Appeal No. UKEAT/0211/19/DA
UKEAT/0003/20/DA
UKEAT/0040/20/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 15, 16 & 17 December 2020
Judgment handed down on 17 March 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR G SMITH — APPELLANT

PIMLICO PLUMBERS LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Ms Heather Williams (One of Her Majesty's Counsel) and Mr David Stephenson (Of Counsel) Instructed by: TMP Solicitors LLP 30th Floor, 40 Bank Street, Canary Wharf, London E14 5NR
For the Respondent	Mr Christopher Jeans (One of Her Majesty's Counsel) and Mr Andrew Smith (Of Counsel) Instructed by: Mishcon de Reya LLP Africa House 70 Kingsway London WC2B 6AH

SUMMARY

WORKING TIME REGULATIONS

The Claimant is a plumbing and heating engineer, who worked for the Respondent from August 2005 to May 2011. Throughout that period, the Respondent maintained that the Claimant was a self-employed independent contractor with no entitlement to paid annual leave. The Claimant did take periods of unpaid leave. On 3 May 2011, the Respondent suspended the Claimant. The Claimant regarded this and other treatment as a fundamental breach entitling him to terminate the contract. On 1 August 2011, the Claimant initiated a claim for, amongst other things, holiday pay. At a hearing in March 2019 (the Claimant's status as a worker having been confirmed by the Supreme Court in the interim), the Tribunal dismissed the holiday pay claim on a preliminary jurisdictional point that it was brought out of time. It did not consider that the CJEU's decision in **King v Sash Window Workshop (C-214/16) [2018] ICR 693 ("King")** entitled the Claimant to bring a claim in respect of unpaid annual leave that was taken. The Claimant appealed contending that the Tribunal had erred in its interpretation of **King** and in determining that his claim was out of time.

Held, dismissing the appeal, that the Tribunal had not erred in its interpretation of **King**. The CJEU's decision in **King** was not concerned with leave that was taken but unpaid, and there was nothing in it to suggest that the carry-over rights in respect of annual leave that is not taken (because of the employer's failure to remunerate such leave) applied to leave that was in fact taken. The Tribunal had also not erred in determining that it had been reasonably practicable for the Claimant to have brought his claim in respect of holiday pay within the relevant time limits.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. This is the latest appeal arising out of an employment relationship between the Appellant, Mr Smith, (referred to here as "the Claimant") and the Respondent that ended almost a decade ago in 2011. The principal question is whether the Claimant is entitled to a payment in lieu of annual leave upon termination, whether such leave was taken or not, in circumstances where the Respondent did not provide any paid annual leave during the relationship.

2. The Respondent operates a plumbing and maintenance business. The Claimant is a plumbing and heating engineer, who worked for the Respondent from August 2005 to May 2011. Throughout that period, the Respondent maintained that the Claimant was a self-employed independent contractor, without entitlement to paid annual leave. Notwithstanding that, the Claimant did from time to time take periods of leave that were unpaid. On 3 May 2011, the Respondent suspended the Claimant and required him to return equipment and a van. The Claimant regarded this as a fundamental breach entitling him to terminate the contract.

3. On 1 August 2011, the Claimant initiated proceedings in the London South Employment Tribunal ("the Tribunal"). His Claim Form included a claim for holiday pay; and a claim for disability discrimination in relation to his alleged dismissal. The Respondent's Grounds of Resistance denied that the Claimant was an "employee" or a "worker"; denied he was entitled to paid annual leave; and denied he was dismissed or discriminated against.

4. At a Pre-Hearing Review in January 2011, the Tribunal decided that the Claimant was an "employee" of the Respondent within the meaning of section 83(2)(a), **Equality Act 2010** ("**EqA**"); and a "worker" within the meaning of section 230(3), **Employment Rights Act 1996** ("**ERA**") and regulation 2(1), **Working Time Regulations 1998** ("**WTR**"). References in this judgment to "employment" and related terms are to employment within the meaning of those provisions. The Respondent unsuccessfully challenged these decisions before the EAT, the Court of Appeal and the Supreme Court. The case then returned to the Tribunal.

5. At a hearing on 18 and 19 March 2019, Employment Judge Morton ("the Judge") dismissed the holiday pay claim on a preliminary jurisdictional point that it was brought out of time. The Judgment and Reasons were sent to the parties on 1 July 2019 ("the Holiday Pay Judgment"). In a subsequent Judgment sent to the parties on 19 December 2019, the Judge refused a reconsideration application ("the Reconsideration Judgment").

6. The disability discrimination claim was heard by the Tribunal (EJ Freer presiding) on 5 to 7 June 2019. The claim was dismissed. The Judgment and Reasons were sent to the parties on 27 September 2019 ("the Disability Discrimination Judgment").

7. The Claimant brings three appeals against those judgments. These are as follows:

   a. An appeal against the Holiday Pay Judgment, sifted to a full hearing by HHJ Eady QC (as she then was);

b. An appeal against the Disability Discrimination Judgment which was sifted to a full hearing by me. The appeal against that judgment is the subject of a separate ruling dismissing the appeal; and

c. An appeal against the Reconsideration Judgment which was also sifted to a full hearing by me.

Factual Background

8. The detailed factual background to this matter has been addressed several times in other judgments and I do not repeat it here. The following passages in the judgment of Lord Wilson in the Supreme Court in this matter (**Pimlico Plumbers Ltd and another v Smith** [2018] ICR 1511 ("the SC Judgment")) provide a helpful summary:

> **"16. Mr Smith made two written agreements with Pimlico, the first dated 25 August 2005 and the second (which replaced the first) made on 21 September 2009 and wrongly dated 21 September 2010. No one has argued that, for the purposes of these proceedings, the agreements have different legal consequences. In places they are puzzling. In his judgment in the appeal tribunal Judge Serota QC concluded that, on the one hand, Pimlico wanted to present their operatives to the public as part of its workforce but that, on the other, it wanted to render them self-employed in business on their own account; and that the contractual documents had been "carefully choreographed" to serve these inconsistent objectives. But the judge rightly proceeded to identify a third objective, linked to the first, namely to enable Pimlico to exert a substantial measure of control over its operatives; and this clearly made development of the choreography even more of a challenge.**
> **17. The first agreement was on a printed form but there were manuscript amendments. The print described it as a "contract"; but the manuscript substituted the word "agreement". Against Mr Smith's name the print explained that it was "name of contracted employee"; but the manuscript added the prefix "sub" to the word "contracted". Against the date of 25 August 2005 the print explained that it was "date of commencement of employment"; but the manuscript deleted the word "employment". The agreement provided that its terms were as set out in a manual entitled "Company Procedures and Working Practices" but, since, as I will explain, the manual was again incorporated into the second agreement, it is convenient to address it in that context.**
> **18. In the second agreement, drafted so as to refer to Pimlico as "the company" and to address Mr Smith as "you", the terms material to the issue before the court were as follows:**

"(a) The company may … terminate [the agreement immediately] if you commit an act of gross misconduct or do anything which brings … the company into disrepute … (b) You shall provide such building trade services as are within your skills … in a proper and efficient manner … (c) You shall provide the services for such periods as may be agreed with the company from time to time. The actual days on which you will provide the services will be agreed between you and the company from time to time. For the avoidance of doubt, the company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the company. However, you agree to notify the company in good time of days on which you will be unavailable for work. (d) You warrant … that … you will be competent to perform the work which you agree to carry out [and] you will promptly correct, free of charge, any errors in your work which are notified to you by the company … (e) If you are unable to work due to illness or injury on any day on which it was agreed that you would provide the services, you shall notify the company … (f) You acknowledge that you will represent the company in the provision of the services and that a high standard of conduct and appearance is required at all times. While providing the services, you also agree to comply with all reasonable rules and policies of the company from time to time and as notified to you, including those contained in the company manual. (g) … you shall be paid a fee in respect of the services equal to 50% of the cost charged by the company to the client in relation to labour content only, provided that the company shall have received clear funds from the client … (h) If an invoice remains unpaid [by the client] for more than one month, the fee payable to you will be reduced by 50%. If an invoice remains unpaid for more than six months, you will not receive a fee for the work. (i) You will account for your income tax, value added tax and social security contributions to the appropriate authorities. (j) You will provide all your own tools, equipment, materials and other items as shall be required for the performance of the services, except where it has been agreed that equipment or materials will be provided through the company. The company may, at a rental price to be agreed with you, provide a vehicle for use in providing the services … If you provide your own materials …, you will be entitled to up to 20% trade mark-up (pre-VAT) on such materials provided [their] cost … is at least £3,000 (pre-VAT) [and otherwise] up to 12·5% … (k) You will have personal liability for the consequences of your services to the company and will maintain suitable professional indemnity cover to a limit of £2m … (l) You shall at all times keep the company informed of your other activities which could give rise to a direct or indirect conflict of interest with the interests of the company, provided that … you shall not be permitted at any time to provide services to any customer … other than under this agreement. (m) … you will not … for three months following [termination of the agreement] be engaged … in any capacity with any business which is … in competition with [the business of the company nor] for 12 months … solicit … the business … of [any customer of the company nor] be involved with the provision of goods or services to [him] in the course of any business which is in competition with [that of the company]. (n) You are an independent contractor of the company, in business on your own account. Nothing in this agreement shall render you an employee, agent or partner of the company and the termination of this agreement … shall not constitute a dismissal for any purpose. (o) This agreement contains the entire agreement between the parties …"

