaint prior to 26 January 2018 was potentially out of time.

1.12 Initially, before me, the claimant also suggested that he had taken a number of days of holiday which he had received no payment for at all. He suggested that the respondent had directed him to take holiday on certain dates and no payment for these days had been made. After discussion, however, the claimant withdrew this allegation - he accepted that he was in fact referring to non-working days not days when he had taken holiday.

1.13 The claimant, who had clearly devoted much time to researching the Working Time Regulations, the Working Time Directive and the case law of the Court of Justice of the European Union, and who volunteered that he has litigated in the Employment Tribunal (and elsewhere) against previous employers in respect of this issue and continues to do so, found it hard to remain focused throughout the hearing on these issues as defined. I explained to the claimant very clearly on a number of occasions that the only issues that I would consider would be those set out in his pleaded case as refined by the list of issues and our discussions. The claimant confirmed on a number of occasions that he understood this. Despite this at various points in the hearing the claimant referred, amongst other matters, to the Fixed Term Worker Regulations and the Part-Time Worker Regulations. He asserted at one point (although not whilst giving evidence) that his employment with the respondent might have terminated and that he thought he could have a potential claim for non-payment of leave on termination of employment. He asserted in submissions hat he had not been paid at all when he took leave in October 2017 and he similarly made assertions that the calculation method used by the respondent to calculate the amount of annual leave accrued by him (12.07% of hours actually worked) under calculated the amount of holiday accrued. As I explained to the claimant these were not matters that fell to be determined within this case.

Evidence and Documents

2 The claimant had prepared a very brief witness statement which ran to just 2 pages. From the respondent I had a witness statement for Ms Adams, Head of HR, to which was attached one exhibit in the form of a table setting out the claimant's hours worked, holiday taken and pay for the leave years in question. The information contained in this document was not disputed by the claimant. I also had before me an agreed bundle of documents running to 254 pages. In the event I was referred only to a small selection of these documents. I explained to the parties that only those documents to which I was referred would be treated as adduced in evidence before me. Two further documents were produced by the respondent during the course of the hearing without objection from the claimant. One of these was a table which sought to draw together information contained in a number of different documents already within the bundle. It recorded the dates when, according to the respondent's records, the claimant applied for leave, whether or not it was refused and whether or not, on the respondent's case, the request was Regulation 15 compliant and/or counter notice compliant.

3 Neither the witness statement of the claimant nor that of Ms Adams addressed the substance of the case in great detail. Neither party, for instance, had addressed in their witness evidence each of the occasions when the claimant had made a request for leave, whether or not each application had been refused and, if it had been refused, the manner of the refusal, when it was refused and why. I make this point not to make any particular criticism of the parties. The claimant, after all, was representing himself. He had simply raised his case in general terms by leading evidence in his witness statement to the effect that from December 2017 to 14 February 2018 all his requests for leave had been rejected. The respondent led some evidence concerning requests for leave made between January and March 2018. I was also told that the respondent was unable to call detailed evidence in respect of each leave request because the manager who had dealt with the relevant holiday requests had left their employment and was living in Ireland. Consequently the respondent had decided not to arrange for him to attend as a witness. I draw no adverse inference against either party in respect of the lack of evidence led but, as I explained to the parties at the time, this also meant that I was required to resolve the often quite detailed issues in this case without the best evidence available. In particular, the often quite broad nature of the verbal evidence has meant that many of my findings of fact have been based on the documents in the bundle.

Findings of Fact

4 I set out the majority of my findings of fact in the section that follows but some findings, particularly when they relate directly to conclusions, are also contained within the conclusions section of this judgment. From the evidence that I heard and the documents that I was referred to I make the following findings of fact:

4.1 The respondent provides security services to nearly 1,500 sites across the UK. In the main it sends security guards to work on site for clients as and when required. It employs around 800 employees or workers. Many are employed on a casual as required basis. This is in part because much of the respondent's work involves providing cover for permanent security guards when they are on holiday or otherwise absent from work.

4.2 The claimant has worked as a security guard for the respondent since 2015. He was engaged under a contract in which it was said that he would work on a casual/temporary or occasional basis from time to time, page 43. It was a term of the contract that the claimant would be engaged on different assignments as and when there was a need for his services and that the claimant was under no obligation to accept work and could refuse any assignment, clause 4.1, page 44. It was also a term of the contract that there was no obligation on the respondent to offer work, page

44. For the purposes of this claim the respondent accepted that the claimant was an employee.

4.3 The claimant had no normal hours of work and no normal place of work. He moved from site to site and from client to client depending on where his services were required. There was some variation in the claimant's hourly rate of pay, as this could be impacted by which site he was working at and the time of day that he was working, although he was generally paid at or slightly above the National Minimum Wage. As he was often required to cover for a permanent security guard whilst he or she was away it would frequently be the case that when the claimant accepted work at a particular site he might then work at that site for a period of several days. The number of days that he worked each month varied considerably. For example, in July 2017 he worked 9 days and in August 13 days, page 249. In October 2017 he worked 17 days, page 251. In November 2017 he worked 22 days, page 251 and in December 17 days, page 252. He worked 28 days in March 2018, page 253. The days of the week that he worked also varied; sometimes he would work through the weekends and sometimes he would work on weekdays.

4.4 As it is only possible to ascertain the amount of leave accrued by a casual worker who works irregular hours by looking back at the amount of hours worked in any given month the respondent operates a policy for all casual workers that leave is accrued at the rate of 12.07% of hours worked each month. As set out at paragraph 1.1 above, when drawing up the list of issues, the claimant confirmed that he did not dispute that calculating leave in this way provided him with his full statutory entitlement.

Further terms of the claimant's contract

4.5 Clause 7.2 of the claimant's contract sets out that the holiday year runs from 1 April to 31 March each year. Clause 7.3 sets out that there is no entitlement to carry over leave, page 45. There is no term in the contract which allows for untaken annual leave to be replaced by a payment in lieu. Clause 17 states;
The company may from time to time notify you in writing that it proposes to alter, add to or abrogate any provisions of this agreement giving details of the proposed alteration, addition or abrogation. Any changes or amendments to your employment will be confirmed to you in writing within one month of them taking effect.

4.6 Clause 20 of the claimant's contract states;
The company's rules, policies and procedures as amended from time to time relating to disciplinary and grievance, equal opportunities, maternity, paternity and parental rights, harassment, health and safety compliance,

external interests, environmental and security policies are contained within the employee handbook. For the avoidance of doubt, save for the disciplinary and grievance procedures, the other rules, policies and procedures are not incorporated into this agreement, and they can be changed, replaced or withdrawn at any time at the discretion of the company, page 49.

The respondent's annual leave policy

4.7 The respondent has an annual leave policy. It was not clear on the evidence before me whether the annual leave policy was contained within the employee handbook as the handbook was not put before me. Nowhere within the policy is it said that the policy, or any part of it, is contractual. It is explained in the policy that employees who work ad hoc or casual or irregular hours will accrue holiday for hours worked up to a maximum of 336 hours per year, which is the equivalent to 28 days leave per year. That 28 day entitlement includes public and bank holidays, the policy makes clear. The policy also stipulates that employees will not be allowed, unless otherwise agreed, to take more holiday than they have actually accrued at the time the holiday is taken. It is said that employees are expected to take their leave throughout the year and must not save holiday entitlement until the end of the leave year. It is said that carry over is not permitted, page 53. The policy states that planning holiday and booking leave well in advance will avoid disappointment, page 53.

4.8 A limited exception to carryover of leave is provided for in the policy for employees working ad hoc, casual or irregular hours. The policy stipulates that such individuals can carry over into the next leave year holiday accrued during the month of March, albeit this holiday must be taken by 31 May, page 53. This provision is made because it is not possible to know until the end of March what leave entitlement a casual worker has accrued for that month.

4.9 The policy sets out that taking holidays is important to employee well-being and it is said that the respondent will monitor leave on a quarterly basis. If, at each quarterly review, no leave has been taken the policy sets out that employees may be instructed to take leave if none has been booked, page 53. Whilst I find that reports setting out the amount of leave taken by employees were provided to managers on a quarterly basis I do not find that, in the claimant's case, there were any discussions with the claimant throughout the year to make sure he was taking his leave. Ms Adams told me that she was unable to say whether or not such conversations had taken place, and there was nothing within the documentation put before me which suggested such discussions had happened.

4.10 The policy sets out that payments in lieu of holiday are not permitted, unless employment has come to an end, page 53.

4.11 The procedure for booking holiday is set out in the policy. It is said that employees are required to give 28 days notice and that all holiday must be approved in advance by the line manager, page 55. The respondent has the 28 day notice requirement in place for a number of reasons. In particular, annual leave costs can be high and 28 days notice gives the respondent the opportunity to plan and budget. It also enables the respondent to ensure that it has sufficient staff available to meet the needs of its clients and to make sure that managers, who are often highly mobile, have plenty of time in which to authorise leave.

4.12 That said, the respondent does not apply the 28 day notice requirement inflexibly. On occasion the respondent may approve leave requests made on a much shorter timescale, particularly if there is a good reason for the request being made late.

4.13 The policy makes clear that, if an employee works on a bank holiday, they will be entitled to take the holiday at another time as part of their holiday quota. If an employee is not working on a bank holiday it is set out that the bank holiday must be booked as holiday, page 55, and it will then be paid as such.

4.14 This particular version of the annual leave policy was first rolled out by the respondent in 2016, but there was no suggestion from either party that this policy was substantially different from previous versions of the policy.

4.15 When this version of the policy came into being the respondent set up it's intranet system so that when an individual logged onto the intranet they would receive an automatic message about the policy. The message stated that taking a holiday was essential to an employee's well-being and that it was important to carefully manage holiday to ensure employees were taking their full holiday entitlement ideally spread proportionally over the leave year. Reference was made to the fact that managers would undertake monthly and quarterly reviews of holiday bookings and it was said that the respondent would actively encourage employees to think about how much holiday they had left and to book holidays well in advance. As I have already set out at paragraph 4.9 above there was no evidence to suggest this was actually done, certainly in the claimant's case.

