THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
BETWEEN:

Mr A Alston and 48 others

Claimants

AND

The Doctors Laboratory Ltd

Respondent

ON: **3, 4 and 5 February 2020**

Appearances:
For 45 Claimants: **Dr J Moyer-Lee, General Secretary IWUGB**
Claimants: **Mr E Anselmo, Mr B Bonnici, Mr A Cordeiro and Mr F De Macedo were not represented and did not appear**
For the Respondent: **Mr M Purchase, counsel**

RESERVED JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that:

(1) By consent, where claimants have not taken annual leave, they carry over the right to do so from year to year.
(2) Where claimants have taken leave, the right to carry over is subject to findings as to why the leave was not taken and the limitation provisions.
(3) Days upon which the claimants did not work are relevant and to be taken into account in considering any declaration or remedy.
(4) There is no entitlement to a punitive award.
(5) The applicable limitation principles are those contained in the Working Time Regulations 1998 and the Employment Rights Act 1996.

REASONS

1. By a number of claim forms, the claimants bring claims which are reflected in the issues set out below.

2. This preliminary hearing was originally listed to be heard from 25-27 June 2019. It was cancelled on the instructions of Acting Regional Judge Wade and the parties were informed of this by letter dated 24 June 2019.

The issues

3. The case concerns the principles to be adopted for the payment of annual leave entitlement for the claimants. The issues were identified at a preliminary hearing on 30 January 2019 before Employment Judge Wade based on an agreed list of issues attached to her Order of that date. The issues had since been refined and narrowed into an updated list of issues presented at this hearing as follows:

4. For the purposes of this hearing the claimants accept that the issues set out below relate to the entitlement to four weeks of paid annual leave, under Article 7(1) Working Time Directive ('WTD'), Article 31(2) of the Charter of Fundamental Rights of the European Union ('CFR'), and/or Regulation 13 Working Time Regulations 1998 ('WTR'), and not to additional leave under Regulation 13A WTR. However, the claimants reserve their position in the event of an appeal as does the respondent.

5. Applying the decision of the Court of Justice of the European Union ('CJEU') in ***King v Sash Window Workshop Ltd 2018 ICR 693*** did any rights to paid annual leave, which each of the claimants had in principle, carry over from year to year because, prior to 1 January 2018, the respondent did not provide them with any paid annual leave? The claimants say 'yes'; the respondent says that this will be a matter for evidence as to why, if they did not take annual leave, any given claimant did not take leave where that is the case.

6. Is it irrelevant that, in the period in respect of which the claims are made, each of the claimants had days on which they did not work for the respondent or at all?

    a. The claimants say that it is irrelevant: unpaid non-working days cannot be regarded as days of annual leave for present purposes and therefore any decisions as to limitation, liability or remedy to be awarded to the claimants in due course must be decided on the basis that none of them took any annual leave before 1 January 2018.

    b. The respondent says that it is not irrelevant: all or some of the claimants' non-working days are capable of being annual leave and/or the fact that they were taken is potentially relevant to liability and remedy more generally and may be relevant to limitation. They say that what time off was taken, why and/or in what circumstances, should be a matter for evidence in due course and the Tribunal should reach its decisions as to what leave was or was not taken in the light of this evidence.

7. In relation to any claims brought by the claimants pursuant to Regulation 30(1)(a)(i) WTR and/or Article 31(2) CFEU on the basis that the respondent prevented them from taking annual leave and/or paid annual leave and/or refused to permit them to do so:

    a. What are the principles applicable to limitation? In particular, did time start to run on 31 December 2017 such that the claims in respect of the whole claim period are necessarily in time?

    b. What are the principles applicable to remedy? In particular:

    i. Is it sufficient for the purposes of the Article 47 CFR right to an effective remedy that the Tribunal should declare the untaken paid annual leave that has accrued in the case of each claimant? or

    ii. Does the right to an effective remedy also require that each claimant is in principle:

        A) entitled to take such leave in the next 12 months, or such longer period as is necessary, where the accrued entitlement is to more than 12 month's leave? and/or

        B) eligible to be awarded compensation and, if so, calculated on the basis of what principles?

    iii. If the right to an effective remedy does require any of the remedies referred to at sub-paragraph (b)(ii)(A)-(B), above, is the Tribunal able to give effect to such requirement and, if so, how?

8. In relation to any claims brought by the claimants on the basis that the respondent failed to pay them for leave which they took or a payment in lieu upon termination, whether such claim is brought under Regulation 30(1)(b) WTR, or section 23 Employment Rights Act 1996, or Article 31(2) CFR:

    c. Does the principle of equivalence require that the rules on limitation applicable to such claims should be the same as those which would apply to contract claims in the courts?

    d. If it does, is the Tribunal able to give effect to such requirement and, if so, how?

9. The claimants no longer challenge the vires of the Deduction from Wages (Limitation) Regulations 2014 but they reserve their position in the event of an appeal, as does the respondent.

10. The claims are brought under both WTR and ERA.

11. The claimants seek their holiday pay for the whole period of their

engagement. The tribunal was told that some have been engaged since as far back as 1999. The issue of individual patterns of work was not a matter for this hearing.

Witnesses and documents

12. There was a witness statement from the respondent from Head of HR, Mr Matt Gibbins, in accordance with the Order of EJ Wade of 30 January 2019 at paragraph 4.1. There were no witness statements on the claimants' side. It had not been contemplated as a fact finding hearing with live witness evidence.

13. There was a discussion at the outset as to whether Mr Gibbins should be called to be cross-examined. I asked what was in contention in his statement. The claimants said that the key for them was the "*gloss*" that the statement sought to provide. I asked if it could be dealt with in submissions. Dr Moyer-Lee said he thought so, unless the respondent had any objections, which it did not. I said I would accept the statement in the spirit with which it had been ordered by Judge Wade and that both parties could make submissions on it.

14. I asked the parties to seek to agree the facts from Mr Gibbins' statement during the tribunal's reading time and for the claimants to let the tribunal know what, if anything, within that statement was not agreed. If there was a disagreement, the parties were asked to seek to agree some alternative wording if at all possible.

15. Paragraphs 1 to 25 of the statement were agreed. Paragraphs 43 to the end were not relevant to this hearing as they went to individuals' working patterns. Certain further agreed facts were introduced on day 2 of this hearing and are set out below.