19. The manual was incorporated into the second agreement by virtue of the term recited at para 18(f) above. It obliged him to comply with the manual "While providing the services". My view is that the quoted words are apt to have made the manual govern all aspects of Mr Smith's operations in relation to Pimlico; in

any event, however, the case proceeded before the tribunal on the basis that even after 2009 the manual remained as much a part of the contract as, on any view, it had previously been. Its relevant provisions are as follows:
(a) "[Your] appearance … must be clean and smart at all times … The company logo-ed uniform must always be clean and worn at all times."
(b) "Normal working hours consist of a five-day week, in which you should complete a minimum of 40 hours."
(c) "Adequate notice must be given to control room for any annual leave required, time off or period of unavailability."
(d) "Engineers on-call between 12 p m (midnight)–6 a m will qualify for the 100% rate, providing the office has not taken the job booking [or] for the 50% rate if the office takes the job booking."
(e) "On-call operatives will be given preference for: overtime; better jobs; newer vans."
(f) "Any operative requiring assistance on any job must inform the customer of the additional charges involved … and obtain the customer's approval for such charges."
(g) "Callbacks [for remedial work] must be treated as a matter of absolute priority by all operatives. No further work will be allocated to any operative until his callbacks are attended to … Until all issues have been settled and all callbacks resolved any outstanding money will be held back for the last month … No payment will be made to that operative, unless the customer is completely satisfied … Any claim made against the company as a result of the operative's incompetence/negligence … will be passed on to the operative and his … insurers."
(h) "No payment will be made to the operative until payment in full has been received by the office … A 50% deduction will be made from the operative's percentage if payment is received by the office later than one month from the job date … Invoices which remain unpaid after six months from the date of the job will be written off."
(i) "Pimlico Plumbers' ID cards are issued to every operative … Your ID card must be carried when working for the company."
(j) "Operatives will be issued with a mobile telephone system … The mobile telephone charges, plus VAT, will be deducted from wages on a monthly basis."
(k) "Any individual undertaking private work for or as a result of contacts gained during your working week and contravening the signed contract will be dismissed immediately …"
(l) "Operatives who fail to observe the rules outlined in this working practice manual in respect of procedures or conduct, will be given a warning and may thereafter be subject to instant dismissal."
(m) "Wages will be paid directly into the operative's designated bank or building society account …"
(n) "The following standard rate of van rental charges, payable monthly in advance, allows operatives to work on a self-employed basis: £120 + VAT. This figure will increase if the operative is involved in consistent vehicle damage." (Emphasis added)

9. For present purposes, it is relevant to note that the highlighted provision as to annual leave was the only one in the contract relating to annual leave. During the period 25 August 2005 to 28

April 2011, the Claimant worked solely for the Respondent: see [47(b)], SC Judgment. It is not in dispute that the Claimant received no holiday pay during that period.

10. On 5 January 2011, the Claimant was taken unwell whilst at work. He had a heart attack and was hospitalised for a week, returning to work thereafter from 31 January 2011. Following this absence the Claimant worked 20 hours a week, rather than his usual 40 hours.

11. On 21 April 2011, the Claimant telephoned Dominic Ceraldi, the Respondent's HR manager, requesting to work three days a week as a result of ongoing health issues. Mr Ceraldi said that a fixed three-day week would not normally be suitable. The Claimant emailed him reiterating the request and providing further details of his health.

12. The Claimant last undertook plumbing work for the Respondent on 28 April 2011. Friday, 29 April and Monday, 2 May 2011 were Bank Holidays. On 3 May 2011, the Claimant was signed off work for two weeks with "stress" by his GP, although he did not provide the certificate to the Respondent at the time. On 3 May 2011, Mr Ceraldi replied to the Claimant as follows:

> **"In regards to your request for a reduced working week, the Company has a duty to enquire into the reasons for this. I request that you obtain and provide us with a letter from your General Practitioner, detailing your health problems and whether or not they consider them to be a disability, and any recommendations they make in regards to your health and safety and your physical capability to undertake work. In the interests of your health and safety, any future work will be suspended until this matter is resolved. In the interim, would you also please arrange for the return of all Company property, including; Vehicle, Company Uniform, Mobile Telephone, Identification Badges, Blue Box and Working Practice Manual, Sales Invoice Book, Purchase Order Book and any related paperwork with details of Pimlico Plumber's customers."**

13. When the Claimant read Mr Ceraldi's letter he believed he had been dismissed: [65] to [66], Disability Discrimination Judgment.

The Holiday Pay Judgment

14. In a careful and clearly written judgment, the Tribunal dismissed the Claimant's claim for holiday pay on the basis that the claims had been brought outside the statutory three month time limit set out in regulation 30(2), WTR and s.23(3), ERA. The Tribunal rejected the Claimant's claim that he had been prevented from exercising the right to take leave under regulations 13 and/or 13A, WTR, and did not accept the argument that European law required the distinction between pay and leave in the WTR to be disapplied in the circumstances of this case.

15. The Tribunal was clearly troubled by the way in which the Claimant's claim had been pleaded:

> **"7. Holiday is dealt with in the Claimant's Grounds of Complaint as follows:**
>
> **a. "I took annual leave but R1 did not pay holidays under WTR" (paragraph 5);**
> **b. (Under the heading "Worker"): "As a worker I was denied paid holidays from the outset or at a later stage in my contract" (paragraph 21);**

16. (Under the heading "Unlawful deduction of wages"): "As an employee or worker R1 failed to allow my entitlement to paid holidays from the outset of my employment or at a later stage. This was a continuous failing connected to each annual leave year up to the date of termination on 3 May 2011" (paragraph 37).

> **I find that the claim form set out in general terms a claim for paid holidays under the Working Time Regulations 1998 ("WTR") and a claim by way of unlawful deduction of wages under the Employments Rights Act 1996 ("ERA") although the statutory references were not included.**

8. Holiday is also dealt with in the Claimant's witness statement at paragraph 17 in which he says "At all times from 2005 to 3 May 2011 I worked continuously for Pimlico Plumbers except for holidays and sickness absence. I did not get paid for holidays and sickness absence."

9. Thus on the Claimant's own pleadings and evidence he took annual leave but was not paid for it. The Respondent did not dispute that. It was not the Claimant's case that he was deterred from taking annual leave because he knew that he was not going to be paid. That is a significant distinction in relation to the Claimant's reliance on the case of King v Sash Window Workshop [2018] IRLR 142 (C-214/16) to which I return in the discussion below.

10. The Claimant provided a holiday pay calculation at page 1 of the bundle. This asserted a right to payment for 4.8 weeks' leave in each of the years of his employment ending on 4 April 2009 and payment for 5.6 weeks in the year to 5 April 2010. The calculation did not set out the dates on which holiday had been taken, but asserted an entitlement to a global amount in each holiday year, based on a net amount of pay received by the Claimant.

11. There were several versions of a schedule of loss in the main bundle at pages 35-36, 37-40 and 42-46 and in the supplementary bundle at pages 61-62. In the first version the figure for holiday was "tbc". In the second at page 39 the Claimant asserted that he was entitled to 28 days holiday for the year ending with the termination of his employment (3 May 2011) at £225.26 per day, a total of £6251.28 for that year. Calculations were also given for the previous years, beginning in August 2005 when he was first engaged by the Respondent. The third version of the schedule of loss (page 44) effectively repeated the table in the first version, but inserted higher figures based on the Claimant's gross earnings and used a formula of 12.07% of gross earnings to arrive at an overall figure for unpaid holiday of £74,089.76. The fourth version of the schedule claimed a sum of £74,274.66 by reference to tax years.

12. Nowhere in the documents or the Claimant's pleadings or witness evidence was there a comprehensive statement of when he had taken holiday in any of the years of his employment or precisely how much holiday he had taken. However he did state in paragraph 29 of his witness statement that in the final year of his employment he had taken a period of leave over Christmas, beginning on 18 December and ending on 4 January. He then had a period of sickness absence from 5 January due to his heart attack. This evidence was not challenged."