4.16 It was further said that holiday must not be saved up until the end of the leave year and employees were asked to plan and use their holiday so they did not lose their entitlement at the end of the year. It was said that if

too many people asked for time off at the end of the year holiday might not be granted and the leave could be lost. This message remained on the intranet throughout 2016.

4.17 Workers such as the claimant would not access the respondent's intranet on a daily basis. However the system would be used to check what shifts were available or to look at payslips or make a holiday booking. The claimant said in cross-examination that he could not confirm or deny whether he had seen the 2016 message. I find on the balance of probabilities that he did not least because the claimant booked holiday in 2016 and he must therefore have accessed the intranet, page 152.

4.18 The holiday leave policy could be viewed on the intranet.

4.19 The claimant was free to book holiday either on days when work was not available or on days when work was available and he would otherwise have been in work. The only restriction about when to book leave, as set out above, was that if the claimant did not work on a bank holiday he would have to book this as leave if he wanted to be paid for that day.

4.20 In September 2016 the respondent's HR department emailed all members of staff, including the claimant, reminding them that if the site to which they were assigned on a bank holiday was closed they would need to book holiday otherwise they would not get paid for the day, page 195.

4.21 In May 2017 the respondent's HR department emailed all staff, including the claimant, with a reminder about the procedure for booking holiday on bank holidays, page 195.

Timegate

4.22 Holiday requests are made via a system called Timegate, which is accessed via the respondent's intranet. Unfortunately, no evidence was led by either the respondent or the claimant as to how this system worked. When making my findings I have had to do the best that I could based on the documentation provided, which was in the form of various Timegate printouts of the claimant's annual leave requests. I find that the Timegate system contained a holiday request page on which an employee could enter the dates on which they wished to take leave. The date the request was made by the employee would be denoted by the words "task created" recorded in a column headed "audit description" alongside which would be the date the request was made. The leave request would then in some way, I know not how, be flagged to the individual's line manager who would be able to enter various comments in the "audit description" column. The manager could enter the word "approved" for example, page 176, or

"not approved", page 188. Unfortunately, from the printouts that were before me, it was not always entirely clear what certain entries meant. On the claimant's Timegate printouts the word "completed" appeared in the manager's column very regularly. That seemed to apply both to dates when it was agreed that holiday had been taken, see for example pages 161 and 174, and to dates when it was agreed that the claimant had actually worked and no holiday had been taken, see for example page 160.

The 2016 - 2017 holiday year

4.23 It was an agreed fact that the claimant worked 1709.5 hours during this leave year and that this equated to a total hourly annual leave entitlement of 206 hours. It was further agreed that the claimant took 198.5 of these hours and that he was paid at the correct rate of pay when he did so.

4.24 I considered it potentially relevant to my conclusions to make findings as to when leave was taken during 2016 - 2017. This proved to be not straightforward because it appeared that the document that the respondent had produced, which the respondent had informed me listed the claimant's holiday dates, pages 152 – 153, was not a complete record of the holiday taken. I find, based on this document, that for the 2016/2017 holiday year the claimant took holiday on the following dates 5 June, 19 – 21 August, 27 - 28 September, 12 - 13 October 19 - 20 October, 19 – 21 December 6 – 8 February, 27 February – 1 March, 16 – 17 March and 25 and 26 March. The lack of clarity came about because it appeared from other documents in the bundle that the respondent treated a holiday "day" as either 6 hours or 8 hours long, see for example page 149. When Ms Adams was asked to explain this in evidence she was unable to do so. But even assuming that a day was equivalent to 8 hours this meant that the claimant had taken 184 hours on the above dates. I cannot make findings as to when the remainder of the claimant's holiday was taken during this year because that information was not put before me.

4.25 As set out above it was further agreed that the claimant had accrued an additional 7.5 hours leave for this year which he did not take, and which he was not paid for.

4.26 The claimant did not lead any evidence to the effect that the respondent refused to allow him to exercise his right to take annual leave on any occasion during the 2016 - 2017 holiday year. To the contrary in his witness statement he stated that his problems started in December 2017. Accordingly, I do not find that the respondent refused to allow the claimant to take annual leave during the 2016 - 2017 holiday year.

The 2017 - 2018 holiday year

4.27 The automated message which the respondent had set up to appear whenever an employee logged onto the intranet was changed at the start of the 2017 – 2018. The new version of this message reminded employees that they were entering a new holiday year and it was said that it was important that members of staff familiarise themselves with the annual leave policy which could be obtained on the intranet. I find that the claimant saw this message. I make this finding based primarily on his evidence, which was that he thought it likely that he had seen it. The more detailed message which the respondent had used throughout 2016, paragraphs 4.15 and 4.16 above, was no longer displayed.

4.28 The parties were agreed, as set out above, that the claimant had a total annual leave entitlement for this leave year of 286 hours, he took 190 hours leave, carried over 24 hours and had 74 hours accrued but untaken and not carried over.

4.29 Based on pages 152 – 153 I find that the claimant took leave on the following dates; 22 – 28 April, 3 – 5 May, 21 June and 20 November. It appeared from the entries in this document that each of these days was treated as 8 hours leave and accordingly that equated to 88 hours leave. There were 3 further days leave granted in February/ March 2018 (for which see below), which would mean a total of 112 hours leave was taken over these dates. Once again therefore I seemed to have been provided with only a partial record of the leave taken by the claimant for this year. 4 other dates were included in this document for February and March 2018 but against these dates an entry of zero was recorded for hours of holiday taken. For example, the date of 9 March 2018 appeared on the list but the document recorded that zero hours holiday had been taken, and I was not taken to any Timegate printout for this date which indicated otherwise. I cannot therefore make findings as to when the remainder of the holiday that it was agreed the claimant had the benefit of was taken during this year because that information was not put before me.

Applications for leave from November 2017 onwards

4.30 The claimant's evidence was that all leave requests were refused from December 2017 onwards, albeit in cross examination he said that the refusals actually started in November 2017. The findings that follow are based on the Timegate printouts cross-referenced to the claimant's record of his hours of work, pages 248 – 253, and the respondent's record of the claimant's hours of work, pages 124 – 147.

4.31 On 27 November 2017 the claimant requested to take one day's leave on 6 December 2017, page 182. This was refused by the claimant's then manager Mr Smith on the basis that the claimant had not given the 28 days notice required under the respondent's annual leave policy. The request was refused when Mr Smith entered onto the system the following comment "not approved, not 28 days notice", and he did this on 29 November 2017. The claimant neither took holiday nor worked on this day, page 252 (claimant), pages 133 – 134 (respondent).

4.32 On 10 December 2017 the claimant requested to take one day's leave on 12 December 2017, page 183. This was refused by Mr Smith on the basis that the claimant had not given the 28 days notice that was required. The request was refused when Mr Smith entered onto the system "not approved 28 days notice needed", and he did this on 11 December 2017. The claimant neither took holiday nor worked on this day, page 252 (claimant), pages 133 – 134 (respondent).

4.33 On 11 December the claimant sent a query via the Timegate system in which he said in respect of his annual leave entitlement that;
"as I was not planning any annual leave until summer time next year could you clear any outstanding balance please? I have accrued more than £600 to date", page 200A.

4.34 On 12 December 2017 the claimant requested to take one day's leave on 15 December 2017, page 184. The request was refused by Mr Smith on 12 December 2017 on the basis that the required 28 days notice had not been given, page 184. The claimant did not work that day.

4.35 On 13 December 2017 the claimant requested to take leave between 5 - 18 March 2018, page 171. In submissions the respondent suggested that the claimant had cancelled this leave request, and submitted that there was, therefore, no refusal. This submission was based on the fact that according to both the claimant's and the respondent's records the claimant had worked at Cavendish House on almost all of these dates, page 253 (claimant), pages 141 and 144 (respondent). A list of the leave requests contained in the bundle at pages 154 - 155 also contained the word "cancelled" against this leave request. However, Ms Adams told me in evidence that the document at pages 154 - 155 had been compiled only for the purposes of the tribunal claim and simply summarised the respondent's view as to what had happened to each leave request based on the information contained in Timegate. It was, therefore, a self-serving document. The facts from which the respondent said that I should infer the leave request had been cancelled by the claimant were that the claimant had worked over most of these dates. I did not consider that I should infer from the fact that the claimant

had worked over most of the dates in question that the claimant had cancelled the leave request. After all, it could just as readily be the case that the claimant, having been told that the leave request was not approved, then decided to work over these dates. In fact, given that it can be inferred from the leave request having been made that the claimant had decided that he did not want to work on these dates, I considered it the more likely inference, in the absence of any other evidence, that the claimant's leave request was refused and only then did he decide to work.

4.36 In any event the respondent's submission that the claimant had cancelled this leave request in fact ran contrary to the evidence led by Ms Adams in her witness statement, see paragraph 37. Ms Adams' evidence was that the leave request had been refused by the respondent. It was explained that the claimant had at this time only 54 hours of accrued but untaken holiday and the request was refused because of this. On the assumption that 8 hours was considered to equate to 1 day's holiday (see paragraph 4.24 above) 54 hours equated to roughly 7 days holiday. Accordingly, I find that the claimant requested 14 days holiday at a point in time when he had 7 days accrued which he could take and the respondent refused the entire leave application for this reason. I cannot make any finding as to when this request was turned down. There was no evidence produced to help me with this. In particular all that was recorded on Timegate was the word "completed", dated 8 March 2018, page 171.