16. The authorities bundle was in three lever arch files with 75 entries including case law and legislation, both domestic and European.

17. There was a small hearing bundle, containing the submissions, the list of issues, Mr Gibbins' statement plus schedules and 56 pages of other documents for this hearing.

18. I had written submissions from both parties to which they spoke at length, just over four hours for the claimants and around three hours for the respondent. The respondent's written submission was initially drafted by Mr T Linden QC and was adopted with revisions by Mr Purchase who appeared at this hearing.

19. As there were detailed written submissions, 28 pages from the claimant and 27 pages from the respondent, they are not replicated here but were fully considered together with the authorities referred to. The submissions are referred to below but this is not intended as a representation of the full written submissions or the full oral submissions on any particular point.

The relevant factual background

20. The respondent is a medical laboratory and the largest independent provider of clinical laboratory diagnostic services in the UK. It provides pathology services to the NHS and to private healthcare providers.

21. All the claimants are couriers delivering medical products to laboratories and/or hospitals. The respondent is a pathology company and not a courier company. It operates 42 laboratories across the UK. It has two hub laboratories in central London and in Manchester. All its other laboratories are situated in NHS and private hospitals.

22. TDL Collect Courier Service is a division of the respondent which provides the courier services. The role of the couriers is to collect samples from the respondent's customers and deliver them to the labs for testing. Couriers also move samples between laboratories and deliver samples and patient consumables to customer sites.

23. The samples are commonly blood and urine samples but can include other forms of biological sample. The couriers also transport blood and blood components for transfusion purposes.

24. Requests for courier services originate from the respondent's clients and the requests are received either by telephone or via an online booking system. The requests are referred to the courier department for allocation. Allocation of jobs is made by a courier controller based upon location and task.

25. The respondent has a computerised transport system into which it records all jobs. Details of jobs allocated to particular couriers are transmitted via a hand-held personal device known as a PDA.

26. The respondent currently engages around 135 couriers made up as to around 86 motorcycle couriers, 9 pushbikes, 30 vans, 5 walking couriers and 5 rail couriers.

27. The vast majority of the couriers and all the claimants in these proceedings apart from four, do their work during agreed hours from Monday to Friday. Four couriers work on a four-day on / four-day off basis.

28. The respondent typically has a need for around 25 couriers to work on Saturdays and 18 on Sundays. This is dealt with by agreed rostered hours and from volunteers. Those who are interested in working at a weekend or on a bank holiday approach the courier controller to find out whether or not they are needed. If they are needed, the courier controller agrees the additional hours during which they will work at the weekend or on the bank holiday.

29. Until 1 January 2018 the claimants were not paid holiday pay. It was

conceded that they were limb (b) workers as set out in the Issues above both in paragraph 9 of the ET3 (bundle page 28) and as shown in the Order of Judge Wade at paragraph 2.2.

30. The respondent sought to qualify this concession and the claimants objected. In the respondent's written submissions, paragraph 4, it was said that the respondent accepted that they were workers with effect from 1 January 2018 but the precise basis on which they were workers was "*yet to be determined*". This did not appear to be the pleaded case, but this was not a matter for this hearing.

31. The claimants agreed that factually this was a matter which could not be decided without evidence which had not been prepared for this hearing. It would in any event need to be the subject of a further application from the respondent if they intended to amend their position and there was insufficient time within this hearing allocation to deal with it.

32. The respondent said that this hearing was to take place on the premise that the claimants were all workers at the material time and that was the basis upon which this hearing proceeded.

33. A further hearing may be necessary to fact-find in the light of the findings made at this hearing, such as on what leave was taken by particular claimants. There may also need to be a remedy hearing but again this would be dependent upon findings from this hearing and there always remains the possibility that remedy could be agreed.

34. It was not in dispute that the respondent granted no facility for paid leave prior to 1 January 2018.

35. It was also not in dispute that the claimants had no contractual right to holiday pay prior to 1 January 2018.

36. The following "Further Agreed Facts" were handed up in a document on day 2 of this hearing, which are as follows:

    a) Prior to 1 January 2018 the respondent classed the claimants as independent contractors and did not pay them for leave under the WTR.

    b) From 1 January 2018 the respondent provided the claimants with the right to paid annual leave in line with the WTR. From March 2018 the couriers were entitled to participate in the respondent's pension scheme with employer's contributions.

    c) Various of the claimants took days of unpaid leave throughout the course of their engagement with the respondent (the claimants do not accept that this was leave within the meaning of Regulation 13 and 13A of WTR).

d) There may be some instances in which some of the claimants' engagements with the respondent ended and they were re-engaged under a fresh relationship at a later date.

e) Even after the introduction of paid leave in January 2018 a number of couriers have continued to notify the respondent of and to take further periods of unpaid leave beyond their statutory entitlement.

37. The respondent conceded in submissions that following ***King*** there should be carry-over of leave not taken at all, but not where the leave has been taken. The claimant's position was that as leave and pay were not coterminous, it must be treated as if the leave was not given and therefore it must be carried over.

The relevant law

38. The Working Time Directive is intended to deal with the health and safety rights of workers. Article 7 on annual leave states:

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

39. Recital 4 of the WTD states that "*the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations*".

40. Article 1(4) WTD states:

> *The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.*

41. The WTD also states at Recital 6 that "*account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time*".

42. The International Labour Organisation's (ILO) Holidays with Pay Convention (No. 132) of 1970 states that a minimum period of three weeks' annual leave should be provided (Article 3), excluding public and customary holidays (Article 6(1)) and periods of incapacity from work due to sickness or injury (Article 6(2)). Article 7 states that holidays should be remunerated at at least the normal rate of pay and paid "*in advance of the holiday*" unless otherwise provided by agreement. Both parties agreed that the ILO Convention is not binding in UK Law.