17. At paragraph 19, the Tribunal again expressed concerns about the pleaded case as follows:

"19. The Claimant's claim for holiday pay was not fully particularised and as noted elsewhere in these reasons he did not set out the details of when he had taken holiday and the number of days for which he sought holiday pay. The facts as I find them are however that the Claimant did take holiday from time to time at Christmas, during the summer holidays and on bank holidays. That was his unchallenged evidence. Paragraph 18 of his witness statement sums it up – "I took leave but I never received holiday pay". He gives further details at paragraphs 19, 20 and 23 and makes a similar statement at paragraph 40. He admits at paragraph 23 that he did not keep a specific record of his holiday – which was understandable given that he did not believe he had a right to paid

holiday at the time. However he gave not a single example of an occasion on which he had been denied the right to take time off."

18. The Tribunal then proceeded to deal with the Claimant's submission that the decision of the CJEU in **King v Sash Windows** [2018] ICR 693 ("**King**") required the Tribunal to interpret the WTR such that the Claimant was entitled to carry over from year to year a right to claim payment for unpaid leave. The Tribunal concluded as follows:

> **"27. I therefore understood the essence of Mr Stephenson's submission to be that as the Claimant did not know that he had the right to leave under the WTR such leave as he did take was not taken in exercise of the right under Regulations 13 (and 13A) and I should decide the case as if the Claimant had been denied the right to leave at all. I do not think that interpretation of the facts of the case or the applicable law is justified or warranted. The CJEU's decision in King was not concerned with leave that was taken but not paid for. It was concerned with leave that had accrued but was not taken because the lack of payment had dissuaded Mr King from taking it. The two sets of facts are therefore fundamentally different. In King the tribunal had distinguished between three types of holiday, (none of which was Mr King paid for):**
>
> **a. 'Holiday Pay 1' was the holiday accrued but untaken at termination in the final leave year;**
> **b. 'Holiday Pay 2' was leave actually taken in the years in which Mr King was working, but in respect of which no payment was made;**
> **c. 'Holiday Pay 3' was the pay in lieu of accrued but untaken leave throughout the whole period of Mr King's employment, that being 24.15 weeks in total.**
>
> **28. By the time of the hearing in the CJEU it was common ground that Mr King had established his entitlement to holiday pay types 1 and 2. The Court's decision therefore only concerned holiday pay type 3 – accrued but untaken leave. If it is the Claimant's case that he had accrued leave but not taken it during his employment that case is unsustainable on the facts. On the Claimant's own evidence he took leave in most if not all the years of his employment. If it is Mr Stephenson's submission that the lack of accurate records of the leave the Claimant took means that I must assume that he did not take any or all of the leave to which he was entitled I disagree with that submission. It would be going too far to suggest that a Claimant who has not made any meaningful attempt to explain the dates on which he took annual leave in all but the most general terms can then claim the benefit of the doubt and be treated as though he has not taken any leave because the Respondent has not kept leave records. The Claimant's claim as pleaded and on the facts can only be a claim for "Holiday Pay 2". The reasoning in the CJEU decision in King did not concern that kind of holiday pay.**
>
> **29. I have nevertheless thought very carefully about this point because the CJEU decision did cast doubt on the compatibility with the EU law of the division in the WTR between the right to pay and the right to leave. But it did so in the context of a set of facts in which Mr King was deprived of a remedy because of this division. Because he had been deterred from taking leave, he could not bring a claim under Regulation 16 – a point identified by the EAT in the case and**

specifically noted by the CJEU in paragraph 43 of its judgment "*As regards the case in the main proceedings, it is clear from the order for reference that the Employment Appeal Tribunal's interpretation of those provisions was, in essence, that a worker (i) could claim breach of the right to annual leave provided for in regulation 13 of the 1998 Regulations only to the extent that his employer did not permit him to take any period of leave, whether paid or not; and, (ii) on the basis of regulation 16 of those regulations, could claim payment only for annual leave actually taken.*" The Claimant is not in that situation – having taken leave he was entitled to bring a claim for payment in accordance with Regulation 16. He therefore was not deprived of an effective remedy. I do not think it is open to me on the facts before me to say that the division between pay and leave in the WTR brought about a situation that deprived the Claimant of his rights under the WTD and that on the facts of this case the WTR regime is therefore incompatible with the WTD. I can see that the second paragraph of the decision of the CJEU could be interpreted as meaning that Mr Stephenson is correct and that the consequence of the denial of one aspect of the right – namely pay – does in effect mean that the right to leave has not been exercised. But the underlying facts of Mr King's case have persuaded me that that is not the meaning of the decision and that to interpret it in the way suggested by Mr Stephenson is going too far.

30. The reason the difference is fundamental concerns, inter alia, the applicable limitation rules, which I deal with in more detail below. King is authority for the proposition that a worker who does not exercise his right to paid leave under the Working Time Directive ("WTD") because his employer refuses to pay for such leave must be permitted to carry over and accumulate such leave until termination of his employment relationship whereupon he is entitled to a single payment in respect of all such untaken leave. The CJEU's ruling means that in cases in which an individual worker has taken less than the leave to which they are entitled because the lack of pay has acted as a disincentive to the taking of leave can accumulate the untaken leave and seek payment in respect of the full accumulated amount regardless of Regulation 13(9) WTR which stipulates that leave must be taken in the year in which it accrues. In other words there is no "use it or lose it" rule where the employer fails to recognise the need for holiday pay (or refuses to pay for it) and the worker does not exercise the statutory right to leave as a result of that failure. As the principle will apply to leave accrued and untaken in the final year of employment as well as in earlier years, provided the worker brings the claim (or initiates early conciliation) within three months of the last payment made to the worker which does not include holiday pay to which the worker is entitled the entire claim will be in time. It will also not be subject to the limitation in s23(4A) ERA, or the decision in Bear Scotland, because the claim would be brought under the WTR, not under ERA section 13.

31. Where the worker has taken leave and is seeking payment on termination under the WTR (the Claimant's position) he is not, in contrast to Mr King, entitled to claim a single payment on termination that has accrued over the years, As Mr Smith in my view correctly submits, each claim for holiday pay must be considered individually and time runs from each instance in which holiday was taken but not paid for. There is no linking or series of deductions provision in the WTR so the tribunal must determine in each case whether the claim has been made within the three month time limit (or whether time should be extended). I have carefully considered Mr Stephenson's submissions to the contrary, but his argument does not seem to me to be sustainable, although I can see the attractions of his suggestion that an employer who has failed to pay for holiday when the worker was entitled to it ought to bear the consequences (to lift a phrase

from the King judgment). The fact remains that the Claimant, unlike Mr King, was not on the facts of this case dissuaded from taking leave and benefitting from periods of rest and relaxation. The King judgment does not suggest that a worker who takes leave but is not paid for it is being deprived of a fundamental European right under the WTD, the Charter of Fundamental Rights or otherwise because that specific issue was not before the Court. In this case the Claimant was not deprived of a remedy in the same was as Mr King by the structure of the WTR and there is therefore no basis in my view arising from the CJEU decision in King for disapplying the provisions of the WTR (Regulation 13(9)) in the way suggested by Mr Stephenson.

32. Given the statements the Claimant himself has made and his failure to particularise any occasion on which he sought to take holiday and was prevented from doing so, any claims under Regulations 13, 13A and 30(1)(a), must fail.

33. I will also briefly make a further point in relation to the Claimant's reliance on European law, which is that the principles established in the relevant case law and in the WTD itself, do not in any event apply to leave under Regulation 13A WTR, which is a purely domestic right. I fully accept Mr Smith's submissions on this point. It is quite clear from the ruling in King that the case concerned only the entitlement to leave under Regulation 13 and not the entitlement under Regulation 13A."

19. The Tribunal then considered whether the Claimant had bought a claim under regulation 14, WTR, and concluded:

> **"42. In my judgment, it was incumbent on the Claimant, who had the benefit of legal representation throughout his case, to plead his claim clearly and unambiguously by reference to the statutory provisions on which he relied. It was also incumbent on him, if he wished to amend his claim or make reference to statutory provisions to which he had not referred in his claim form, to make an application to amend his claim accordingly and to do so in plain terms. He did not make any such application either at or before the hearing, most notably at the hearing before Judge Martin on 26 November 2018 at which a detailed application to amend other aspects of the Claimant's claim was considered (and rejected)."**

20. Having decided that the Claimant was not paid for leave taken and did suffer unlawful deductions from his pay contrary to regulation 16, WTR and section 13, ERA respectively, the Tribunal considered whether the claims in respect of those breaches were brought in time. It concluded as follows:

"Time limits

45. I will therefore deal now with the issues of whether the claim under Regulation 16(1) and the claim under s13 ERA were brought about in time. The relevant statutory time limits are set out above at paragraphs 12 and 13. The relevant findings of fact are at paragraphs 5 – 11 above. In particular I found at paragraph 11 that Claimant's pleadings and witness evidence lacked a comprehensive statement of when he had taken holiday in any of the years of his employment or precisely how much holiday he had taken. His evidence was that he would habitually take time off during the school summer holidays and time off over Christmas. His unchallenged evidence however was that in the final year of his employment he had taken a period of leave over Christmas, beginning on 18 December and ending on 4 January. He then had a period of sickness absence from 5 January due to his heart attack. There was no reference to any later period of holiday during that year in any of the documents.