4.37 Also on 13 December 2017 the claimant made a second request to take annual leave this time between 19 March and 31 March 2018, page 185. I find, based on page 185, and specifically the entry that was recorded on the Timegate printout "holiday cancelled by employee", that this holiday request was cancelled by the claimant on 17 December at 11.26AM. I took into account also when making this finding that just one minute later on 17 December on Timegate the claimant made a request for annual leave, which shows that the claimant was active on the system at this time and considering what annual leave he wanted to take. This leave request was not therefore refused by the respondent.

4.38 There followed 3 requests for annual leave all made on 17 December. The first was at 11.27AM. The claimant requested to take leave from 19 – 29 March 2018 (10 days), page 186. It was not disputed that the claimant did not take leave during this period and in fact worked various shifts. Once again in submissions the respondent suggested that the claimant had cancelled this request for leave. On this occasion this submission was based on the fact that the entry on Timegate for this request contained the word "cancelled". Once again, however, this submission ran contrary to the respondent's evidence, which was that this request was refused because the claimant had not accrued sufficient leave, paragraph 38 Ms Adams' witness statement.

4.39 I find that Mr Smith refused the claimant's request on the basis that he had not accrued sufficient holiday and, following this refusal, the claimant then cancelled the request. I make this finding based on Ms Adams' evidence and the Timegate print out and in particular the sequence of entries that appeared in the description column. This was as follows; "task created", then Manager comment "you have no holiday remaining for this request", then status changed from "started" to "cancelled". Of course, at this time, as already set out, the claimant had accrued 54 hours holiday (equivalent to roughly 7 days) which he had yet to take, see paragraph 4.36. As to the date the leave request was turned down doing the best I could on the very limited evidence that was available to me I find that it was turned down on 8 March 2018, which is the date when Mr Smith recorded on the system that the claimant had no holiday remaining for this request.

4.40 The second request made on 17 December was to take one day's leave on 31 March, page 187. It was not disputed that the claimant did not take leave and in fact worked on this day. Once again in submissions the respondent suggested that the claimant had cancelled this request for leave and this submission was based on the fact that the entry "cancelled" appeared in the Timegate printout. Once again this submission ran contrary to the respondent's verbal evidence, which was that this request was refused because the claimant had not accrued sufficient leave, paragraph 38 Ms Adams' witness statement. Doing the best that I could on the evidence that I had I find that Mr Smith refused the claimant's request on the basis that the claimant had not accrued sufficient holiday and only after this did the claimant cancel the request. I do so because the sequence of entries on Timegate was exactly as set out in paragraph 4.39 above. The request for leave was in fact turned down on an erroneous basis given that the respondent's own evidence was that the claimant at this time had 54 hours of accrued but untaken leave, see paragraph 4.36 above. I find that it was turned down on 8 March, which is the date when Mr Smith recorded on the system that the claimant had no holiday remaining for this request.

4.41 The third and final request made on 17 December was to take one day's annual leave on 22 December, page 188. Again it was not disputed that the claimant in fact worked on this day and the respondent suggested I should infer from this that the claimant cancelled the leave request in order to work. I reject this based on the information recorded on the Timegate system. The system recorded that on 18 December Mr Smith entered the comment "28 days notice needed" and the status of the request was changed from started to "not approved". Accordingly I find that Mr Smith rejected this leave request on 18 December on the basis that the claimant had given insufficient notice.

4.42 On 28 December 2017 the claimant requested to take one days leave on 7 January 2018, page 189. This request, it was accepted by the respondent, was refused by Mr Smith on 29 December on the basis that the claimant had given insufficient notice.

4.43 The next leave request was made by the claimant on 4 January 2018, page 190. He requested to take one days leave on 19 January 2018. Once again it was not disputed that the claimant actually worked on this day and the respondent once again submitted that it could be inferred from this that the claimant had cancelled this leave request. Ms Adams did not lead any evidence about this request and the Timegate printout was particularly unclear. The following entry appeared against Mr Smith's name "status changed from started to not approved" but somewhat confusingly the date of this entry was 19 February one month after the day's leave that had been requested. As I have already set out, I am not prepared to infer from the fact that the claimant actually worked that he cancelled his leave request. Given that "not approved" was recorded on the system, albeit with a date that was well after the day's leave that was requested, I find that this leave request was refused by the respondent. Whilst it must have been refused either on or before 19 January I do not find it was given at least one day in advance of 19 January, because there was no evidence before me on which to base such a finding.

4.44 On 26 January 2018 the claimant emailed his manager, Mr Smith, saying that he had not been paid holiday since 14 July and had accrued more than £600 to date. He once again asked the respondent to "clear any outstanding balance please", page 202.

4.45 The claimant next made a leave request on 1 February 2018 to take leave on 6 and 7 February 2018, page 191. The claimant, it was not disputed, did in fact work on these days. The respondent once again submitted I should infer from this that the request was cancelled. That was inconsistent with Ms Adams' evidence which was that the request was refused. I do not find that the claimant cancelled this leave request. I find, based on the Timegate printout and Ms Adams' evidence, that on 2 February 2018 Mr Smith refused the leave request recording "not approved" on the Timegate system.

4.46 The next leave request was made the following day on 2 February 2018 to take leave on 8 and 9 February 2018, page 192. The circumstances of this leave request were exactly as for the leave request on 1 February. I find that Mr Smith refused the leave request, recording "not approved" on the Timegate system on 12 February. Whilst the leave must have been refused either on or before 8 and 9 February I do not find it was given at least two days in advance of these dates, because there

was no evidence before me on which to base such a finding.. Also on 2 February a further request was made to take leave on 16 February. This request was granted, page 172.

4.47 The next leave request was made by the claimant on 9 February 2018, page 173. He requested to take leave on 14 and 15 February 2018. I find, based on the information contained in the printout that appeared at page 141 of the bundle, that the claimant did take annual leave on 14 February. It was not disputed that he worked on 15 February. Ms Adams' evidence was to the effect that the claimant cancelled his request for leave on 15 February in order to work. The Timegate system was very little help as to what had happened to this part of the leave request; it simply recorded that the status of the leave request had changed from started to completed on 12 February, which as set out above was not an indicator of whether the request was either refused or cancelled. I find it more likely than not that the leave request was refused for the following reasons. As I have already set out, I considered the fact that the claimant actually worked on the day in question to be more consistent with the respondent having refused the leave request and the claimant then deciding to work. I also took into account, when making this finding, that by this time the respondent was regularly refusing the claimant's leave requests. I cannot make any finding as to the date when this leave request was refused because, as set out above, the entry of the word "completed" on the system was not necessarily indicative of a refusal. All I can find is that must have been refused either before or on 15 February.

4.48 The claimant made a further leave request on 14 February to take leave on 19 and 20 February 2018, page 193. Once again it was not disputed that the claimant actually worked on these days and the respondent submitted I should infer from this that the claimant cancelled his leave application. That, once again, appeared to be a submission that ran contrary to the respondent's evidence, which was that the leave request was refused, paragraph 44 Ms Adams' witness statement. In any event against Mr Smith's name on 19 February the following entry was recorded on Timegate "status changed from started to not approved", and based on this I find that the leave request was refused, and was refused on 19 February. The leave request was refused because the claimant had not complied with the 28 day notice requirement.

The conversation with Mr Smith

4.49 The next leave request was made on 20 February 2018 to take leave on 24 and 25 February 2018, page 194. It was the claimant's case that Mr Smith verbally refused him this leave request and did so during a telephone call on 20 February. On balance I find that to be the case taking into account in particular that on Timegate the following comment from Mr

Smith was recorded (albeit dated 8 March) “no holiday remaining for this request”. I took into account also that there was a handwritten note from the respondent in the bundle relating to this leave application, page 194, which recorded “2 days not approved”.

4.50 It was the claimant’s case that during this telephone call Mr Smith was angry and intimidating and told him to stop claiming holidays because he claimed too much. The respondent, as set out above, did not call Mr Smith to give evidence. The respondent submitted that I should find that this conversation did not take place because in an email that the claimant subsequently sent to HR about this conversation, for which see more below, he made no complaint about the way in which Mr Smith had handled the call and also because, the respondent submitted, the claimant continued to request holidays.

4.51 I did not find this an easy dispute of fact to resolve. The claimant’s credibility I considered generally to be poor; he was very evasive and frequently failed to answer questions. He had to be reminded on several occasions to answer the question. However, there was no direct evidence from the respondent to weigh up against the claimant’s evidence. On balance I considered it more likely than not that Mr Smith had been angry during this phone call and had told the claimant to stop requesting holiday as he was requesting too much. I make this finding for the following reasons. Whilst the respondent had correctly submitted that the claimant had made no complaint in his email of 20 February about Mr Smith, the email did clearly show that Mr Smith had telephoned the claimant on that day to have a conversation about his leave requests. Given the number of leave requests that the claimant was by this time making I considered it more likely than not that the volume of requests would have become a source of irritation to Mr Smith. Moreover, there was a change in the claimant’s behaviour in relation to leave applications, albeit only for a relatively limited period, after this conversation took place. As I will set out in a moment no leave requests were made by the claimant after this conversation for the best part of a month. This was despite the fact that he had leave accrued and outstanding. This was in stark contrast to the weeks preceding this conversation; in the 3 weeks before the conversation the claimant had made 6 requests for leave. That change in behaviour, in my view, corroborated the claimant’s case that pressure was applied to him to stop him taking leave. The respondent also submitted that I should place weight on the fact that the claimant had not mentioned the conversation with Mr Smith in his claim form. However, his claim form was very brief and it did not set out a narrative of events at all. It instead focused very much on calculations setting out the amount of money that the claimant said he was owed for accrued but unpaid holiday pay. In those circumstances I did not consider that any adverse inference could be drawn from the failure to mention the conversation in the claim form.

4.52 Following the telephone call with Mr Smith the claimant emailed Ms Brown from HR. He said that he had received a phone call from Mr Smith about his holiday requests which were not being processed correctly. He went on to say that he had accrued £859.35 of holiday entitlement up to Sunday 15 January and he asked if the outstanding balance could be cleared as he was not planning annual leave in the near future, page 203. The respondent's response to this was that they operated a use it or lose it policy and if he did not take the holiday he would not be paid for it, page 203.