43. The Charter of Fundamental Rights of the European Union ("CFR") at Article 47 provides at section VI on "Justice" and in relation to the right to an effective remedy and to a fair trial:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

44. Any limitation on the Article 47 CFR right to an effective remedy is subject to the proportionality exercise at Article 52(1):

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

45. Article 31(2) of the CFR provides:

Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

46. The UK implemented the WTD through the Working Time Regulations (WTR) 1998. The following regulations are relevant:

Regulation 13: "…a worker is entitled to four weeks' annual leave in each leave year";

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…

(4) A right to a payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") and paragraph (1) does not confer a right under that contract";

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 … 13…;

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

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

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

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

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

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

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

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

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

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

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

47. Regulation 15 of the WTR sets out notice requirements for the exercise of the right to take annual leave.

48. The right to claim for unlawful deductions from wages under the Employment Rights Act 1996 (ERA), which includes the right to claim for under or non-payment of holiday pay is set out in section 23 which states:

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

49. Subsections 4A and 4B set out above, limit the jurisdiction of the tribunals to deductions made within no more than two years prior to the claim. These provisions were inserted by the ***Deduction from Wages (Limitation) Regulations 2014*** ("the 2014 Regulations").

50. The rights under section 23 ERA became a less attractive to some workers following the decision of the EAT in ***Bear Scotland Ltd v Fulton 2015 IRLR 15***. This case concerned the issue of breaks in any series of deductions. It was held that the three-month time limit runs from the date of the last deduction. The EAT (Langstaff J) said at paragraph 81:

> *The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.*

51. In relation to the matter of the three-month gap, the claimant cited the decision of the Court of Appeal in Northern Ireland in the case of ***Chief Constable of the Police Service of Northern Ireland v Agnew 2019 IRLR 782***, which held that whether there is a series of deductions is a question of fact to be decided in each individual case and that a series is not ended, as a matter of law, by a gap of more than three months between unlawful deductions nor is it ended by a lawful payment. The claimants accepted that this decision is not binding on this tribunal.

52. ***King v Sash Windows*** (above and hereafter referred to simply as ***King***) relied upon three breaches of the WTR: (a) leave taken but not paid, claimed as a series of unlawful deductions under the ERA; (b) leave accrued but untaken in his final year of employment, claimed under Regulation 14 WTR and (c) leave untaken in previous years, which he said accumulated until termination of employment, on a proper construction of the WTD. It is only the third category which went on appeal and is relevant to these proceedings.

53. Other cases cited and relied upon are set out in relation to the submissions made and conclusions reached.

<u>The ***King*** case</u>

54. Mr King was a salesman paid on commission only. He was not classed as a worker. For 13 years he was given the right to unpaid leave but no right to paid annual leave. He claimed three types of holiday pay over the 13 year period: (a) payment for unpaid leave taken - and it should be noted that King was decided before Bear Scotland and before the two-year limit

so he was awarded the full period (b) payment for leave accrued and untaken in his final leave year - this was awarded and is uncontroversial (c) payment for untaken leave for the entirety of the 13 years which accumulated and carried over. It was the third point that went on appeal and is relevant. Mr King's employment, unlike most of the claimants in this case, had come to an end. He was entitled to carry over the annual leave which he had not taken as a result of his employer's refusal to pay. The case does not deal with leave taken but unpaid.

Submissions

55. As stated above, there were detailed written submissions from both parties which are not replicated here. I set out below some of the points made orally by the parties as they spoke to their submissions. It is not intended to be a full capture of the entirety of the oral submissions. All submissions and authorities referred to were fully considered, even if not expressly referred to below.

The claimant's submissions

<u>The question of legally binding precedent</u>

56. The claimants' position is that it is open to this tribunal to depart from existing UK case law and interpret ***King*** in accordance with EU law and that the tribunal is required to do so. The parties agreed that this was the first time in which ***King*** had been interpreted in this context and that there was no UK appellate authority to assist.

57. The claimants made submissions on the respondent's position as set out at paragraph 50 of its written submission. This was to the effect that if a decision of the CJEU merely cast doubt upon the UK case law and the answer was not according to the doctrine of *acte clair* (ie not "*so obvious as to leave no scope for any reasonable doubt"*) then the tribunal had two options (1) to refer to the CJEU or (2) to follow domestic law.

58. The question was whether ***King*** was materially in conflict with the existing case law on any of the issues in this case. If it was, then the question was whether the position on any such issue was so clear from the judgment of the CJEU, that there could be no reasonable doubt as to the law. It is only if that was the case, according to the respondent, that this tribunal could depart from the existing UK case law or consider supplying or reading down legislation.

59. The claimant took the tribunal two UK tax authorities on the point: ***Edgeskill Ltd v Revenue and Customs Commissioners 2014 STC 1174***, Upper Tribunal (Tax and Chancery Chamber) and ***Euro Trade and Finance Ltd, Pierhead Drinks Ltd v HMRC 2016 UKFTT 279*** First Tier Tribunal (Tax Chamber). The parties accept that these authorities are not binding upon this tribunal. These cases concerned whether the tribunal in question could depart from UK case law in the light of CJEU decisions. I

was also taken by both parties to the decision of the Court of Appeal in ***Sub One Ltd (t/a Subway) v Revenue and Customs Commissioners 2014 STC 2508*** in which the CA upheld the decision of the Upper Tribunal to depart from normally binding UK precedent in order to give effect to EU law. In ***Sub One Ltd*** there was no question of not dealing with the matter and leaving it to an appeal court, there was no reference to the CJEU and no reliance on the *acte clair* doctrine.

60. The CA in ***Sub One*****,** judgment paragraph 41, said that Member States, including their courts, must respect the primacy of EU law and they must refuse to apply domestic legislation and previous decisions of their courts, in any manner that conflicts with it. I was taken to the relevant CJEU decisions which gave the background to this decision, as cited in paragraph 16 of the Upper Tribunal decision in the same case (reference ***2013 STC 318***).

61. In ***Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Shimizu 2018 All ER (D) 30*** the CJEU said at paragraph 60 that the requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case law where necessary, if national law is incompatible with the objectives of a Directive.

62. The claimants submit that all the respondent can rely upon is obiter dicta and have no binding authority to support its position.

63. The claimants submit that following the reasoning in ***King***, payment for all the claimants' untaken leave, including any going back more than two years, should accumulate and carry over until termination of their engagement; otherwise this would amount to an unjust enrichment of the respondent. They submit that it would also validate the respondent's conduct in depriving them of their annual leave rights and extinguish any remedy available to them.

Composite or single right

64. The claimants submit that the right to paid annual leave is a composite right and not two separate rights, to pay and to leave. The claimants rely upon paragraph 37 of ***King*** in the CJEU which states "*The very purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure…"* and paragraph 92 of Advocate General Tanchev's Opinion in which he said of Article 7 of the WTD: "*This implies an inherently contemporaneous element to the right to paid annual leave*."