46. The Claimant's claim form was presented on 1 August 2011. I have already determined that there was no claim under Regulation 14 for holiday accrued but untaken in the final year of the Claimant's employment. If his complaint was that he was not paid for the period of leave taken in December 2010 and January 2011, there being no evidence whatsoever of any period of holiday having been taken at any later date in 2011, any claim under Regulation 16(1) and 30 (1)(b) WTR in respect of that period of leave ought to have been presented under Regulation 30 (2)(a) before the end of the period of three months beginning with the date the payment should have been made. There is a gap in the sequence of payslips between the payslip dated 18/12/2010 (page 115) and the next payslip which was dated 05/02/2011 (page 114). The Claimant's witness statement explained this by reference to his period of sickness absence caused by his having had a heart attack. The Claimant did not advance any argument about when payment for the holiday in December and January should have been made and I have therefore decided this point on the basis that the payment for holiday should have been made with the payslip dated 05/02/2011 – the payslip that next followed the period of holiday absence. The claim for payment in respect of that period of holiday should therefore have been presented on or before 4 May 2011. The Claimant did not put forward any other submission. Self-evidently a claim in respect of any period of holiday preceding Christmas 2010/2011 would have had to have been brought within three months of the payment date relevant to that period of holiday and all such dates would have been earlier than 4 May 2011. The entire claim under Regulation 16(1) and 30(1)(b) WTR was therefore presented outside the statutory time limit.

47. If the Claimant puts his claim as a claim of unlawful deduction from wages under s13 ERA his claim should have been presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made (or if there was a series of deductions the date on which payment of the last in the series should have been made). The same analysis therefore applies – taking the last such payment, assuming that the relevant payslip was the one issued to him on 5 February 2011 he should have presented his claim at the latest by 4 May 2011."

21. As to whether time should have been extended on the grounds that it was not reasonably practicable for the claim to be submitted in time, the Tribunal held as follows:

"50. But having considered both parties' submissions, I preferred those of the Respondent. Reasonable practicability – or, as it also expressed, reasonable feasibility (Palmer v Southend-on-Sea Borough Council [1984] IRLR 119), sets a high bar for a Claimant. I do not agree with Mr Stephenson that the Claimant was not aware of the material facts giving rise to a potential claim – he did know that when he was taking holiday he was not being paid. What he did not know – because at that point the case law had not evolved in such a way as to make the position clear, was that someone providing services in the way that he did was, as a matter of law, entitled to holiday pay. But he was an intelligent man carrying out a professional service. It does not seem to me that there was any impediment to his realising that he might have had more legal rights than he thought in the sense required for the test of reasonable feasibility to be met. It was reasonably feasible to enquire about his rights at any point in his employment as indeed he did once his health deteriorated in 2011.

51. On the question of evolution in the law and its effect on individuals who were unaware of the full extent of their rights before the position was made clear by developments in case law, Mr Smith referred me to Biggs v Somerset County Council [1996] IRLR 203. This was a Court of Appeal decision that addressed the question of the position of a Claimant who brought a claim of unfair dismissal some 18 years out of time, after the ECJ (as it then was) ruled that UK statutory rules imposing longer qualifying periods for bringing unfair dismissal claims on part time workers were incompatible with EU law. The Court of Appeal held that despite the fact that the Claimant could not have known at the time she was dismissed that she had a legal right to bring a complaint, she could in theory have brought a complaint arguing that the statutory provisions which prevented her bringing a claim infringed EU law. Her ignorance of the law was not a factor she was permitted to rely on. The Court held that the expression 'reasonably practicable' was directed to difficulties faced by an individual claimant, such as illness, whereas Mrs Biggs' mistake as to her rights was a mistake of law. Neil LJ said: "*It seems to me that in the context of s.67 the words 'reasonably practicable' are directed to difficulties faced by an individual claimant. Illness provides an obvious example. In the case of illness the claimant may well be able successfully to assert that it was not 'reasonably practicable' to present a claim within three months. But the words 'reasonably practicable', when read in conjunction with a 'reasonable' period thereafter, point to some temporary impediment or hindrance … In my view it would be contrary to the principle of legal certainty to allow past transactions to be re-opened and limitation periods to be circumvented because the existing law at the relevant time had not yet been explained or had not been fully understood*." Accordingly it had been reasonably practicable for Mrs Briggs to present a claim within the prescribed time where he reason for her not doing so was her ignorance of the effects of EU law on UK statutory provisions.

52. The Claimant in this case is in similar circumstances to Mrs Briggs. His failure to assert his right to holiday pay was his ignorance of the effects of the law as it is now understood on his particular circumstances. He wrongly understood himself to be self-employed when he was in fact a worker. That was a mistake of law not fact. Despite Mr Stephenson's attractive argument that an employer who deliberately arranges his affairs so as to circumvent statutory employment rights ought to bear the consequences, that does not itself address the question of what it was reasonably practicable for the employee to do. I prefer Mr Smith's submission that there was nothing impeding the Claimant from finding out what his true employment status was by bringing proceedings in one of the earlier years of his employment, or within three months of any of the dates

> **on which he asserts he did not receive a payment of holiday pay to which he was entitled. I also consider that I am bound to apply the analysis of the Court of Appeal in Biggs. I therefore find that it was reasonably practicable for the Claimant to have brought his claims under the WTR and the ERA within the relevant statutory time limits in relation to each payment claimed, notwithstanding the fact that he mistakenly understood himself to have been self-employed and not entitled to holiday pay."**

22. The Tribunal also found that, even if it was not reasonably practicable for the claim to be submitted within the primary time limits, the Claimant had not presented his claims within a reasonable further period: [53].

23. At [54] to [59] of the Reasons, the Tribunal rejected a submission that the effect of European law was that the time limit provisions in domestic law ought to be disapplied. Finally at [60] to [70], the Tribunal dealt with an argument that the judgment of Langstaff P of the Employment Appeal Tribunal in **Bear Scotland Ltd v Fulton** [2015] IRLR 150 should not be followed on the basis that it had been wrongly decided. As to that contention, the Tribunal, having referred to the first instance judgment in **Battan and ors v Lloyds Bank and ors,** (Case No 2200055/2018), held as follows:

> **"66. The tribunal in Battan therefore agreed that it was bound to follow the decision in Bear Scotland as regards UK law and s23 ERA specifically. I accept Mr Smith's submission that I am bound by Bear Scotland as regards its interpretation of the domestic statutory provisions and it is not open to me to decline to follow it. As I have already said, Mr Stephenson also effectively conceded that in paragraph 60 of his submissions. If the EAT's interpretation of s23 ERA in Bear Scotland is wrong then that issue will need to be dealt with on appeal."**

24. Accordingly, the Claimant's claim for holiday pay was dismissed.

A

Legal Framework

EU law provisions

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25. The WTR were made under section 2(2) of the **European Communities Act 1972** to implement in domestic law **Directive 2003/88/EC** of 4 November 2003 on working time ("**the Directive**" or "**WTD**"). Article 1 provides that the purpose of the Directive is to lay down

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"minimum safety and health requirements for the organisation of working time".

26. Article 7, WTD provides:

> **"Annual leave**
> **"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."**

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27. Article 17, WTD provides that Member States may not derogate from Article 7.

28. The right to annual leave is also enshrined in the EU **Charter of Fundamental Rights** ("**the Charter**"). Article 37(2) of the Charter provides:

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> **"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."**

29. Article 47 of the Charter provides:

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> **"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…"**

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30. The purpose of the requirement for annual leave is to ensure the worker receives "actual rest, with a view to ensuring effective protection of his health and safety": **Stringer v Revenue and Customs Comrs** [2009] ICR 932 CJEU at [23]; and **NHS Leeds v Larner** [2012] ICR 1389 CA, per Mummery LJ at [37].

Domestic law provisions

31. Regulation 13, WTR provides for a right to four weeks' leave in each leave year. That is the right deriving from WTD. Regulation 13A, WTR provides for the purely domestic right to an additional period of leave, which currently stands at 1.6 weeks. So far as relevant, these provisions of the WTR (as amended recently in light of the coronavirus pandemic) provide:

> **"13 Entitlement to annual leave**
> **(1) Subject to paragraph (5), a worker is entitled to four weeks annual leave in each leave year.**
> **…**
> **(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –**
> **(a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due; and**
> **(b) It may not be replaced by a payment in lieu expect where the worker's employment is terminated.**
> **(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11)**
> **(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.**
> **(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.**
> **(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).**
> **13A Entitlement to additional leave**
> **(1) Subject to regulation 26A and paragraphs (3) and (5) a worker is entitled**
> **in each leave year to a period of additional leave determined in accordance with paragraph (2).**
> **…**

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days."