4.53 On 15 March 2018 the claimant requested to take leave on 18 March 2018, page 174. This leave request was approved.

4.54 On 20 March 2018 the claimant requested to take leave on 25 March 2018, page 175. This leave request was approved on 21 March 2018, page 175.

Findings of Fact relevant to time limits

4.55 The claimant is familiar with Employment Tribunal practice and procedure. He has litigated previously in the Employment Tribunal in respect of holiday pay claims on at least 2 occasions. On both occasions the claimant represented himself through this process. The second claim was dismissed at a Preliminary Hearing because the Tribunal concluded that the claimant had presented his claim outside the time limit, page 240. The claimant was present at this hearing, which took place on 20 November 2017, and the judgment was promulgated on 23 November 2017. The claimant was, therefore, aware by 20 November 2017, if not before, of the Tribunal time limits, and more specifically how the time limits worked for this type of claim.

The Law

5 Article 7 of the Working Time Directive (WTD) states;

7(1) Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

7(2) The minimum period for annual leave may not be replaced by a payment in lieu, except where the employment relationship is terminated.

6 It is well established that when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result sought by the Directive.

7 In the UK the Working Time Directive is implemented by the Working Time Regulations 1998 (WTR), as amended. Relevantly, these state as follows;

Regulation 2

Day means a period of 24 hours beginning at midnight.

Relevant agreement, in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer.

Regulations 13(1) and 13A(1) and (2) of the Working Time Regulations set out a worker's annual leave entitlement. The current entitlement for any leave year is a maximum of 28 days, Regulations 13(1), 13A(2)(e) and 13A(3). The Regulation 13A leave is additional leave which workers have been entitled to since April 2009; it is not based on any obligation under the Working Time Directive and is therefore purely a matter for domestic legislation.

Regulation 15

15(1) A worker may take leave to which he is entitled under Regulation 13(1) 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).

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13(1); or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

Regulation 16

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

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).

Regulation 17

17 Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable

Regulation 30

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);

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

(iii) regulation 25(3) or 27(2); or

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

(2) 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.

Section 224 of the ERA

This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

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

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

Carry over of leave

8 Much of the case law of the CJEU has focused on the issue of when unused leave can be carried over thus triggering an obligation to make a payment in lieu for that leave on termination of employment. This issue was considered in detail in **Stringer v HM Revenue and Customs C-520-06, [2009] IRLR 214**. It was held that when a worker cannot take leave during a particular leave year for reasons beyond his or her control, such as ill health, the leave must be carried forward and a payment in lieu must be made if the sick leave ends on termination of the employment. Over the years this principal has been developed and expanded both in the case law of the CJEU and domestically. In **NHS Leeds v Larner [2012] EWCA Civ 1034** it was said that if an employee is unable or unwilling to take paid annual leave because of sickness then such an employee is entitled to receive payment on termination of their employment for the leave which the employee had, for that reason, been prevented from taking. This is the case even if the leave accrued in a leave year prior to that in which the employee's employment terminated. This was a case brought under Article 7 of the WTD, as the respondent employer was an emanation of the state, but the Court of Appeal stated, obiter, that if necessary it would be possible to interpret the WTR compatibly with the WTD, and the rulings of the CJEU, by reading in words to regulations 13 and 14 to permit carry over and payment for carried over leave on termination of employment in these circumstances. Whilst these comments were obiter this approach has been followed by the national courts, see for example **Plumb v Duncan Print Group Ltd UKEAT/0071/15** and **The Sash Window Workshop Ltd v King UKEAT/0057/14**.

9 In **The Sash Window Workshop Ltd** the EAT gave guidance that sick leave may not be the only circumstance that would act as an impediment to taking annual leave. It was said that the tribunal in that case should 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. The EAT in **Shannnon v Rampersad & Anor (t/a Clifton House Residential Home) UKEAT/0050/15** explained that the right to carry forward is not limited to cases where a worker is prevented from taking leave by ill-health. That is an example of where holiday pay may accrue. Paragraph 32:
The question for the tribunal was whether the claimant was unable or unwilling to take annual leave as it fell due for reasons beyond his control, for example due to sick leave or maternity or paternity leave or because the employer would not allow him to do so.

10 The principal first set out in Stringer was extended further by the CJEU in **King v The Sash Window Workshop Ltd C-214/16** to cover situations where leave was not taken because the employer refused to pay for the leave. In summary it was held in this case that a worker is entitled to be paid on termination of employment for any periods of annual leave that had accrued where he had not taken the leave because it would have been unpaid. Article 7 does not allow national legislation to prevent a worker from carrying over and accumulating until the termination of his employment annual leave where the employer has refused to pay him for that leave. It is irrelevant whether or not over the years the worker has made requests for paid annual leave. The circumstances in which WTD leave may be carried forward and paid for on termination of employment was extended again by the CJEU in **Max-Planck Gesellschaft zur Forderung der Wissenschaften e. V. v Shimizu C-684/16, [2019] CMLR 1233**. The facts of this case were that the worker was engaged under a series of fixed term contracts which came to an end on 31 December 2013. The worker had accrued 51 days paid annual leave for 2012 and 2013 which had not been taken. He had not requested to take this leave. The German legislation in question had been interpreted as having the effect that the fact that the worker had not requested any paid leave during the leave year *automatically* resulted in the worker losing his leave entitlement. The fundamental issue in this case was whether the worker was entitled to be paid for the accrued leave when his employment terminated, and the (relevant) question which was referred was whether Article 7 precluded legislation which provided that in the event that the worker did not request to take his leave the entitlement to leave, and thus to payment in lieu of it on termination of employment, was automatically lost.

11 The Court held that Article 7 does not require that irrespective of the circumstances leave should be carried over, nor does it preclude national legislation which, for instance, lays down that leave as a rule should be taken within the relevant leave year, paragraphs 35 – 36. However it also held that legislation which resulted in leave automatically being lost was not compatible with the Directive. Moreover, any practice on the part of an employer that might deter a worker from taking his annual leave is incompatible with the Directive. It was said that an employer is required to ensure that the worker is actually in a position to take the paid annual leave to which he is entitled by encouraging him,

formally if need be, to do so and by informing him accurately and in good time that if he does not take it it will be lost at the end of the reference period, paragraph 45. Paragraph 46; the burden of proof in that respect is on the employer. Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave it must be held that the loss of the right to such leave at the end of the reference or carryover period constitutes a failure and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard to Article 7. In summary, therefore, the position under the case law of the CJEU is essentially that workers must have the opportunity to exercise the right to annual leave before the right to paid leave can be lost, and the employer must be able to show that is the case. Currently, the extent to which the WTR can be read compatibly with the approach in **Max-Planck** has not been considered domestically at appellate level.

Regulation 15

12 Article 7 also does not preclude national legislation laying down conditions for the exercise of the right to paid annual leave - to the contrary Article 7 makes express provision for this;
"1. Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice".

13 We see the implementation of this in Regulation 15 of the WTR. Regulation 15 is therefore not on its face inconsistent or incompatible with the Directive, to the contrary it is consistent with it.

14 Regulation 15 sets out the notice that a worker must give to his employer to trigger the entitlement to take leave. In essence Regulation 15 requires that a worker who wishes to take leave gives notice to his employer of his request twice as many days in advance of the number of days holiday to which the notice relates. In **NHS Leeds v Larner** the Court of Appeal stated that Regulation 15 has no application where a worker is on sick leave. If a worker has a right under Article 7 to take annual leave at another time outside sick leave, to require the worker to serve a notice or to make a request to take paid annual leave during sick leave would be fundamentally inconsistent with this right. If the worker has not recovered or returned from sick leave, and therefore had no opportunity to take that leave at another time, the service of a notice for a period which is not sick leave is not practically possible. The claimant was therefore entitled in this case to carry forward her untaken paid annual leave to the next leave year without having made a prior request to do so. As her employment was terminated in that (following) year before she could take the carried forward leave, she was

entitled to payment on termination for the paid annual leave she had been prevented from taking. The extent to which Regulation 15 notices are required where a worker is unable or unwilling to take leave for reasons beyond his control remains unresolved domestically in cases other than supervening sick leave, but this is an area that has been considered, albeit in the context of payments for holiday once employment has terminated, by the CJEU.

15 As I have already set out above, in **Max-Planck** the worker had not made any request to take leave and the CJEU held that accrued leave would carryover unless the employer could show it had exercised all due diligence in order to enable the worker to take the leave. In **Kreuziger v Land Berlin ECJ C-619/16**, a case which was heard together with **Max-Planck**, Mr Krueziger likewise did not make any request to take annual leave during his employment. After his employment had ended he requested that he be paid a payment in lieu of the annual leave not taken. This was refused. He bought proceedings and the claim against the respondent was dismissed. It was dismissed on the basis that German law places an obligation on the worker to take his leave and that entails the person concerned being required to apply for leave. Since he had voluntarily failed to submit such an application his entitlement to paid leave expired when his employment relationship came to an end. The Higher Administrative Court made a reference to the ECJ. The ECJ noted that, as with **Max-Planck**, it was apparent from the order for reference that the national legislation in question was interpreted as meaning that the fact that the worker did not request to take the paid annual leave before the employment relationship ended automatically meant that when the relationship was terminated the worker lost his entitlement to that leave and accordingly to an allowance in lieu of that leave. The ECJ stated that such an automatic loss of entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise the right to take leave, fails to have regard to the limits placed on member states when specifying the conditions for the exercise of the right.

16 It held that, in circumstances where a worker has not asked to exercise his right to paid annual leave, Article 7(2) precludes national legislation which excludes, automatically and without prior verification of whether the employer had enabled the worker to take the leave, an entitlement to an allowance in lieu of holiday on termination of employment where the worker did not apply for the leave.