65. The claimants submit that when there is no facility for paid annual leave, the fact that an employer may grant unpaid leave may allow the worker to rest but it does not allow them to enjoy a period of leisure. This was said to be because it comes from the worker having the financial means to enjoy the leisure and not worrying about such means.

66. The claimant's submission was that if a worker is allowed unpaid leave but has to go to the tribunal to obtain payment, being the remedy suggested by the respondent, the worker is not receiving contemporaneous pay and leave. They may not receive their pay until perhaps 2.5 years later.

67. The claimants invited this tribunal to read down Regulation 13 of the WTR as shown underlined and in bold as follows:

> *"(1) … a worker is entitled to four weeks' **paid** annual leave in each leave year.*
>
> *(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—*
>
> *(a) it may only be taken in the leave year in respect of which it is due, **unless the employer fails to provide facility for paid annual leave, in which case it carries over and accumulates until termination**…"*

68. The claimants said that not allowing a worker who has been deprived of paid annual leave, to claim arrears in their entirety, restricts the remedy. The claimants seek a declaration that when the facility for paid annual leave is denied, the workers full entitlement accumulates and carries over.

The Charter of Fundamental Rights

69. The claimants rely on Articles 31 and 47 of the Charter of Fundamental Rights of the European Union (CFR). The wording is set out above.

70. The claimants submitted that the relevance of these provisions lay in the Treaty of Lisbon, amending the Treaty of the European Union which it said gave the same legal value to the CFR as to the Treaties. The claimants submit that Article 19(1) of the Treaty of the EU requires Member States to provide remedies to ensure effective legal protection. Article 19(1) states that the CJEU "*shall ensure that in the interpretation and application of the Treaties the law is observed".*

71. The claimants submit that Article 31 CFR adds something of substance to the Working Time Directive by stating that every worker has the right to "*an annual period of paid leave*", emphasising the word "*paid*". The reason the claimants rely on the CFR is because they submit it can be relied upon against a party which is not an emanation of the State, as has to be the case with a Directive.

72. The claimants submit that Article 47 CFR on effective remedy can be relied upon as if the respondent was an emanation of the State. The traditional position under EU law is that remedy is a matter for Member States, subject to the principles of effectiveness and equivalence. The principle

of effectiveness is that remedy should not be excessively difficult or impossible to achieve. The principle of equivalence is to the effect that domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents.

73. The claimant's submit that Article 47 CFR goes beyond effectiveness as it incorporates Articles 6 and 13 of the European Convention on Human Rights (ECHR) being the right to a fair trial and the right to an effective remedy.

74. The claimants submit that the right to an effective remedy means that any restriction on remedy must be subject to the proportionality test. They submit that the right to an effective remedy is wider than the principle of effectiveness up following the case of ***Unison v Lord Chancellor 2017 ICR 1037***, Lord Reed at paragraphs 106 and 116, where the proportionality test was considered.

75. The claimants also rely on the EU principle of effective transposition – not under the CFR, but in relation to remedy itself. The claimants took the tribunal to the CA decision in ***Oyarce v Cheshire County Council 2008 ICR 1179*** and to paragraph 56 of that case. The EU principle of effectiveness is that domestic rules should not render the assertion of the Community right impossible or excessively difficult. The principle of effective transposition as set out in paragraph 14 of ***Oyarce*** is put as the obligation to provide sanctions against conduct inconsistent with the terms of the Directive and sufficiently effective to achieve the objective of the Directive in question. It should be capable of being effectively relied upon by the persons concerned before the national courts.

76. The claimants submit that sanctions must constitute a real deterrent effect and to which the Advocate General alluded in ***King*** at paragraph 55 of his Opinion.

77. The claimants say that Articles 31 and 47 are directly and horizontally applicable and that the Article 47 right to an effective remedy goes beyond the principle of effectiveness.

<u>The right to paid annual leave and the UK regime</u>

78. The claimants submit and it is not in dispute that the right to paid annual leave is a health and safety measure based on European law and that it is an important aspect of EU social law. The claimants submit that the right in European law is a single composite right whereas the respondent submits that there are separate rights to leave and pay. The onus is on the employer to ensure that workers receive the right to paid annual leave.

79. The claimants submit that when construing the WTD regard must be had to the principles of the International Labour Organisation. Both parties accept that it is not expressly binding in UK law. The claimants say that this is unless it has been incorporated into UK law or into European law.

They submit that it is binding as a matter of European law.

80. The claimants said that if they are deprived of the right to paid annual leave then they have a right to an effective remedy under Article 47 CFR. They submit that the remedy must be no less favourable than in similar domestic claims under the principle of equivalence and that remedy must have a deterrent effect to ensure adherence to the Directive.

81. In this case the claimants are only relying on Regulation 13(1) WTR, the right to 4 weeks paid annual leave and not to regulation 13A, the right to an additional 1.6 weeks, which is purely domestic in origin.

82. As to remedy the claimants submit that as Regulation 30(4)(a) states that regard must be had to the employer's default, this entitles them to a punitive element of damages. They rely on the decision of the CA in ***Santos-Gomes v Higher Level Care Ltd 2018 ICR 571***, a case which primarily deals with injury to feelings and whether the tribunal had jurisdiction to award non-economic loss.

83. The CA in that case held that the remedy for the wrong of failing to give a paid break during the day, was not an award for injury to feelings but payment of compensation for that pay, based on the rate of pay. At paragraph 63 Singh LJ said: "….*the limb in the relevant legislation that deals with the infringement by an employer – or, in the context of regulation 30(4)(a) , default – is not naturally language that is concerned with compensation at all. Rather it concerns the nature or extent of the employer's unlawful action: for example, was it a one-off incident or was it a persistent practice?"*

Does unpaid leave "count" as leave?

84. The claimant's case is that unpaid leave does not count as annual leave within the meaning of the WTR. They say unpaid leave is irrelevant and does not go to discharge the respondent's statutory duties. They submit that unpaid leave cannot be leave within the meaning of Regulation 13 unless it is taken pursuant to a notice under Regulation 15.