32. There is no entitlement to a payment in lieu of leave not taken during a leave year save where, as per regulation 14, WTR, the employment is terminated in the course of a leave year. Regulation 14 provides:

"14 Compensation related to entitlement to leave
(1) This regulation applies where –
(a) a worker's employment is terminated during the course of his leave year, and
(b) on the date on which the termination takes effect ("the termination date") the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.
(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
…
(5)Where a worker's employment is terminated and on the termination dated the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10 and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave."

33. Regulation 16, WTR confers an entitlement to payment in respect of periods of leave:

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

34. Regulation 30, WTR deals with remedies. It provides:

"30 Remedies
(1) A worker may present a complaint to an employment tribunal that his employer–
(a) has refused to permit him to exercise any right he has under–
(i) regulation 10(1) or (2) , 11(1), (2) or (3) , 12(1) or (4), 13 or 13A;…….
(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."

35. In **Revenue and Customs Comrs v Stringer** [2009] ICR 987 ("**Stringer**"), the House of Lords held that "wages" in section 23, ERA included claims for payments for annual leave under regulation 16 and claims for payment in lieu on termination under regulation 14, WTR. In turn this meant that the worker could rely on the "series of deductions" provisions in section 23, ERA to claim in relation to payments from earlier leave years. The relevant provisions of the ERA are as follows:

"13 Right not to suffer unauthorised deductions
(1) An employer shall not make a deduction from wages of a worker employed by him unless—
…
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

23 Complaints to employment tribunals
(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…

(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
(b) …
the references in subsection (2) to the deduction…are to the last deduction…in the series...
(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 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)."

EU provisions and domestic law

36. The principles applicable when interpreting domestic law provisions compatibly with EU law are well-established and not disputed. When national courts apply domestic law they are bound to interpret it, so far as possible, in light of the wording and the purpose of the directive concerned, in order to achieve the result sought by the directive: **Marleasing SA v Commercial Internacional de Alimentacion SA** (Case C-106/89) [1990] ECR I-4135; and **Plumb v Duncan Print Group** [2016] ICR 125, per Lewis J at [40]. This includes an obligation to change established case law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of the directive: **Max-Planck-Gesellschaft Zur Förderung Der Wissenschaften EV v Shimizu** [2019] 1 C.M.L.R. 35 ("**Shimizu**") at [60].

37. Article 7, WTD cannot be applied directly in a dispute between private individuals / bodies (as is the case here): **Shimizu** at [68]. However, the right to paid annual leave is an essential principle of EU social law and article 31(2) of the Charter can be relied on directly in such situations: **Shimizu** at [74] to [79]. Accordingly, if it is impossible to interpret the national legislation at issue in a manner consistent with article 31(2) of the Charter, it will be for the national court to ensure the full effectiveness thereof, by disapplying that national legislation: **Shimizu** at [80].

38. Ms Williams QC, who appears with Mr Stephenson (who appeared alone below) on behalf of the Claimant, submits that, when an issue arises as to whether domestic legislation complies with article 7, WTD and/or article 31(2) of the Charter in a dispute between private parties, the correct approach for the national court is to:

(1) ascertain what is required by the EU provisions;

(2) consider if this is given effect to by the WTR;

(3) if it is not, then consider whether the domestic legislation can be re-interpreted to give effect to the requirements of WTD and article 31(2), Charter; and

(4) if it is not possible to do so, disapply the legislative provision and permit direct reliance upon article 31(2), Charter.

39. I agree that that is the approach that emerges from the authorities.

40. The Community principle of national autonomy recognises that, in general, it is for member states to determine the procedural conditions governing legal actions intended to ensure

the protection of rights conferred by Community law: **Levez v T. H. Jennings (Harlow Pools) Ltd** [1999] ICR 521 CJEU.

41. However, this independence in procedural matters is subject to the following qualifications. Firstly, the principle of equivalence requires that the rules of procedure laid down by domestic law for the exercise of the rights derived from EU law must not be less favourable than those governing similar domestic actions. Secondly, the principle of effectiveness requires that procedural requirements for domestic actions must not make it virtually impossible, or excessively difficult, to exercise the rights conferred by EU law: **Levez** at [21] to [23].

The importance of the EU right to paid annual leave

42. As has been stated above, paid annual leave is a particularly important principle of Community social law from which there can be no derogations: **NHS Leeds v Larner** [2012] ICR 1389 CA per Mummery LJ at [37(2)]. The issue in that case was whether a worker who had not taken paid annual leave in the relevant leave year because of absence from work on long-term sick leave was entitled to a payment in lieu. The Court of Appeal held that the worker was so entitled. In coming to that conclusion, Mummery LJ summarised (at [37]) some further principles derived from the CJEU's case law as it stood then. So far as relevant, they included the following:

> **"(3) While it is for the member states to lay down conditions for the exercise and implementation of the right, they must do so "without making the very existence of that right…subject to any preconditions whatsoever."**
> **……**
> **"(5) National legislation may also provide for the loss of the right to paid annual leave at the end of a leave year or of a carry forward period, 'provided, however, that the worker who has lost his right to paid annual leave has actually the opportunity to exercise the right conferred on him by the Directive."**

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> …..
> **"(8) With regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship."**

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King v Sash Windows Workshop

43. In **King**, the CJEU considered for the first time a situation where the worker had not received paid annual leave because his employer wrongly characterised him as self-employed. I consider this decision in more detail in the discussion below, as a key dividing issue between the parties is as to the effect of that decision. For present purposes, it suffices to set out a brief description of the facts, the five questions referred by the Court of Appeal and the CJEU's conclusions.

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44. On the termination of his contract, Mr King brought claims under the WTR in respect of three types of holiday, which were not paid: a claim for accrued but untaken holiday in the final leave year ("Holiday Pay 1"); a claim for payment in respect of leave actually taken over the years ("Holiday Pay 2"); and a claim for a payment in lieu of untaken accrued leave throughout the whole period of his employment, that being 24.14 weeks in total ("Holiday Pay 3"). The Tribunal considered that Mr King was a "worker" and found for him in relation to all three claims. By the time the case reached the Court of Appeal, it was common ground that Mr King was a worker and that he was entitled to sums in respect of Holiday Pay 1 and Holiday Pay 2. Thus, the only issue referred to the CJEU concerned Holiday Pay 3, i.e. a claim for payment for accrued leave not taken during the whole of the employment. The parties' positions on this issue were summarised by the CJEU as follows:

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> **"20. Regarding holiday pay type 3, Sash WW claims that, under regulation 13(9)(a) of the 1998 Regulations, Mr King was not entitled to carry over periods of untaken annual leave into a new holiday year. By failing to bring an action pursuant to regulation 30(1)(a) of the Regulations, Mr King lost all entitlement in respect of annual leave, since a claim for payment in lieu of paid annual leave not taken in respect of the holiday years in question was time-barred.**
> **21. By contrast, Mr King takes the view that his rights in respect of paid annual leave not taken because it would have been unpaid by the employer were carried over into the next holiday year, notwithstanding regulation 13(9)(a), and then from year to year until the date of termination of the employment relationship. Mr King claims, with reference to Stringer v Revenue and Customs Comrs (Joined Cases C-350/06 and C-520/06) [2009] ICR 932; [2009] ECR I-179, that the right to payment in lieu of paid annual leave not taken did not arise until termination of the employment relationship and, accordingly, that his claim was brought in time.**
> **22. The referring court, noting that United Kingdom law does not allow annual leave to be carried over beyond the leave year for which it is granted and does not necessarily ensure an effective remedy for breach of article 7 of Directive 2003/88 , expresses doubt as to the interpretation of the relevant EU law for the purpose of resolving the dispute pending before it."**

45. At [24], the CJEU set out the five questions it had to consider:

> **24. In those circumstances, the Court of Appeal (Civil Division) decided to stay the proceedings and to refer the following questions to the court for a preliminary ruling:**
> **"(1) If there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to article 7 of Directive 2003/88 , is it compatible with EU law, and in particular the principle of effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid?**
> **"(2) If the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it?**
> **"(3) If the right carries over, does it do so indefinitely or is there a limited period for exercising the carried-over right by analogy with the limitations imposed where the worker is unable to exercise the right to leave in the relevant leave year because of sickness?**
> **"(4) If there is no statutory or contractual provision specifying a carry-over period, is the court obliged to impose a limit to the carry-over period in order to ensure that the application of the national legislation on working time does not distort the purpose behind article 7?**
> **"(5) If the answer to the preceding question is yes, is a period of 18 months following the end of the holiday year in which the leave accrued compatible with the right set out in article 7 [of Directive 2003/88] ?"**

46. The CJEU's conclusion in respect of the first question is at [47]:

> **"In light of all of the foregoing considerations, the answer to the first question is that article 7 of Directive 2003/88 and the right to an effective remedy set out in article 47 of the Charter must be interpreted as meaning that, in the case of a**

dispute between a worker and his employer as to whether the worker is entitled to paid annual leave in accordance with article 7 of the Directive, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave."