17 Regulations 15(2) and (3) of the WTR give an employer the right to give the employee a counter notice to take leave on particular days, or not to do so. If the employer is serving a notice to take leave it has to be given twice as many days before the start of the leave period as the number of days leave to be taken. If the employer's notice is not to take the leave requested then it need only be given a number of days before the proposed leave equal to the number of days leave to be cancelled. The notice requirements apply to both basic leave under Regulation 13 and additional leave under Regulation 13A. Under these

Regulations employers are given a considerable amount of control over the timing of annual leave, albeit as was explained by the EAT in **Kigass Aero Components Ltd v Brown [2002] IRLR 312** these powers should not be used in such a way as to prevent workers from taking leave altogether.

18 Whilst there are, to my knowledge, currently no authorities to this effect it also stands to reason that the CJEU's decision in **Max-Planck** may have implications for the employer's rights to serve a counter notice under Regulations 15(2) and (3). It would seem on the authority of **Max-Planck** (if the WTR can be read compatibly to achieve this effect) that if an employer uses the counter notice provisions in a way that means the employer has not facilitated the taking of leave, then an employee may have the right to carry over the leave so affected.

19 There has been very little case law on the form that a Regulation 15 counter notice should take. **Craig and others v Transocean International Resources Ltd and others [2009] IRLR 519** was a case in which the group of claimants worked on oil rigs working a shift pattern of 2 weeks offshore followed by 2 weeks onshore field break. Each of the claimant's applied in writing to take holiday during the offshore period. Each request was refused by the respondent in writing. The exact terms of the refusals varied; in broad terms some claimants were told that their notice was invalid and some that they were not entitled to leave other than that incorporated into their existing work rotation. As the EAT summarised it at paragraph 51;

What had occurred was that each claimant had sought to be allowed to take annual leave on specific dates, all of which were dates that they were rostered to work offshore. They had done so in writing and the requests for those dates had been refused in writing. Some were typically advised that leave was to be taken during field break… and one was in addition advised that leave was incorporated into his existing work rotation.

Against that background the EAT explained that a Regulation 15 counter notice is not required to be in any particular form, paragraph 104. Any such notice must tell the employees what days they may or may not take leave but neither the WTD nor the WTR suggest the actual dates require to be specified by the employer. Paragraph 105; in a case where the employer's position is that he has given a Regulation 15 notice the question is simply whether the employee knows, as a result of whatever communication there has been on matter, either when he can, or when he cannot, take his annual leave.

20 The EAT said this about the employer's various responses to the requests for annual leave, paragraph 119;

"In every case the claimants asked to take leave for periods between particular dates. In each case they were told they could not do so. That being so, in every case, the employers had given notice that specified the days on which leave was not to be taken, namely the days of leave that were specifically requested. Furthermore, they did so in advance of those particular dates. In the circumstances, a majority of us are satisfied that the respondents had given

effective Regulation 15 notices and for that reason alone, could not be said to have wrongfully refused to permit the claimants to take leave at the time specified. They were entitled to respond to the requests by giving the notifications that they gave."

21 The claimants also argued that the reason that the respondent gave for refusing the leave requests was erroneous; the requests were refused because the respondent believed the claimants could be directed to take their leave during onshore periods, whereas as a matter of principle, they asserted, their entitlement to annual leave had to come out of offshore periods. The EAT said this in relation to that argument, paragraph 120;
"We should observe that there is nothing in either the WTD or the WTR to render invalid an employers Regulation 15 notice refusing a request for leave at a particular date on the basis that the reason for the refusal is flawed in some way. Under the WTR the employer's entitlement to intimate Regulation 15 notification is not dependent on his decision to issue the notice being reasonable or on the reasoning behind his decision being free of error".

22 In **Lyons v Mitie Security Ltd [2010] IRLR 288** the claimant's contract specified that he had to give 4 weeks notice of any annual leave. His leave year ended at the end of March each year and in March 2008 the claimant had 9 days leave still to take. On 6 March 2008, and with no further work scheduled for the claimant for that month, he requested payment for those 9 days. This was refused on the basis that he had failed to give the minimum 4 weeks notice. He resigned and claimed constructive dismissal and bought a claim for failure to pay holiday pay. The tribunal found the employer had been entitled to refuse to pay the 9 days holiday. On appeal it fell to be considered whether the contractual provisions as to notice could operate so as to prevent an employee from taking his full statutory leave. It should be noted that the EAT were troubled in this case about whether the claimant had actually requested leave or simply requested to be paid for the 9 days leave, but the appeal appeared to proceed on the basis that, as the claimant was not due to work in March, he was asking for the days to be treated as paid holidays. The EAT held that the notice provisions contained in Regulation 15 are capable of being varied by Regulation 15(5) even if they impose a longer notice period. Regulation 17, which provides that where a worker has a right to annual leave both under the contract and under the Regulations he can take advantage of whichever right is more favourable, does not affect such a variation, which would not affect the leave entitlement, but merely the notice provisions.

**Submissions**

23 Mr Pollit handed in the following cases; **Bear Scotland and others v Fulton and Ors UKEAT/0047/13**, **Lyons v Mitie Security**, **King v Sash Windows** and **Max-Planck**. He also handed in written submissions, although 10 pages out of 17 of this was simply a regurgitation of the provisions of the WTR

and the ERA. He supplemented his written submissions with oral submissions. I summarise only the main points here. Mr Pollitt submitted that the claimant's case had evolved and changed over time. He acknowledged that the claimant is a litigant in person and he confirmed that the respondent made no complaint about the changing nature of the claimant's case. Nevertheless, he stated that the changing nature of the case was important with regard to one point in particular, namely that the claimant had not mentioned the alleged intimidation of him by Mr Smith in his claim form. This, he said, undermined the credibility of this allegation. Mr Pollitt submitted that in reality, as was evident from the claimant's claim form, the claimant wanted to be paid for accrued but untaken holiday. He submitted that the only time when a payment in lieu can be made is when a person's employment is terminated, and that was not the case here. He submitted that all of the ECJ case law on which the claimant relied concerned situations where there had been a payment in lieu on termination of employment. They could all be distinguished, therefore, from the claimant's case.

24 He submitted that the evidence showed that the claimant was perfectly capable of taking annual leave but that he often decided to cancel the leave and work instead. That was his choice. It was not the case that the claimant had been unable, or was not given the opportunity, to take leave.

25 He submitted that the respondent had served a valid counter notice in respect of those leave requests where the claimant had not been allowed to take leave. He reminded me that in the case of **Transocean** it was said that a counter notice did not need to have any particular form.

26 He stated that the claimant needed to put forward a positive case in respect of each alleged refusal on each date and he had not done so.

27 As to the claimant's assertion that the respondent should have used a 52-week average to calculate his holiday pay he submitted that the law currently was that a 12 week average should be used. The claimant accepted that a 12 week average had been applied. The respondent could not be required to comply with legislation that was not in force.

28 He submitted that working out the amount of leave which a zero hours contract worker has accrued by applying a 12.07% accrual rate was a necessity because there was no other practical way to work out the amount of annual leave to which such a worker was entitled, and the Working Time Regulations must be read with that in mind.

29 He submitted that the 28 day rule in the annual leave policy did not prevent the claimant from taking leave. Mr Pollitt accepted that the annual leave policy was neither a collective agreement nor a workforce agreement but he submitted that it was a relevant agreement because it was another type of agreement in writing which was legally enforceable between the worker and his

employer. He noted that Ms Adams had told me in evidence that the document was not contractual but he submitted that whether it was contractual or not was a legal point. He submitted that it was incorporated through custom and practice and in the alternative the claimant's contract of employment contained the power for the respondent to vary the claimant's terms and conditions, which was done when the respondent sent copies of the annual leave policy to staff in 2016.

30 In relation to the case law of the CJEU he accepted that **Max-Planck** was authority for the proposition that an employer must facilitate and encourage someone to take their leave, but he submitted that the case also makes clear that an employer does not have to force a person to take leave. In this case the claimant was provided with information about how to go about taking leave and was given the opportunity to take it. **King**, he submitted, was entirely different from this case; it dealt with carry over of annual leave until the termination of employment. Carry over was permitted because the employer had refused to pay for annual leave which was not the case here. **Land Berlin**, he submitted, added nothing to **Max-Planck**, it simply confirmed that carry over is permissible in certain circumstances.

31 The claimant, in his submissions, confirmed that he wished to rely on **Max-Planck, King** and **Land Berlin** and he also referred to, but did not hand in, the case of **Brazel v Harpur Trust UKEAT/0102/17**. The claimant told me in submissions that the 12.07% accrual rate was not an issue in this case. He told me that the 28 day notice requirement was the problem and also the lose it/use its policy. He complained that the respondent was operating a first-come first-served approach to annual leave, which he described as utterly wrong. He submitted that in any event the respondent could not rely on the annual leave policy because under the WTR - specifically Regulation 17 - he was permitted to rely on the most favourable condition or Regulation for him, and this was Regulation 15. He submitted that applying a 52 week average to work out the level of holiday pay was common sense and such a calculation would come into force soon by virtue of what he termed the Employment Rights Act Amendment Regulations 2018.

32 He submitted that he had been intimidated by Mr Smith and he submitted that he was not required to give any notice at all if he wished to take his holiday, which he said was his understanding of the judgements from the ECJ. He submitted that December 2017 was when his problems started with leave requests being refused and from then on he had a series of requests which were not approved. That confused him, he said, because prior to that he had had no problem and all his requests had more or less been approved.

33 He submitted that he understood the case law of the ECJ to say that if his employer made it impossible for him to take leave then at the end of the year it was irrelevant whether or not he had applied for the leave. He was entitled to it.

**Conclusions and further Findings of Fact**

34 The issues set out at paragraphs 1.4 to 1.10 are all potentially interlinked and require to be dealt with together. The issue set out at paragraph 1.3 is a discrete matter and I found it convenient to start with this.