85. The claimants took the tribunal to paragraph 88 of ***NHS Leeds v Larner 2012 ICR 1389*** which concerned the taking of annual leave during a period of sick leave. The CA said that Regulation 15, whereby an employee elected to take annual leave by giving notice to the employer, could have no application where an employee like the claimant, had not returned from sick leave and had no opportunity to take a leave at another time. In that case the claimant was held to be entitled to payment on the termination of her employment, for the paid annual leave she had been prevented by sickness from taking. The claimants say that this is analogous to the present case where there was no facility for taking paid annual leave.

86. The claimants in the present case say that the respondent is retroactively trying to designate periods of annual leave in order to exhaust their

exposure to remedy. The claimants' position is that if they wished to designate periods of annual leave they should have done so before that leave was taken and not afterwards.

87. In support of this the claimants took the tribunal to the first instance Employment Tribunal decision (also London Central) from Employment Judge Goodman in the case of ***Carranza v ISS Mediclean Ltd 2202457/*2018,** which is understood to be on appeal by the claimant, to the effect that it was for the claimant in that case under Regulations 17 and 15, to elect which of the days he wanted to take as leave under Regulation 13 (the EU right to 20 days) and Regulation 13A, (the domestic right to a further 8 days).

Equivalence

88. The EU principle of equivalence is that it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law, it being understood that such conditions cannot be less favourable than those relating to similar actions at domestic nature – see for example the decision of the CJEU in ***Levez v TH Jennings Ltd 1998 ICR 521*** at paragraph 41 on page 545.

89. The claimants rely on this principle because there may be incidents where there have been materially long breaks during their working engagement with the respondent and the "employment" (in the widest sense) may have ended and started again sometime later. In order to bridge any such gaps and for example to claim any entitlement to a payment in lieu on termination, the claimants wish to import into the Employment Tribunal the six-year limitation period to which they would be entitled in a County Court breach of contract claim. The claimants accept that under the legislation as currently set out, Regulation 16(4) WTR means that they are not conferred with a contractual right to holiday pay, which they could utilise in the County Court. They therefore rely on the principle of equivalence.

The respondent's submissions

Precedent

90. On the issue of binding precedent, the respondent said that there was not much between the parties on the law. The respondent had no dispute with what was said in paragraph 16 of the decision of the Upper Tribunal in the ***Sub One*** case, as endorsed by the CA. This is set out above in relation to the claimants' submissions. The issue between the parties was whether ***King*** was materially in conflict with existing domestic case law and if so, whether there was any reasonable doubt as to the law. The respondent submitted that it was only then that this tribunal could depart from the existing domestic case law.

91. The respondent accepted what was said in ***Edgeskill*** and ***Euro Trade*** in

particular in paragraph 124 of ***Edgeskill.*** In that case Hildyard J referred to previous CJEU authorities and said that he could find nothing that involved any departure from or restriction of those principles as interpreted by the Court of Appeal in the case of ***Moblix Ltd*** (reference ***2010 EWCA Civ 517***). He said that ***Moblix*** was binding at that level (Upper Tribunal, Tax and Chancery Chamber) and he could only depart from it if he was persuaded that subsequent cases cast such doubt as to merit a reference to the CJEU. He was not so persuaded. He held that the law was settled and that the appellant had not demonstrated some basis for distinguishing ***Moblix;*** or some basis for a reference as to its compatibility with the case of ***Kittel*** or some inconsistency between ***Moblix*** and other CJEU authorities (paragraph 259).

92. The respondent accepts that this tribunal cannot decline to deal with the matter if it is not clear, but submits that where there is already binding precedent the Employment Tribunal has to follow that precedent.

93. On the issue of precedent, as stated above, the claimant took the tribunal to the Employment Tribunal decision of ***Carranza.*** The respondent took the tribunal to the ET decision of ***Battan v Lloyds Bank plc Case No. 2200055/2018,*** also a decision of Employment Judge Goodman. In ***Carranza***, as similar issues applied as in ***Battan***, the Judge relied on and cross-referenced her reasoning in ***Battan*** (see paragraph 76 of ***Carranza***). ***Battan*** decided that the interruption of three months or more in a series of unlawful deductions was not unlawful, as interpreted by the CJEU in ***King***; that the tribunal was bound by ***Bear Scotland*** and that the two year limitation on arrears in the 2014 Regulations did not breach the EU principle of equivalence. Not surprisingly the claimant submitted that ***Battan*** should not be followed and the respondent submitted that it should.

94. It is long established that decisions of the ET are not binding upon other ETs but are of persuasive value. On this point the respondent took the tribunal to the decision of the High Court in ***Lornamead Acquisitions Ltd v Kaupthing Bank HF 2011 EWHC 2611.*** In quoting *Halsbury's Laws* Gloster J highlighted that there is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where however a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of coordinate jurisdiction should follow that decision (***Lornamead*** paragraph 53). The modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of a judge of first instance unless he (or she) is convinced that that judgment was wrong.

95. The respondent submits that this tribunal is not approaching the issues from a "*clean slate*", it is starting from a base where a judge of equivalent jurisdiction has made careful and lengthy findings on relevant points of principle and this tribunal should only depart from those findings if convinced that they are wrong.

96. The respondent made further submissions under the three following headings: (i) how to deal with unpaid leave/time away from work (ii) the principle of equivalence and (iii) untaken leave.

97. Unpaid leave/time away from work: It is agreed between the parties that there were periods when the claimants were away from work and did not have work commitments. The precise details are yet to be determined or agreed. The respondent's case is that this unpaid leave or time away from work counts as leave for the purposes of WTR.

98. The respondent submits that if it did not count as leave, it could only amount to a breaking the employment relationship. Either way, the respondent submits that time runs under Regulation 30 WTR from the date upon which the claimant should have been paid his or her annual leave pay.

99. The respondent submits that the workers have a remedy which is to come to the tribunal and enforce their rights under the WTD or WTR. On the respondent's submission there is nothing wrong with this. They say the claimants must comply with the three month time limit with the possibility of an extension of time if it was not reasonably practicable to present within time. If they wish, they can claim unlawful deductions from wages under the ERA 1996 to be backdated for two years if there is a series of deductions. The respondent's case is that this cannot possibly be incompatible with EU law.

100. The respondent took the tribunal to the decision of the CJEU in ***Van Campenhout v Belgium 1996 1 CMLR 793***. The issue in that case was the application of a 60 day limitation period and whether this was incompatible with EU law. At paragraph 12 the CJEU said: " *In the absence of Community rules governing matter, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to lay down the detailed procedural rules governing action is the safeguarding rights which individuals derive from the direct effect of community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law*".