47. As to the second to fifth questions, the CJEU held as follows at [65]:

"It follows from all the foregoing considerations that the answer to the second to fifth questions is that article 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".

Withdrawal Act 2018

48. Before leaving this summary of the legal framework, I deal briefly with the effect of Brexit and the **European Union (Withdrawal) Act 2018** ("**the WA 2018**") on my analysis of the relevant law. The relevant provisions for present purposes are as follows:

"5 Exceptions to savings and incorporation (in force as from 31 January 2020)

(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day;
(2) Accordingly the principle of the supremacy of EU law continues to apply on or after exit day (31 January 2020) so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.
…
(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.
(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).
…"

49. Although the Charter is no longer part of domestic law, paragraph 39 of Schedule 8 to the WA 2018 provides:

(1) Subject as follows and subject to any provision made by regulations under section 23(6), section 5(4) and paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before exit day (as well as anything occurring on or after exit day)

(2) Section 5(4) and paragraphs 1 to 4 of Schedule 1 do not affect any decision of a court or tribunal made before exit day.
(3) Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before exit day.
…

50. These provisions in Schedule 8 to the WA 2018 are not yet in force. However, it is clear that if brought into force, the present proceedings would fall within the exception provided by paragraph 39(3) of Schedule 8, as they were brought before a tribunal before exit day and are not yet finally decided. Even if these provisions are not brought into force, as Ms Williams submits, the provisions of the Charter recognise established fundamental principles of EU Law and would therefore be applicable by reason of the retention in domestic law after exit day of "fundamental rights or principles" that exist irrespective of the Charter. Mr Jeans acknowledges that whilst one cannot say whether these provisions will be brought into force, it has no practical effect in this case as the issue is not as to the status of EU law but its meaning.

51. As such, I proceed on the basis that the WA 2018 or related legislation does not substantively affect the issues I have to consider.

Grounds of Appeal

52. There are five grounds of appeal. Ms Williams addressed these in the following order:

a. Ground 2, Holiday Pay Appeal: that the Tribunal misdirected itself in law and/or misconstrued the CJEU's decision in **King**, in finding that the Claimant was not denied his right to Euro-leave under regulation 13 so that any claim under regulation, 30(1)(a) WTR failed;

b. Ground 5, Holiday Pay Appeal: that the Tribunal erred in law in finding the Claimant had not brought a claim in respect of an accrued entitlement to Euro-leave on termination under regulation 14, WTR:

c. Ground 1, Holiday Pay Appeal and Ground 1, Reconsideration Appeal: If and in so far as the Claimant's claim was restricted to non-payment for holidays taken (contrary to Grounds 2 and 5 above), the Tribunal erred in law in finding that his claim was brought outside of the three-month time limit. These grounds apply to both Euro-leave and additional leave;

d. Ground 3, Holiday Pay Appeal: If and in so far as his claim was restricted to non-payment for holidays taken and was brought outside the primary time limit (contrary to Grounds 2, 5 and 1 above), the Tribunal erred in law in concluding that the Claimant had not shown that it was not reasonably practicable for him to bring the claim within the primary time limit; and

e. Ground 4, Holiday Pay Appeal: If he was entitled to pursue a deduction of wages claim under section 23, ERA, the Tribunal was wrong to conclude that he was precluded from claiming for deductions made prior to a longer than three months gap since the last 'in time' deduction as a result of the EAT's decision in *Bear Scotland v Fulton* [2015] ICR 221.

53. I shall consider each ground of appeal in that same order.

Ground 2 – Did the Tribunal misconstrue King and err in finding that the Claimant was not denied his right to paid annual leave under regulation 13, WTR?

Outline of the Claimant's Submissions

54. Ms Williams submits that the Tribunal erred in five principal respects. Firstly, Ms Williams submits that the Tribunal misunderstood the proper scope of the CJEU's decision in **King**. **King** made clear that the right to annual leave and to payment for leave were two aspects of a single right, and that the right to an effective remedy (as required by article 47 of the Charter) precluded the worker from having to take his leave first in order to establish the right to be paid for it. Accordingly, the Tribunal erred in concluding that **King** did not suggest that a worker who takes leave but is not paid for it is deprived of a fundamental right under the WTD or the Charter. In fact, submits Ms Williams, that is precisely what the CJEU in **King** did say.

55. Secondly, the Tribunal erred in concluding that **King** was confined to cases of untaken holiday or Holiday Pay 3 claims (as defined by the tribunal in **King**). Ms Williams submits that on a proper reading of **King**, the principles set out were not so confined and the Tribunal should have found that the Claimant, in being denied paid annual leave, was denied the rights conferred by article 7, WTD and regulation 13, WTR, throughout the period that he worked, in respect of all of his leave entitlement, both taken and untaken.

56. Thirdly, the Tribunal erred in finding that the Claimant was not entitled to carry over any entitlement to be paid for leave actually taken. It is submitted that a proper application of **King** (and subsequent CJEU decisions) means that there is a right to carry over such entitlement to paid annual leave irrespective of whether that leave was taken.

57. Fourthly, the Tribunal erred in treating the Claimant's claim as being only for unpaid leave actually taken. It is submitted that the Tribunal's approach, whereby a claim could only be made out if the Claimant could establish that he was in fact dissuaded from taking leave, was contrary to the clearly stated principle that the worker is not required to prove any deterrent effect. In fact, as set out in **Kreuziger v Land Berlin**, Case C-619/16 [2019] 1 CMLR 34 ("**Kreuziger"**) at [53], the burden of establishing that a worker is actually given the opportunity to exercise the right to take the paid annual leave to which he is entitled lies with the employer. A further related error lies in the Tribunal's mischaracterisation of the Claimant's claim as being confined to one for payments for leave taken. That finding was contrary to the claim being pursued and to the unchallenged evidence of the Claimant that he was underpaid holiday pay by reference to both taken and untaken leave.

58. Fifthly, Ms Williams submits that by reason of the foregoing errors, the Tribunal erred in failing to conclude that the WTR, which did not allow the carry-over of any entitlement to holiday pay, whether taken or not, did not provide an effective remedy. It was submitted that, by analogy with the approach in the cases of **NHS Leeds v Larner** and **Plumb v Duncan Print Group** (the annual leave during sickness cases), the WTR could be re-interpreted to provide an effective remedy to enable the carry-over of such entitlement. I was provided with some suggested additional wording to be inserted into regulations 13 and 14.

Outline of the Respondent's Submissions

59. Mr Jeans submits that the Claimant is seeking impermissibly to recast what was clearly a claim for payment for leave that he did in fact take into one for a payment in lieu upon termination

in respect of unpaid leave, whether taken or not, accrued over the whole of his employment. The claim as pleaded, which was for unpaid leave actually taken, was clearly out of time and there is nothing in any EU law that invalidates the applicable time limits, or which has the effect of transmogrifying the Claimant's pleaded claim into something that it is not. The Claimant was at all times professionally represented and could have sought permission to amend his claim but did not do so. The Tribunal was correct, submits Mr Jeans, to conclude that the Claimant's claim was not that he was deterred from taking annual leave; that distinguished it from **King** where the worker was dissuaded from taking and benefitting from such leave.

60. The CJEU stated at [15] of **King** that Mr King "sought to recover payment for his annual leave – taken and not paid as well as not taken – for the entire period of his engagement". Mr Jeans submits that that shows that the CJEU treats unpaid leave as still amounting to "leave" within the meaning of article 7, WTD. The Tribunal was correct to say, at [31] of the Reasons, that **King** "does not suggest that a worker who takes leave but is not paid for it is being deprived of a fundamental European right under the WTD, the Charter… or otherwise because that specific issue was not before the Court".

61. A proper reading of **King** establishes that the case was very much about the right to payment for accrued but untaken leave. There was no need for the CJEU to say anything about the rights of a person who has in fact taken his leave: such a person can bring a claim, subject to any procedural requirements such as time limits. EU law, consistently with the principle of national procedural autonomy, respects time limits. The relevant time limits here cannot be said to make it impossible to exercise those rights. It is only in the special circumstances of deterrence,

whereby the worker has not been afforded a proper opportunity to exercise the right to annual leave, that the right to carry over could arise.

62. Mr Jeans accepts that if the Claimant had not taken his leave, and made a claim for payment in respect of such untaken leave at the end of his employment, he would have had a claim under **King**. I was provided with an alternative suggestion as to wording that could be read into regulations 13 to take account of the principles established in **King**. However, none of that can assist the Claimant, who did in fact take his leave.

Discussion

63. The starting point is to determine what was decided in **King**. Mr King had brought a claim both in respect of taken and untaken leave. However, the claim for payment for leave actually taken (Holiday Pay 2) had been resolved before the referral to the CJEU: see [19] of **King**. Thus, the factual context for the questions referred was a Holiday Pay 3 claim, i.e. a claim for pay in lieu of accrued but untaken leave.