Has the claimant been underpaid in respect of his holiday pay because the respondent used a 12 week average rather than a 52 week average to calculate the pay due?

35 The 12 week average reference period is, of course, currently contained in section 224 of the Employment Rights Act 1996, and this method of calculation is incorporated into the Working Time Regulations by virtue of Regulation 16(2). The claimant's case in respect of this issue was a narrow one. It was based purely on a submission that, as the claimant understood it, what he described as the Employment Rights Act Amendment Regulations 2018 would require employers to apply a 52 week average when calculating a week'a pay for the purposes of holiday pay rather than a 12 week average. The claimant meant, it would seem, to refer to the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018. In their current form these Regulations will amend Regulation 16(3) to change the reference period that applies for calculating a week's pay where the worker has variable remuneration. The Regulations provide that if the worker has been employed for at least 52 weeks the reference period will be increased from 12 weeks, as it is currently, to 52 weeks. However, the short answer to this point is that this statutory instrument, as the claimant himself accepted, is not yet in force. It is due to come into force on 6 April 2020. The respondent, of course, is obliged to comply with the law as it currently stands. Under the WTR currently average weekly remuneration is calculated over a 12 week period. The claimant accepted that the respondent had used a 12 week average in his case. Of course, European case law has made it clear that the length of the appropriate reference period may vary from case to case, because the reference period needs to be a period of time over which an average of normal pay can properly be calculated. The length of the reference period is a highly fact sensitive issue, which it is for national courts to determine. The claimant did not seek to argue, relying on European case law, that a 12 week period was not an appropriate reference period on the facts of his case and, perhaps because of the narrow basis on which this aspect of the claim was put, neither party led any evidence relevant to the appropriate length of the reference period. There was no evidential basis, therefore, on which I could consider this issue any further and, more importantly, it was not part of the pleaded case that a 12 week reference period was not appropriate. To the extent that the claims under Section 23 of the ERA and Regulation 30(1)(b) of the WTR were based on this issue, these conclusions mean that these aspects of these claims fail and are dismissed.

Has there been a refusal to permit the claimant to exercise his right to take annual leave under regulations 13 and 13A contrary to Regulation 30(1)(a)(i)?

36 This encompasses the issues set out at paragraphs 1.4 – 1.10 above. I should deal firstly with one general point made by the respondent about the claimant's case, which was that the claim under Regulation 30(1)(a)(i) must fail because the claimant had failed to put forward a positive case. I disagree. Whilst it is true that the claimant did not lead evidence on each individual leave request it was his evidence that from December 2017 onwards none of his leave requests were approved, paragraph 6 of his witness statement; that it seemed to me was sufficient to assert a positive case.

37 I start my analysis with the issue set out at paragraph 1.9 above, which was the claimant's contention that he was not required to give notice under Regulation 15 as a precondition to exercising his right to take annual leave. He relied on the cases of **Max-Planck,** **King** and **Land Berlin**.

38 It can be taken from the cases of **Max-Planck, King** and **Land Berlin** that it is not compatible with the Directive for national legislation to operate in such a way that leave is automatically lost in all circumstances at the end of the leave year. Even if a worker has not given notice to take leave the worker does not lose their leave entitlement (and can carry it over) if the employer cannot show that it enabled the worker to take his leave and/or where the worker has been deterred from taking his leave and/or where the worker is off sick. The relevance of this to this case is an issue to which I will return below. However, as a broad proposition, the fact that a worker may have the right to carry over leave and take it at another time, or be paid for it on termination of employment, does not of itself mean that whenever a worker wishes to take paid leave, whatever the circumstances, a request to take leave does not need to be made. The case law of the CJEU does not support such a broad proposition. Moreover, as set out above, both the WTD and the WTR explicitly *provide for* there being conditions to the exercise of the right to paid leave. Accordingly, I find that the claimant was required to give a notice which was compliant with Regulation 15.

39 As set out at paragraph 1.8.1 above it was the respondent's case that it had varied the Regulation 15 notice requirements, by way of a relevant agreement, so that 28 days notice of any leave was required.

40 I conclude that the respondent's annual leave policy was not a relevant agreement for the following reasons. The respondent accepted in closing submissions that the policy was neither a workforce agreement nor a collective agreement. It was the respondent's case that the policy was another type of agreement in writing which was legally enforceable between the worker and his employer. It was submitted that the annual leave policy had been incorporated into the claimant's contract of employment. This submission was contrary to the respondent's evidence – Ms Adams told me that the annual leave policy was not

incorporated. Mr Pollitt submitted that this did not matter because whether or not the document was incorporated was a legal question not a question of fact. He submitted that the requirement for 28 days notice was implied through custom and practice. He did not, however, expand on this submission and explain the facts on which the respondent relied to prove this was the case.

41 I concluded that it could not be said that the requirement for 28 days notice had been implied into the claimant's contract through custom and practice for the following reasons. Whilst very little evidence was led about the 28 day notice requirement, it was the respondent's evidence (which I have accepted) that the 28 day rule was not always followed, paragraph 4.12. That certainly seemed to be the respondent's approach in respect of the claimant's leave applications. For example, the leave request made by the claimant on 15 March 2018 to take leave on 18 March 2018 was granted as was the leave request made by the claimant on 20 March to take leave on 25 March, paragraphs 4.53 and 4.54. It is not therefore a practice that has been followed without exception. To the extent that the 28 day notice period was applied there was no evidence led as to how long this practice had been followed for, nor any evidence as to how it came into being - for example whether it was negotiated and agreed and if so with whom. Moreover, there is nothing about the annual leave policy itself which would support an inference that the respondent intended to be contractually bound by it. The document is described as a policy and there are no express words of incorporation. That the document is a policy and is not contractual is entirely consistent with Ms Adams' evidence, mentioned above. Lastly, it was not clear, on the evidence before me, whether the annual leave policy is contained within the employee handbook as the handbook was not put before me. If it is, Clause 20 of the claimant's contract of employment specifically stated that the disciplinary and grievance procedures were the *only* policies from the handbook that were incorporated.

42 Mr Pollitt also relied on clause 17 of the claimant's contract, in which the respondent reserved the right to make amendments to terms and conditions of employment. He submitted that the annual leave policy produced in 2016 amounted to an amendment to the claimant's contract which the claimant had then accepted. Clause 17, however, stipulated that if there was to be a variation to terms and conditions the claimant would be notified in writing that a variation was proposed and details of that variation would be given, and this would then be confirmed again in writing one month after the change had taken effect, paragraph 4.5 above. The difficulty with the respondent's submission was that there was no evidence led by the respondent that it had at any time written to the claimant informing him that it proposed to alter the terms of his employment by incorporating the annual leave policy into his contract, as Clause 17 required. There was, therefore, no variation made within the terms of this clause.

43 This conclusion makes it unnecessary to deal with the claimant's submission that the respondent could not rely on the requirement for 28 days

notice under the annual leave policy because under the WTR - specifically Regulation 17 - he was permitted to rely on the most favourable condition or Regulation for him. For the avoidance of doubt, however, I would have rejected this submission. The interaction between the provisions of Regulation 17, Regulation 15 and contractual notice requirements were considered in **Lyons v Mitie Security Ltd [2010] IRLR 288**. It was explained in that case that Regulation 17 related to the entitlement to leave (not to the requirement to give notice), and that the notice provisions in Regulation 15 are capable of being varied by Regulation 15(5) even if it is to impose a longer period of notice, see paragraph 22 above.

44 The next issue for me to decide was whether the claimant had served a valid Regulation 15 notice, and if so whether the respondent had served an effective Regulation 15 counter notice, see paragraphs 1.6 and 1.10 above.

45 I start this part of the analysis by setting out what was not in issue. All of the putative counter notices, bar one, were given to the claimant via the Timegate system. This meant that the claimant would have had to log on and enter Timegate in order to ascertain what the respondent's decision on any application for leave was. It was not argued before me that this did not amount to "giving" the claimant counter notice. Nor was it argued that the wording of the putative counter notices, which more often than not simply contained the words "not approved", did not comply with the Regulation 15 requirements.

46 I have found as a fact that the respondent did not refuse to allow the claimant to take annual leave during the 2016 – 2017 leave year, paragraph 4.26. In respect of the 2017 – 2018 leave year it was the claimant's case that the refusals were from November/December 2017 onwards. Accordingly, I have focused my analysis on this period.

47 Aside from the two leave requests to take holiday on 18 and 25 March, which were made towards the very end of the period in question, and which were granted, in the period 27 November 2017 through to the end of the leave year the claimant made 16 requests for annual leave, paragraphs 4.31 – 4.47. On my findings the claimant cancelled one of those requests, paragraph 4.37 above, and one request for one day's leave was granted, paragraph 4.46. The remaining 14 requests were all refused by the respondent. It is convenient to analyse both notice and counter notice together in relation to each leave request. Taking each in turn;

48 On 27 November the claimant requested to take one day's leave on 6 December, paragraph 4.31 above. In order to be Regulation 15 compliant the notice had to be given twice as many days before the start of the leave period as the number of days leave to be taken. This request was, therefore, Regulation 15 compliant. On my findings the respondent refused this request and did so on 29 November 2017. As this was a notice not to take leave the requirement is that

this is to be served a number of days before the proposed leave that is equal to the number of days leave to be cancelled. That requirement was therefore met. The respondent did serve a valid counter notice.

49 On 10 December 2017 the claimant requested to take one day's leave on 12 December, paragraph 4.32. The claimant was required to give two days notice of this leave under Regulation 15, which he did not do. Accordingly, the claimant did not serve a valid Regulation 15 notice. The respondent refused this request, on the basis that insufficient notice had been given, on 11 December.

50 On 12 December the claimant requested to take one day's leave on 15 December, paragraph 4.34 above. That was a valid Regulation 15 notice. The respondent, on my findings, refused this request, also on 12 December. That was a valid Regulation 15 counter notice.