101. In ***Levez v Jennings*** (above) at paragraph 19 the CJEU said: "*As the EAT mentions……the court has consistently held that in the absence of community rules of harmonisation it is for the domestic legal system of each member state to determine the procedural conditions governing action is at law intended to ensure the protection of rights conferred on individuals by virtue of the direct effect of Community law*."

102. The respondent submits that a three month time limit and a not reasonably practicable exception, plus a two-year backdating period, is a reasonable limitation. The tribunal was taken to the decision of the CA in ***Biggs v Somerset County Council 1996 ICR 364*** at page 376 paragraph A,

where Neill LJ said: "*Furthermore, the time-limit itself does not offend Community law and indeed is compatible with the principle of legal certainty*." The time-limit in question was the three month time limit.

103. The respondent said that the claimant relies upon the right to an effective remedy under Article 47 CFR which they say is more onerous than the principle of effectiveness, because Article 47 requires a consideration of proportionality. The respondent said that the requirement for an effective remedy has always been a fundamental feature of EU law and did not arise with the CFR. The respondent submitted that the remedy is proportionate and effective if access to that remedy is available. The respondent took the tribunal to the CJEU case of ***Unibet London v Justitiekanslern 2008 All ER 453.*** It states that Article 47 "*reaffirms*" the position and therefore it is not something new (paragraph 37).

104. On the question of whether the right to paid annual leave is a composite or two separate rights, the respondent accepts that it is a single right to paid annual leave but that there are two components to that right. They say there is nothing in the CJEU authorities preventing Member States from dealing with them separately, provided the worker can gain access to the tribunal to enforce the right. At paragraph 35 of ***King***, the CJEU expressly referred to the right to annual leave being "*two aspects of a single right*".

105. This was confirmed by the CA more recently in ***Harper Trust v Brazel 2019 IRLR 1012*** by Underhill LJ who considered the decision of the CJEU in ***Hein v Albert Holzkamm GmbH 2019 2 CMLR 698*** and said that decision made "*a clear distinction between the entitlement to annual leave, which accrues in proportion to actual work done, and pay in respect of such leave"* (paragraph 52)*.*

106. The tribunal was also taken to paragraph 40 of the decision of the CJEU in ***Stadt Wuppertal v Bauer 2019 IRLR 148*** which says: *"The holiday pay required by art 7(1) of Directive 2003/88 is intended to enable the worker actually to take the leave to which he is entitled".* The respondent submits that if the worker has not taken the leave, this creates a problem for them because the worker has not had the rights conferred by the Directive; but if the worker has taken the leave, the claim is in pay as the additional part of that right.

107. Equivalence: the respondent submits that a breach of contract claim in the County Court is not an appropriate comparison for the principle of equivalence because it is an action which is not sufficiently similar to a claim the holiday pay under the WTR. In addition, WTR rights can be enforced under section 23 ERA in the ET in which a breach of contract claim can also be brought. The respondent submits that if domestic law provides for two or more methods of enforcement, the comparison for equivalence must be with the least favourable of those domestic provisions. They relied upon the decision of the Supreme Court in ***Totel Ltd v Revenue and Customs Commissioners 2018 1 WLR 4053*** at

paragraph 36. This deals with the issue of true comparators with the EU claim. Lord Briggs said:

> *"This issue arises if the search for true comparators with the EU claim discloses more than one comparable domestic claim with, viewed in the round, different levels of favourableness in procedural treatment. On almost every occasion when it has referred to the principle of equivalence the CJEU has added the proviso that the principle does not require the EU claim to be treated as favourably as the most favourably treated comparable domestic claim".*

108. Leave which is untaken: The respondent submits that the fact that there was no facility the paid annual leave until 2018, does not mean of itself that any untaken leave carries over. The respondent submits that the claimant will need to show the causative link and the reason why they did not take the leave. The respondent relies upon the decision of the CJEU in ***King*** itself at paragraph 65 which says: *"It follows from all the foregoing considerations that the answer to the second to fifth questions is that art 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave",* the emphasis for the respondent being on the word "*because*".

109. The respondent accepts that if the causative link is established then they have no objection to the tribunal making a declaration to that effect. The respondent submits that the tribunal should not stipulate when the leave falls to be taken and that should be covered by Regulation 15. This is to avoid operational problems or very long periods of leave being taken.

110. Punitive award: The respondent submits that the claimants are not entitled to punitive award in addition to a declaration. They base this on the wording of Regulation 30 itself (set out above) which they submit is governed by the word "*compensation*". The respondent submits that a punitive award would be inconsistent with the decision in ***Santos Gomez*** which decided that awards for injury to feelings were not payable. The respondent also submits that if this tribunal found there was jurisdiction to make a punitive award, it is critical as a matter of legal certainty, that the basis of it should be clear and predictable and there is nothing in Regulation 30 to place any limit on what the tribunal might award.

111. From a European perspective the respondent took the tribunal to the decision of the Court of Appeal in ***Copple v Littlewoods plc 2012 ICR 354*** at paragraphs 26, 28 and 29, a case dealing with denial of access to a pension scheme. In considering CJEU authority, the CA noted that the full implementation of the Directive did not require any specific form of sanction for unlawful discrimination; although it did entail that the sanction be such as to guarantee real and effective judicial protection. It was accepted that the domestic remedy satisfied the principle of effectiveness. Elias LJ said that the CJEU authority relied upon did not support the

proposition that a penal remedy was appropriate.

Discussion and Conclusions

Precedent

112. On precedent I agree with the respondent's submission that if a higher UK court, ie higher than this ET, has ruled on, interpreted and applied EU law, then it is not for this tribunal to say that the decision is wrong. It is only possible to do so if a subsequent EU ruling makes it clear that the higher domestic courts made the wrong decision.

113. If it were open to this tribunal to decide that the rulings of higher national courts on the application EU law were wrong, it could lead to the perpetual re-arguing of such points. This could lead to considerable legal uncertainty. It is not for this tribunal to decide that higher courts have "*got it wrong*" when interpreting and applying EU law. It is the other way around.

114. The only time when it would be appropriate for a first instance court or tribunal to depart from a ruling of a more senior court, is where the ruling had not been based on an application of EU law and was inconsistent with it.