64. The first question referred asks whether it is compatible with EU law, and in particular the principle of effective remedy, for the worker to have to take leave first before establishing whether he is entitled to be paid. That question might itself arguably be said to encompass the situation of a worker who has taken leave for which he has not been paid as well as one who had not taken the leave at all. Both are concerned to receive payment in circumstances where there is a dispute as to whether there is an entitlement to paid annual leave. The fact that the former has taken the leave, and so performed the condition the compatibility of which is in question, does

not necessarily exclude him from the scope of that question. However, the better view, in my judgment, is that this question is really directed at those who have not taken the leave at all. That that is the case emerges from the factual context in **King**, and from the fact that a claim for pay in respect of leave taken (a Holiday Pay 2 claim) was expressly not before or considered by the Court.

65. The CJEU answers the first question at [32] to [47] of **King**. The first few of those paragraphs emphasise the importance of the right:

> **"32. First, as is clear from the very wording of article 7(1) of Directive 2003/88 , a provision from which no derogation is permitted by that Directive, every worker is entitled to paid annual leave of at least four weeks. That right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself: *Sobczyszyn v Szkola Podstawowa w Rzeplinie (Case C-178/15) [2016] ICR D21; [2016] IRLR 725*, para 19 and the case law cited.**
> **33. Second, it must be noted that the right to paid annual leave is expressly set out in article 31(2) of the Charter, which article 6(1)EU of the EU Treaty recognises as having the same legal value as the Treaties: *KHS AG v Schulte (Case C-214/10) [2012] ICR D19; [2011] ECR I-11757*, para 37.**
> **34. Third, it is clear from the terms of Directive 2003/88 and the court's case law that, although it is for the member states to lay down the conditions for the exercise and implementation of the right to paid annual leave, they must not make the very existence of that right, which derives directly from that Directive, subject to any preconditions whatsoever: *Stringer v Revenue and Customs Comrs [2009] ICR 932*, para 28.**
> **35. Fourth, it is also clear from the court's case law that Directive 2003/88 treats the right to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement that the leave be paid is to put the worker, during such leave, in a position which is, as regards salary, comparable to periods of work: *Lock v British Gas Trading Ltd (Case C-539/12) [2014] ICR 813*, para 17 and the case law cited."**

66. There can be no doubt, from the tenor of these passages, as to the very high importance attached by the CJEU to the right to *paid* annual leave with the CJEU describing the right to

annual leave and to payment on that account "as being two aspects of a single right". The reason that pay is as important as the leave to which it relates is set out in the next few paragraphs:

> **"36. It follows from the foregoing that, when taking his annual leave, the worker must be able to benefit from the remuneration to which he is entitled under article 7(1) of Directive 2003/88 .**
> **37. 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: see, inter alia, *Stringer* , para 25, and *Sobczyszyn* , para 25.**
> **38. However, as the European Commission notes in its written observations, a worker faced with circumstances liable to give rise to uncertainty during the leave period as to the remuneration owed to him, would not be able to fully benefit from that leave as a period of relaxation and leisure, in accordance with article 7 of Directive 2003/88 .**
> **39. Similarly, such circumstances are liable to dissuade the worker from taking his annual leave. In that regard, it must be noted that any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave: *Lock* , para 23 and the case law cited.**
> **40. Against that background, contrary to what the United Kingdom maintains in its written observations, observance of the right to paid annual leave cannot depend on a factual assessment of the worker's financial situation when he takes leave." (Emphasis added)**

67. The right to remuneration, the benefit of which must be available when leave is taken, is as important as the rest and relaxation which that leave affords. It is clear from these passages that the mere taking of leave, where that leave is unpaid, would not necessarily result in the benefit of rest and relaxation to which the worker is entitled. The uncertainty as to remuneration would preclude such benefit. It cannot be said that the uncertainty is necessarily removed in cases where the worker is aware from the outset that leave will be unpaid. The uncertainty to which the CJEU refers must mean the uncertainties created by having to take leave without pay. It is not unreasonable to assume that a worker who takes time off knowing that he will be paid in full during that period will benefit more from the rest and relaxation afforded by a period of leave than a worker who has to ensure that he has sufficient funds to make the leave affordable, and who may, as a result take less or no leave. The CJEU makes the same point where it states, at

[39] that ".. such circumstances [i.e. uncertainty as to remuneration] are liable to dissuade the worker from taking his annual leave."

68. The CJEU then goes on to consider whether there is an effective remedy:

> **"42. In the present case, it is clear from the order for reference that the right to paid annual leave laid down in article 7 of Directive 2003/88 is implemented, in the United Kingdom, by two separate regulations of the 1998 Regulations, namely, regulation 13, which recognises the right to a period of annual leave, and regulation 16, which establishes the right to the payment of that leave. Following the same logic, regulation 30(1) of those Regulations recognises workers' right to two separate judicial remedies, the worker being able to bring an action before a court either to contest the refusal by his employer to recognise his right to a period of annual leave under regulation 13, or to argue that his employer has not paid him for all or part of that leave pursuant to regulation 16.**
> **43. As regards the case, it is clear from the order for reference that the Employment Appeal Tribunal's interpretation of those provisions was, in essence, that a worker (i) could claim breach of the right to annual leave provided for in regulation 13 of the 1998 Regulations only to the extent that his employer did not permit him to take any period of leave, whether paid or not; and (ii), on the basis of regulation 16 of those Regulations, could claim payment only for leave actually taken."**

69. The CJEU clearly notes at [43] that the EAT in **King** had determined that the WTR permitted a worker to claim that there was a breach of regulation 13, WTR "only to the extent that his employer did not permit him to take any period of leave, whether paid or not". It goes on to say:

> **"44. However, in a situation in which the employer grants only unpaid leave to the worker, such an interpretation of the relevant national remedies would result in the worker not being able to rely, before the courts, on the right to take paid leave per se. To do so he would be forced to take leave without pay in the first place and then to bring an action to claim payment for it.**
> **45. Such a result is incompatible with article 7 of Directive 2003/88 for the reasons set out in paras 36–40 above.**
> **46. A fortiori, in the case of a worker in a situation such as that of Mr King, if the national remedies are interpreted as indicated in para 43 above, it is impossible for that worker to invoke, after termination of the employment relationship, a breach of article 7 of Directive 2003/88 in respect of paid leave due but not taken, in order to receive the allowance referred to in article 7(2) . A worker such as Mr King would thus be deprived of an effective remedy.**
> **47. In the light of all the foregoing considerations, the answer to the first question is that article 7 of Directive 2003/88 and the right to an effective remedy set out in article 47 of the Charter must be interpreted as meaning that, in the case of a**

> **dispute between a worker and his employer as to whether the worker is entitled to paid annual leave in accordance with article 7 of the Directive, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave." (Emphasis added)**

70. The use of the phrase, "A fortiori" (i.e. all the more so) in [46], in relation to Mr King's case does suggest that the circumstances set out in that paragraph (i.e. where the claim is for leave not taken) are not the only ones in which the incompatibility of the available remedy arises. However, that does not mean that the Claimant's situation, whereby leave is taken, is another such case. In the preceding paragraphs, the CJEU was dealing with the situation where, in respect of each leave year, the worker had not taken leave. A worker in that position should be entitled to make a claim for payment without having to take that leave. It was in comparison to a worker in that position that Mr King's position, whereby he had not taken some or all of his leave for several successive years up to his termination, was even stronger.

71. The second to fifth questions referred to the CJEU (see paragraph 43 above) are dealt with at [48]ff in **King**. The questions are summarised at [48]:

> **"48. By its second to fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether article 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."**

72. It is relevant to note that the CJEU refers here to the carrying over and accumulation of "paid annual leave rights not exercised", and does not appear to be confining its analysis to that involving untaken leave. It would arguably be inconsistent with what the CJEU said at [32] to [39] of **King** if the taking of unpaid leave amounted to the exercise of "paid annual leave rights",

although it could amount to a partial exercise of the right, full exercise having been precluded by the employer's failure to pay. The CJEU goes on to say:

> **49. In that regard, in order to respond to those questions, it must be noted that the court has previously been called upon, inter alia, in *Stringer v Revenue and Customs Comrs [2009] ICR 932* , to rule on questions concerning a worker's right to paid annual leave which he was unable to exercise until termination of his employment relationship due to reasons beyond his control, specifically because of illness.**
> **50. In the present case, it was indeed for reasons beyond his control that Mr King did not exercise his right to paid annual leave before his retirement. The court points out, in this respect, that even if Mr King could, at some point during his contractual relationship with his employer, have accepted a different contract providing for the right to paid annual leave, that is irrelevant in answering the present questions referred for a preliminary ruling. The court must take into consideration, in that regard, the employment relationship as it existed and persisted, for whatever reason, until Mr King retired, without him having been able to exercise his right to paid annual leave.**
> **51. Thus, it must be noted, in the first place, that Directive 2003/88 does not allow member states either to exclude the existence of the right to paid annual leave or to provide for the right to paid annual leave of a worker, who was prevented from exercising that right, to be lost at the end of the reference period and/or of a carry-over period fixed by national law: *Stringer*, paras 47 and 48 and the case law cited.**
> **52. Moreover, it is clear from the court's case law that a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu under article 7(2) of Directive 2003/88. The amount of that payment must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship: *Stringer*, para 61.**

73. The CJEU refers throughout these passages to the right to *paid* annual leave, and emphasises the importance of workers not being prevented "from exercising that right". It is certainly arguable that the CJEU did not consider that the taking by a worker of unpaid leave of itself amounted to the full exercise of the right to paid annual leave, and that the worker's ability only to exercise the right partially (by taking only unpaid leave) was for "reasons beyond his control". That is because the worker was subject to a contractual arrangement (which must be taken "as it existed and persisted": [50]) that precluded pay for leave taken.