51 On 13 December the claimant made two requests for leave. The first request was to take leave between 5 – 18 March, paragraph 4.35. Clearly, therefore, that was a valid Regulation 15 notice. For the reasons that I have already set out it has not been possible for me to make a finding of fact as to when this application for leave was refused by the respondent, paragraph 4.36. It would be for the respondent to prove that the refusal was given on a date so as to amount to a valid counter notice, and in the absence of this I conclude no valid counter notice was served in respect of this request.

52 The second request made on this date was in respect of leave that was, on my findings, cancelled by the claimant, paragraph 4.37.

53 On 17 December 2017 the claimant made 3 requests for leave. The first of these was to take leave between 19 - 29 March 2018, paragraph 4.38. That was a valid Regulation 15 notice. On my findings of fact the respondent turned down this request on 8 March 2018, paragraph 4.39. The claimant had requested 10 days leave. If one counts working days and weekends the request was turned down 10 days prior to the leave (or 7 working days before the leave). The Working Time Regulations, as set out above, define a day as being a period of 24 hours beginning at midnight. This definition does not therefore exclude weekend days. Accordingly, I find that this was a valid Regulation 15 counter notice.

54 The second request was to take one day's leave on 31 March. That was clearly a valid Regulation 15 notice, paragraph 4.40. On my findings the respondent refused this request on 8 March, which was likewise a valid Regulation 15 counter notice.

55 The third request was to take one day's leave on 22 December, paragraph 4.41. That was a valid Regulation 15 notice. On my findings the respondent

refused this request on 18 December. That was a valid Regulation 15 counter notice.

56 On 28 December the claimant requested to take one day's leave on 7 January, paragraph 4.42. That was a valid Regulation 15 notice. It was refused by the respondent on 29 December; that was a valid Regulation 15 counter notice.

57 On 4 January the claimant requested to take one day's leave on 19 January, paragraph 4.43. That was a valid Regulation 15 notice. Whilst, on my findings, the respondent refused this request, I have not been able to make any findings as to the exact date of the refusal – merely that it was on or before 19 January. The respondent has not therefore proved that it served a valid counter notice.

58 The next leave request was made by the claimant on 1 February to take leave on 6 and 7 February, paragraph 4.45. That was a valid Regulation 15 notice. On my findings the respondent refused the request on 2 February. That was a valid Regulation 15 counter notice.

59 On 2 February the claimant requested to take leave on 8 and 9 February, paragraph 4.46. That was a valid Regulation 15 notice. Whilst, on my findings, the respondent refused this request, I have not been able to make any findings as to the date of the refusal other than that it must have been refused either on or before 8 and 9 February. Accordingly, I conclude that no valid counter notice was served in response to this request.

60 On 9 February the claimant requested to take leave on 14 and 15 February, paragraph 4.47. That was a valid Regulation 15 notice. I have not been able to make any findings as to the exact date of the refusal – merely that it was on or before 15 February. The respondent has not therefore proved that it served a valid counter notice.

61 On 14 February the claimant requested to take leave on 19 and 20 February, paragraph 4.48. That was a valid Regulation 15 notice. On my findings that request was refused on 19 February and accordingly the respondent did not serve a valid counter notice.

62 On 20 February the claimant requested to take two days leave on 24 and 25 February, paragraph 4.49 above. In order to be Regulation 15 compliant the notice has to be given twice as many days before the start of the leave period as the number of days leave to be taken. This request was therefore not Regulation 15 compliant. On my findings the respondent refused this request and did so on 20 February during a phone call in which Mr Smith told the claimant to stop claiming holidays.

63 Accordingly I conclude that, in relation to the requests for leave that were refused, the claimant served a valid Regulation 15 notice for 12 out of the 14 requests. I find that the respondent served a valid Regulation 15 counter notice on 7 out of those 12 occasions. The respondent failed to serve a valid Regulation 15 counter notice, therefore, on 5 occasions.

64 The question then becomes, in the light of these conclusions, whether it can be said that the respondent has refused to permit the claimant to exercise his right to take annual leave.

65 I considered this issue first of all from the perspective of the WTR alone. There were two occasions when the claimant failed to serve a valid Regulation 15 notice. In general terms, as set out above, the entitlement to paid leave is only triggered when a Regulation 15 notice is served. Accordingly, I conclude that there has been no refusal to permit the claimant to exercise his right to annual leave in respect of these requests. The respondent served a valid counter notice on 7 occasions. There must be a difference between a refusal to allow someone to exercise their right to take annual leave and a counter notice because if all counter notices amounted to a refusal then the counter notice provisions would be otiose. It would seem, therefore, that the scheme of the legislation is that if a valid counter notice is served that is not a refusal. Indeed, that was the approach taken by the EAT in **Transocean**, see paragraph 20 above. Accordingly, I conclude that in those instances where the respondent has served a valid counter notice there has been no refusal under the WTR.

66 That still leaves, however, the 5 occasions when the respondent failed to serve a valid counter notice. I conclude that there was a refusal to allow the claimant to exercise his right to take annual leave on these occasions. Before me the respondent did not put forward any arguments as to why, if there was no valid Regulation 15 counter notice, the decision to not allow the claimant to take leave should not be considered to be a refusal. Giving the words of Regulation 30(1)(a) their ordinary meaning a refusal occurs when there has been a denial or rejection of a request to exercise an entitlement to leave, which is precisely what happened here.

67 I was mindful that, on my findings, the request made on 13 December 2017 to take leave on 5 – 18 March was turned down, at least in part, because the claimant had not accrued sufficient leave. As already set out the respondent operated a policy whereby zero hours workers/ casual workers with irregular hours would accrue leave retrospectively on a monthly basis based on the number of hours that they had worked that month, paragraph 4.4. The WTR, of course, talks in terms of a week's leave. For someone who works a fixed number of days each week that is relatively straightforward concept but it is not a straightforward concept when it comes to casual/zero hours contract workers. The WTR does not assist with how holiday should be calculated in this scenario. Calculating the holiday entitlement in hours, as a proportion of hours worked, is,

as the respondent submitted, a pragmatic solution to the issue. There might have been an argument to say that, in respect of any leave requests turned down because insufficient holiday had accrued, there could not have been a refusal. This is because there must be a refusal to exercise an entitlement to leave, and it is not possible to say what the entitlement is until the hours are worked. But even if that is the case it does not arise on my findings of fact, because, on my findings, the respondent turned down this request for 14 days leave when the claimant had 7 days, or thereabouts, to take, paragraph 4.36. Accordingly, there clearly was an attempt to exercise an entitlement to leave which was refused even in respect of this request.

Time limits

68 It had agreed at the case management preliminary hearing that, allowing for the primary tribunal time limit and early conciliation, any complaint about something that happened prior to 26 January 2018 was on its face out of time. It requires to be remembered that for these purposes the date of the refusal is the date when it is alleged that the exercise of the right should have been permitted, Regulation 30(2)(a) - i.e. in this case the date when the claimant should have taken his annual leave. Time runs therefore from each date when the exercise of the right should have been permitted, or in the case where leave has been requested extending over more than 1 day, the date on which the leave should have been permitted to begin. There is no equivalent under the WTR to the ERA provisions which permit a claim to be made in respect of a series of deductions so long as the claim is bought within 3 months of the last deduction in the series.

69 Accordingly, the refusal of the 13 December request to take leave between 5 – 18 March, is in time. The 4 January 2018 request to take leave on 19 January 2018, and the refusal of this leave, is out of time, and the 3 requests made for leave in February 2018 where no valid counter notice was served (the 2 February request for leave on 8 – 9 February, the 9 February request for leave on 15 February and the 14 February request for leave on 19 and 20 February) are all in time.

70 In respect of the refusal that is out of time I conclude that the claimant has not proved that it was not reasonably practicable for this claim to be submitted within time for the following reasons. The claimant advanced no reason for the delay in submitting his claim. He is a person who is familiar with Employment Tribunal practice and procedure having litigated previously in the Employment Tribunal in respect of holiday pay claims on at least 2 occasions (2 of his previous judgments, both from 2017, were included within the bundle). On both occasions the claimant represented himself through this process and he must therefore have familiarised himself with Tribunal procedure. Critically the second claim was dismissed at a Preliminary Hearing because the Tribunal concluded that the claimant had presented his claim outside the time limit, page 240. The claimant was present at this hearing, which took place on 20 November 2017,

and the judgment was promulgated on 23 November 2017. The claimant must, therefore, have been aware by 20 November 2017, if not before, of the Tribunal time limits, and more specifically how the time limits worked for this type of claim. The refusals about which the claimant now complains, including the one that is out of time, all took place very shortly after this hearing. Yet he did not present his claim form until 9 May 2018.

71 These conclusions mean that, under the WTR alone, the claimant succeeds in relation to the four refusals that are in time. The complaint concerning the refusal to permit the claimant to take leave on 19 January 2018 is out of time and the tribunal has no jurisdiction to deal with this complaint. Accordingly, it is dismissed.

<u>The remaining requests for leave made by the claimant between November 2017 – March 2018.</u>

72 In addition to arguing that the respondent had explicitly refused permission to take leave in response to a request to do so, the claimant also argued that the way in which the respondent had handled his leave requests put him in a position whereby he was unable to take leave, and that this amounted to a refusal. It is in respect of this part of his case in particular, as I understood it, that the claimant sought to rely on the case law of the ECJ. He asserted in particular that he was unable to take leave because;

1 He was required to give 28 days notice of leave which was not practicable particularly given that he could be asked to work and be cancelled at short notice.
2 The respondent's policy was that leave could not be taken until it had accrued.
3 In March of each year he had to carry over his leave for that month and take it before the end of May not known until the end of March how much leave been accrued for that month (i.e. in effect the same point as above).
4 Mr Smith on 20 February intimidated him in a phone call.