115. On the issue of precedent, it does not appear to be materially in dispute that other decisions at ET level are persuasive but not binding. I agree with the respondent's submission, based on the authority of ***Lornamead***, but even without it, that this tribunal should not depart from the decision of a Judge at the same level, unless convinced that she was wrong.

116. I have had the benefit of reading Judge Goodman's decisions in both ***Battan*** and ***Carranza*** (the latter case cross-referencing and applying the reasoning in ***Battan***). Judge Goodman gave lengthy, careful and considered decisions in both cases after an extensive review of the relevant authorities at domestic and European level. Whilst I note that the claimants disagree with her decisions, on the points which do not support their case (the claimant succeeded in part in ***Carranza***), I do not consider any aspect of those decisions to be wrong.

117. In ***Battan*** the tribunal did not accept that limiting a series of deductions or the two-year backdating period once the claim was brought, denied a worker and adequate facility to take leave (paragraph 65). The worker can bring a claim, provided he does so within three months of the deduction/underpayment. The claimants in ***Battan***, unlike Mr King, had taken leave and the issue for the tribunal was within what time they must claim for their underpayment. The tribunal upheld the domestic position in UK law on the three month time limit, the effect of the decision in ***Bear Scotland*** and the two-year backdating – finding expressly that this did not breach the EU principle of equivalence.

118. The tribunal in ***Battan*** did not accept the argument that failing to pay normal remuneration (during leave taken) meant that they had not been an adequate facility to exercise the right or that it displaced a time limit.

119. When these matters have been considered and fully reasoned by a judge of equivalent level and decided upon with full reasons given, I consider it is not for me to "*reinvent the wheel*" and start from scratch by finding differently, unless I consider that Judge Goodman was wrong. I have already said that I do not.

120. My decision would be the same even without the benefit of ***Battan*** and ***Carranza*** because of the further reasons set out below.

Single or composite right

121. Based on ***King*** and ***Harper Trust*** which in turn considered CJEU in ***Hein***, in the passages relied upon by the respondent, I find that the right to leave and pay is not one coterminous right, it is a right with two components. There is nothing that prevents a Member State from dealing with these rights separately, provided that the worker can gain access to the tribunal to enforce those rights. I find for the reasons set out below that they can. Where the leave has been taken, the pay can be claimed. There is no reason or basis for the worker to be treated as not having taken any leave and being given the right to carry it over and take it all over again. ***King*** was a case which considered periods where no leave had been taken.

122. I agree with the respondent's submission that the claimants in the present case were at liberty to come to the tribunal at any time to complain that they had not been given their holiday pay. I agree with the respondent based on ***Bauer***, that there is a difference where the worker has taken the leave albeit unpaid and where he or she has not. If the leave has not been taken, the worker has not had the rights conferred by the Directive; but if the worker has taken the leave, I find that the claim is in pay as the additional part of that right. In so far as the claimants have not taken the leave, they retain and carry over the right to do so. The respondent accepts this.

Equivalence and access to remedy

123. What the claimant asks the tribunal to do is to provide them with the same remedies available to them in the County Court when Parliament expressly has not done so and to read words into the WTR as set out under their submissions above. This is in respect of a prohibition on reading a term into their contracts as a result of the 2014 Regulations, which they do not challenge for the purposes of these proceedings as being vires, whilst reserving their rights (to the extent that they are permitted to do so by the EAT) on appeal. I consider this to be a position which is unsustainable for the following reasons.

124. On access to remedy I agree with the respondent's submission that Article 47 CFR did not introduce anything new but reaffirmed existing principles - as set out in ***Unibet***. In that case at paragraph 43 the CJEU said that the detailed procedural rules governing action is for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of those rights (principle of effectiveness).

125. There is sufficient authority before me, for example ***Biggs v Somerset County Council*** and ***Van Campenhout*** to enable me to find that the three month limitation period does not offend EU law. It does not make it impossible or excessively difficult for claimants to exercise those rights.

126. The claimant's complain that there may be holiday pay going back many years. The time limit is not new and the right to paid annual leave is not new. The fact that claimants may not have known about their rights or decided, as was submitted orally on their behalf, that they wanted to "*avoid friction*" with the respondent or they did not "*feel comfortable"* asserting the right (written submission paragraph 60), is a matter for them and a matter they may seek to argue on a reasonably practicable point (upon which I make no comment).

127. It is argued for the claimants that it may mean for some of them that they would have to present further claims each time there was a risk of a break of more than three months. Again I consider that this does not make it impossible or excessively difficult for claimants to exercise their rights. Litigants in person are able to present claim forms online all the time at no financial cost. Whilst it might be inconvenient, it would simply be a case of filling in virtually the same particulars each time and resubmitting.

128. On the issue of whether this tribunal should import the limitation period of the County Court, namely six years, I decline to do so. There were a number of submissions from the claimants on the principle of equivalence making comparison with the right to the National Minimum Wage. I find that this is not an equivalent right, it is a national and not an EU right. For equivalence it is necessary to look at the domestic regime for the enforcement of a European right and the regime for enforcing the European right should not be substantially less favourable than enforcing the equivalent domestic right. The comparison has to be similar one and I find that the right to a NMW is not.

129. I also adopt and agree with the reasoning of Judge Goodman in ***Battan*** that the two year limitation on arrears for unlawful deductions does not breach the EU principle of equivalence. As is said at paragraph 65 of ***Battan*** and applies in the present case, these claimants, unlike Mr King, have taken leave and the issue is within what time they must bring their claim. In further support of this finding I agree with the respondent's

submissions on ***Totel*** (above) and adopt and agree with Judge Goodman's findings in ***Battan*** at paragraphs 76 to 82.

130. The claimants case is that as they are prevented by Regulation 16(4) WTR from bringing a breach of contract claim in the County Court, they should be permitted to do so in the ET as if such rights applied. The position on my finding is that for the purpose of equivalence, it is only necessary to compare with the least favourable means of enforcement, which is an unlawful deductions claim. The claimants accepted that there was no authority for the proposition that it had to be as good as the best domestic law right.

131. Even if I am wrong about that, I find it is not right to say that the County Court is not more favourable overall. There is the need to pay a fee in the County Court, both for issuing proceedings and for making applications within proceedings and the procedures under the CPR are stricter and have more formality.

Remedy

132. I apply and follow the reasoning in ***Santos Gomez*** (above) which says that Regulation 30 WTR does not confer power to award for injury to feelings. The CA said that the phrase in Regulation 30(4) "*just and equitable*" did not confer on the ET a general power to award what they thought ought to be awarded, and they did not have the power under Regulation 30(4) to make an award of compensation for injury to feelings.

133. I find that the same applies to punitive damages. Had Parliament intended this, it was entirely open to it to say this expressly and it has not. The default of the employer is a matter to which the tribunal may have regard and I agree with the respondent that on the wording of Regulation 30(4) it is intended as an amount of compensation. The overarching provision is compensatory and not punitive. I find that this tribunal has no more power to award punitive damages than it does to make an award for injury to feelings.

134. Furthermore, I was taken to no authority that supported the claimants' proposition that there should be a punitive award. I find that the decision of the CA in ***Copple*** supports my finding (Elias LJ at paragraph 29 as set out above). It was open to Parliament to provide clearly for a penal award if that were the intention. I find it was not.

Does leave taken "count" under Regulation 13?

135. Turning now to the claimants' submission that leave is not properly leave under Regulation 13 unless it is taken pursuant to a notice under Regulation 15, I disagree with this. I agree with the respondent's submission that leave which is taken without the formal Regulation 15 requirements being complied with, is still leave for the purposes of

Regulation 15. In the EAT in ***Larner*** (reference ***2011 IRLR 894***) Bean J said at paragraph 13: *If a worker makes, say, an oral request at work one day to take the following week as holiday, that is not compliant with reg. 15(1), even if the employer agrees to the request. If Mr Daniel's argument [for NHS Leeds] were right, the week's holiday arranged at short notice could not be annual leave to which the worker was entitled under reg. 13 or in respect of which he would be entitled to be paid under reg. 16. This would be a curious conclusion".*

136. I agree with this and adopt this reasoning. If the leave has been taken, it is leave for the purposes of Regulation 13. There is no requirement that the notice under Regulation 15 be in writing. Informal arrangements for taking leave are made in workplaces across the country all the time. It does not give rise to a right to take the leave all over again if Regulation 15 notice provisions were not strictly complied with. The leave has been taken. It satisfies the health and safety component.

Determination of the issues

137. Based on the findings and reasons set out above I make the following determination on the issues.

138. Applying the decision of the CJEU in ***King*** did any rights to paid annual leave, which each of the claimants had in principle, carry over from year to year because, prior to 1 January 2018, the respondent did not provide them with any paid annual leave?

139. The answer to this question is that the right to carry over exists subject to qualification. Where claimants have not taken the leave, they retain and carry over the right to do so. This is accepted by the respondent. Where they have taken leave, it is a right to pay. I also agree with the respondent's submission based on paragraph 65 of ***King*** that there is also a question of causation to be considered. Were their rights not exercised "*because [the] employer refused to remunerate that leave"* or were there other reasons?

140. Is it irrelevant that, in the period in respect of which the claims are made, each of the claimants had days on which they did not work for the respondent or at all?

141. I find that it is relevant that the claimants had days on which they did not work for the respondent, in other words where they took leave which was unpaid, this is capable of amounting to annual leave and is relevant to liability, remedy and limitation. It is leave which is capable of fulfilling the health and safety objective and is therefore relevant. Findings of fact will be necessary as to what leave was taken, when and for what reason. As I have found above, if the leave has been taken, it counts for the purposes of Regulation 13

142. What are the principles applicable to limitation? In particular, did time start

to run on 31 December 2017 such that the claims in respect of the whole claim period are necessarily in time?

143. On the issue of whether time started to run from 31 December 2017 such that the whole of any claim, however far back it goes, is within time, I find against the claimants. The limitation rules apply for the same reasons given by Judge Goodman in ***Battan***. An interruption of three months or more is not unlawful, ***Bear Scotland*** is binding in the ET and the two year backdating under the 2014 Regulations does not breach the principle of equivalence. The three month time limit is in use for the vast majority of rights in the ET whether based on EU law or not. For the reasons given above, I decline to import into the ET the time limit and backdating provisions as if this were the County Court.

144. What are the principles applicable to remedy? Is it sufficient for the purposes of the Article 47 CFR that the Tribunal should declare the untaken paid annual leave that has accrued in the case of each claimant?

145. It is not sufficient for the tribunal simply to declare the untaken paid annual leave that has accrued in the case of each claimant. As set out above, findings of fact will be necessary as to what leave was taken, when and for what reason. Article 47 CFR was a reaffirmation of the existing position under EU law, as stated in ***Unibet*** and does not add anything of substance.

146. Does the right to an effective remedy also require that each claimant is in principle entitled to take such leave in the next 12 months, or such longer period as is necessary, where the accrued entitlement is to more than 12 month's leave?

147. Findings of fact are necessary as to what leave was taken, when and for what reason to determine first of all what leave actually carries over. The mechanism for taking that leave must, in default of agreement, be subject to the regime under Regulation 15.

148. Are claimants eligible to be awarded compensation and, if so, calculated on the basis of what principles?

149. Claimants are entitled to pay in lieu of leave on termination or compensation under Regulation 30(1)(a) WTR if they are not permitted to take leave or where leave has been taken and unpaid under Regulation 30(1)(b) or section 23 ERA. I was told that seven of the claimants are no longer in an "employment" relationship with the respondent. There may be termination issues for some claimants related to time away from work. The claimants are not entitled to payment in lieu whilst their employment/engagement continues as this is contrary to Article 7(2) WTD and the health and safety objections of that Directive. The tribunal is not in a position at this stage to make a decision on remedy and this must be a matter either for agreement or a further hearing.

150. The tribunal is able to find that there is no basis for a punitive award.

151. Does the principle of equivalence require that the rules on limitation applicable to such claims should be the same as those which would apply to contract claims in the courts?

152. As given in the reasons outlined above, the claimants are not entitled to the limitation and remedy provisions as if this were a breach of contract claim in the County Court.

153. Finally I would like again to express my gratitude to Dr Moyer-Lee and Mr Purchase for their detailed, thorough and considered submissions, both written and oral and to those who put together the bundles used in the tribunal hearing.

Employment Judge Elliott
Date: 6 February 2020

Judgment sent to the parties and entered in the Register on: 10th Feb 2020 :
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For the Tribunals