73 As I have already set out it is correct that the respondent operated a policy whereby zero hours workers/ casual workers with irregular hours would accrue leave on a monthly basis retrospectively based on a calculation of 12.07% of the hours that they had worked that month. This retrospective calculation of holiday entitlement is what also necessitated the approach that leave should be taken once accrued. Whilst at times the claimant's case during this hearing appeared to veer towards a complaint that the calculation method was wrong, the claimant did not seek to suggest that the respondent should have adopted an alternative approach to this issue nor did he seek to suggest that in adopting this approach the respondent had under calculated the amount of leave that he was due. He did at one point make passing reference to the case of **<u>Brazel v The Harpur Trust</u> UKEAT0102_17_0603** but that case was principally about the calculation

of holiday pay using the 12.07% formula for term time only workers, which the claimant was not. In any event, as already set out, the claimant had confirmed at the start of this hearing that he agreed that calculating leave in this way equated to the statutory entitlement for a full-time worker of 5.6 weeks.

74 In fact the claimant's case before me so far as this issue was concerned was that having to deal with his leave in this way was so off-putting that it amounted to the respondent deterring the claimant from exercising his right to take leave and/or left him unable to take leave. As to the former point, I do not find that the accrual policy deterred the claimant from taking leave. This requirement had been in place from the very beginning of the claimant's employment and it clearly did not put off the claimant from exercising his rights in any way. Indeed, over the period of time with which this case was concerned, the claimant put in over 25 requests for annual leave. Whether the policy operated in such a way as to make it an impediment to taking leave is an issue I will return to in due course.

75 Neither was it clear the basis on which the claimant asserted that being allowed to accrue and carry over leave in March of each year deterred him from taking his leave, point 3 above. The claimant did not explain why he considered this to be the case in either his evidence or submissions. I conclude that this was a mechanism by which the respondent sought to ensure that workers could take all of their leave, by giving them additional time to take leave that they had accrued at the end of the year. It was not, therefore, a practice which deterred people from taking leave.

76 It was likewise the claimant's case that the requirement to give 28 days notice was a deterrent to exercising the right to take leave. I reject that because, as I have already noted, on the evidence before me the claimant was not deterred from exercising his right to leave because he did so on multiple occasions over the 2 years with which this case is concerned. The claimant specifically complained, in respect of this issue, that it was not practicable to give such long notice because he could be both asked to work and cancelled at short notice. It is true that he could be asked to work and cancelled at short notice but that had no impact at all, in fact, on requests for leave. This was not a case, for instance, where the employer had directed that leave should be taken only on non-working days or only on working days. This employer operated a policy whereby a worker could take a day's paid leave either on a day that they were scheduled to work or on a day that they were not scheduled to work. The claimant was free to choose. The requirement to give 28 days notice, I conclude therefore, had no impact at all on the claimant's ability to take leave.

77 I conclude that being told by Mr Smith to stop claiming for holiday because he was claiming too much did deter the claimant from taking leave. It stands to reason that being told this by a manager would have an off-putting effect. In any event it clearly did have such an effect because the claimant stopped requesting

leave, at least for a time in mid-February to mid-March 2018. I will deal with the relevance of this in my conclusions below.

78 The claimant also argued, relying on the case law of the ECJ, that it was enough, in order for his case to succeed, if the respondent had dealt with his annual leave requests in such a way as to make it impossible or very hard for him to exercise his right to take leave and/or had failed to take steps to facilitate him in taking his leave. The claimant relied in particular on **Max-Planck** and **Land Berlin**.

79 The first issue was whether, as a matter of fact, I was prepared to find that respondent had made it very hard (or impossible) for the claimant to take his leave. I conclude, and find, that the respondent did make it very hard for the claimant to take his leave in respect of the last 4 months of the 2017 – 2018 leave year and it follows from this that I also find that the respondent has not shown that it has exercised all due diligence to enable the claimant to take his leave. I am mindful that the claimant was clearly able to take some leave during this leave year; on my findings he took 6 days leave in April, 3 days in May, 1 day in June and 1 day in November, paragraph 4.29. It is also the case that on occasion the respondent sent out reminders about the need to book bank holidays as annual leave, paragraphs 4.20 and 4.21, and the annual leave policy, which was available on the intranet, set out that there was an expectation that employees would take their leave throughout the year, paragraph 4.7. But the detailed reminder that the respondent had made available to employees when they logged onto the intranet in 2016 was not in place for the 2017 - 2018 holiday leave year. All that was said when employees logged on during this leave year was that it was important that members of staff familiarise themselves with the annual leave policy, paragraph 4.27. Whilst the policy sets out that the respondent will monitor leave on a quarterly basis and may instruct employees to take leave, there was no such monitoring carried out in the claimant's case, paragraph 4.9. Moreover, standing back and looking at what happened in the latter part of the leave year the respondent refused, on my findings, 14 out of 18 requests from the claimant to take annual leave (of those not refused 3 were granted but these were only for single day's of leave and 1 was cancelled by the claimant). True it is that two of these requests were made with insufficient notice on the claimant's part and, as already set out, some of the requests were refused correctly within the counter notice provisions. But looked at as a whole the end result of the way in which the respondent handled the claimant's requests was that it became extremely difficult for him to take leave for the last 4 months of the leave year, despite repeated requests from him to do so. One request for 14 days leave was turned down in its entirety on the basis that the claimant had not accrued sufficient leave, despite the fact that at that point the claimant had 7 days leave to take and one other request was turned down on this basis despite the fact that the claimant had sufficient leave accrued for the amount of holiday that he wanted to take. Some other requests were turned down on the basis that insufficient notice had been given when, on my findings, the claimant had given

sufficient notice. Some requests were turned down for no reason at all. Moreover, the difficulty became greater for the claimant in February 2018 when Mr Smith told the claimant to stop claiming for holiday because he was claiming too much. As a result of all of these factors the claimant was left with a large amount of leave, 74 hours, equivalent to some 9 days holiday or so, which he was simply unable to take in that leave year despite his best efforts to do so.

80 It is clear from the judgments of the CJEU in **Max-Planck** and **Land Berlin**, that leave is not automatically lost at the end of the leave year if the employer cannot show that it has exercised all due diligence in order to enable the worker to take his leave, and in such a situation the leave will carry over. Domestically, the Court of Appeal has, obiter, indicated that words can be read into the WTR so that carry over is permitted when a worker is off sick. The EAT in both **The Sash Window Workshop** and **Shannon** adopted and broadened this approach to include cases where the respondent has not allowed the claimant to take leave. If the WTR can be interpreted consistently with the WTD in these scenarios it seems to me that it would likely also be permissible, following **Max-Planck** to read into Regulation 13(9) words to the following effect "it may only be taken in the leave year in respect of which it is due *save where employer has failed to take steps to enable the employee to take his leave and as a consequence he did not exercise his right to annual leave.* But, for the reasons I set out below, that is not a point which I have to decide.

81 This is because the question remains of where that leaves the claimant on the facts of this case. The claimant asserted that he had an entitlement to carry over and be paid for accrued but unused leave for both 2016 – 2017 and 2017 – 2018. It was evident from the emails that the claimant had sent to the respondent about being paid for accrued but untaken leave, and indeed from the way that his claim form was originally drafted, that this was a central aspect of the claimant's case. However, it is an aspect of the claimant's case that is based on a fundamental misunderstanding on the claimant's part of the case law of the Court of Justice of the European Union. The claimant relied on **King, Land Berlin** and **Max-Planck** as being authority for the proposition that there is an entitlement to be paid for all accrued but untaken leave. What he did not appreciate was that these cases deal with payments for accrued but untaken leave on termination of employment.

82 In the claimant's case his employment was continuing. Indeed when the claimant realised during this hearing that this was a potentially fatal difficulty for him he tried to suggest that there was an argument to say his employment had been terminated; which was not in accordance with either his pleaded case or the issues. Neither, it turned out, was it consistent with the claimant's own position because he later accepted that he was continuing to work for the respondent. The position in respect of accrued holiday, whilst employment is ongoing, is clear under both the WTD and the WTR.

83 As set out above Article 7 of the WTD states;
2 The minimum period for annual leave may not be replaced by a payment in lieu, except where the employment relationship is terminated.

The WTR adopts a position which is entirely consistent with this. Regulation 13(9) states that;
Leave to which a worker is entitled under this Regulation may be taken in instalments, but
…
(b) it may not be replaced by a payment in lieu except where the workers employment is terminated.

84 Moreover the Court of Justice has reiterated, time and time again, that there is no right to a payment in lieu other than on termination of employment. Indeed that was a point referred to in **Max-Planck**, one of the cases relied upon by the claimant;
Paragraph 33;
"by providing that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated, Article 7(2) aims to ensure that workers are entitled to actual rest".

85 On the domestic front see for example the comments of the EAT in **King;**
Paragraph 23;
"the only permissible option however, under the WTD, is to allow the worker to carry forward unused paid annual leave entitlement into the following leave year. It would not be possible to pay compensation in lieu of the leave lost. "

86 Accordingly, to the extent that the claimant sought to pursue a claim for an unlawful deduction from wages under the ERA/a failure to pay holiday pay under Regulation, 16 and 30 of the WTR, in respect of non-payment of accrued but untaken holiday whilst his employment is continuing these claims fail and are dismissed.

87 Moreover, as the claimant's employment has not terminated his right to receive payment on termination of employment in respect of any leave that has accrued and carried over has not crystallised.

88 The claimant would, on my findings, be entitled to carry over accrued but untaken leave from the 2017 - 2018 holiday year in to the 2018 – 2019 leave year. But this claim was about the events up to the end of the 2017 – 2018 holiday year. If, in the 2018 – 2019 leave year, the claimant has attempted to exercise his rights to take that leave and if there has been a refusal to allow the claimant to do so then he may have a legitimate complaint to make in respect of that. But that is well beyond the scope of this case.

Case No:1302129.18
Employment Judge Harding
Dated:20 August 2019