74. The CJEU then goes on to express its conclusions:

> **"58. First, according to the court's settled case law, the right to paid annual leave cannot be interpreted restrictively: *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol (Case C-486/08) [2010] ECR I-3527*, para 29. Thus, any derogation from the European Union system for the organisation of working time put in place by Directive 2003/88 must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which that derogation protects: *Union Syndicale Solidaires Isère v Premier Ministre (Case C-428/09) [2010] ECR I-9961*, para 40 and the case law cited.**
> **59. In circumstances such as those at issue, protection of the employer's interests does not seem strictly necessary and, accordingly, does not seem to justify derogation from a worker's entitlement to paid annual leave.**
> **60. It must be noted that the assessment of the right of a worker, such as Mr King, to paid annual leave is not connected to a situation in which his employer was faced with periods of his absence which, as with long-term sickness absence, would have led to difficulties in the organisation of work. On the contrary, the employer was able to benefit, until Mr King retired, from the fact that he did not interrupt his professional activity in its service in order to take paid annual leave.**
> **61. Second, even if it were proved, the fact that Sash WW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is for the employer to seek all information regarding his obligations in that regard.**
> **62. Against that background, as is clear from para 34 above, the very existence of the right to paid annual leave cannot be subject to any preconditions whatsoever, that right being conferred directly on the worker by Directive 2003/88. Thus, it is irrelevant whether or not, over the years, Mr King made requests for paid annual leave: *Bollacke v K + K Klaas & Kock BV & Co KG (Case C-118/13) [2014] ICR 828* , paras 27–28.**
> **63. It follows from the above that, unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer who does not allow a worker to exercise his right to paid annual leave must bear the consequences.**
> **64. Third, in such circumstances, in the absence of any national statutory or collective provision establishing a limit to the carry-over of leave in accordance with the requirements of EU law (*KHS AG v Schulte [2012] ICR D19* and *Neidel v Stadt Frankfurt am Main (Case C-337/10) [2012] ICR 1201*), the European Union system for the organisation of working time put in place by Directive 2003/88 may not be interpreted restrictively. Indeed, if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that Directive, which is that there should be due regard for workers' health.**
> **65. It follows from all the foregoing considerations that the answer to the second to fifth questions is that article 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."(Emphasis added)**

75. What emerges from these passages is that although the second to fifth questions are asked in the context of Mr King not having taken some or all of his leave, the CJEU's answers are more broadly formulated and could be read as encompassing the situation where an employee has not been paid for leave taken. Ms Williams relies on these passages, read with those at [36] to [40] of **King**, in support of the contention that the right to carry over "paid annual leave rights" applies as much to the worker who has taken unpaid leave as it does to the worker who was deterred from taking some or all of the leave to which he is entitled. Notwithstanding the force of Ms Williams' submissions, I find myself unable, ultimately, to accept them for the following reasons.

76. The fact that the CJEU refers to "paid annual leave rights" does not extinguish or diminish the significance of the distinction between the worker who has taken leave and the one who, as a result of his employer's refusal to pay, has not. In identifying the right that may be carried over, the CJEU refers to "paid annual leave rights *not exercised* in respect of several consecutive reference periods *because* his employer refused to remunerate that leave" (my emphasis). A worker who takes his leave, albeit unpaid, cannot be said to be in a position where he has not exercised the right to paid annual leave. He has, at the very least, exercised that right in part, by taking the leave in question. Furthermore, the worker has exercised that right *despite* the employer's refusal to remunerate that leave, not *because* of it. It would be illogical to describe a worker who takes his leave as having done so *because of* the employer's failure to remunerate that leave. There is no causality in that situation between the employer's failure and the taking of the leave. Of course, the employer's failure might result in the worker taking less leave than that to which he was entitled. Insofar as the worker did curtail the exercise of his right, there would

be a causal connection between that proportion of leave that remained untaken and the employer's failure to pay, but not otherwise.

77. The carry-over right to which the CJEU refers gives rise to the allowance under Article 7(2) of the Directive, which provides that "The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated." The allowance must obviously be in lieu of leave not taken: if leave had been taken then the payment would not be in lieu. That follows from the ordinary and natural meaning of the wording of article 7. The case of **Maschek v Magistratsdirektion der Stadt Wien – Personalstelle Wiener Stadtwerke,** C-341/15, [2016] IRLR 801, referred to in **King** in Advocate General Tanchev's opinion at [67], puts the matter beyond any doubt:

> **"26. It should also be noted that art 7(2) of Directive 2003/88, as interpreted by the Court, lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended …**
> **27. It follows, in accordance with art 7(2) of Directive 2003/88, that a worker who has not been able to take all his entitlement to paid annual leave before his employment relationship has ended, is entitled to allowance in lieu of paid annual leave not taken. In that respect, the reason for which the employment relationship has ended is not relevant." (Emphasis added)**

78. Article 7(2) cannot therefore be invoked to confer an entitlement to an allowance in respect of leave that is taken, because any such allowance would not be an allowance in lieu. The CJEU's judgment in **King**, which, as set out above, was decided specifically in the context of a claim in respect of untaken leave, does not suggest otherwise.

79. King was considered by the CJEU in three subsequent decisions, all of which were issued on the same date, 6 November 2018. The first is **Kreuziger**, in which a legal trainee with a public

authority made a claim, at the end of his traineeship, for payment in lieu of paid annual leave not taken and not requested. This was refused on the grounds that German law did not provide for a payment in lieu on termination to trainees in these circumstances. On referral, the CJEU was asked whether article 7(2), WTD, precluded provisions that excluded the entitlement to a payment in lieu upon termination where the worker did not apply for paid annual leave even though he could have done so. The CJEU, having reiterated the importance of the right to paid annual leave, and the affording of an opportunity to exercise that right (at [41] to [50]), held that such provisions were precluded: see [56]. At [52] to [53] some guidance was given on the relevant burden of proof:

> **"53. In addition, the burden of proof in that respect is on the employer (see, by analogy, *Robinson-Steele [2006] 2 C.M.L.R. 34* at [68] and the case law cited). 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 to which he is entitled, it must be held that the loss of the right to such leave, 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, respectively, to art.7(1) and art.7(2) of Directive 2003/88." (Emphasis added)**

80. This passage is unambiguous as to where the burden of proof lies in respect of establishing that the worker has been afforded an opportunity to exercise the right to take paid annual leave: it lies with the employer. That is not contentious. What is in dispute is whether this case assists the Claimant. The Respondent submitted that the highlighted words indicated that this case too was about untaken leave, and did not affect the Claimant, who had in fact taken leave. I agree with that submission. The CJEU's reference to an "allowance in lieu of annual leave not taken" further confirms that this case was about untaken leave. For reasons already discussed, an allowance in respect of leave that is taken would not be a payment in lieu within the meaning of article 7(2), WTD.

81. The second of the three cases post-**King**, is **Shimizu**. In **Shimizu** an employee of an entity governed by private law claimed for 51 days' paid annual leave which had not been taken prior to termination. There was a requirement for the worker to apply for leave with an indication of preferred dates before it could be granted. The claim was refused because national law precluded a claim for a payment in lieu of leave except for leave not taken in the year for which it had been granted. The CJEU confirmed (at [61]) that EU Law precluded the national law in question and confirmed that this applied even where the dispute was between two private parties:

> **"75. Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, that the national court must disapply national legislation negating the principle, recalled at [54] of this judgment, that a worker cannot be deprived of an acquired right to paid annual leave at the end of the leave year and/or of a carry-over period fixed by national law when the worker has been unable to take his leave, or correspondingly, of the entitlement to the allowance in lieu thereof upon termination of the employment relationship, as a right which is consubstantial with the right to "paid" annual leave. Under that provision, nor may employers rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.**
> **…**
> **81. In the light of all the foregoing considerations, the answer to the second question is that, in the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with art.7 of Directive 2003/88 and art.31(2) of the Charter, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the <u>allowance in lieu of leave not taken</u> which must be paid, in that case, directly by the employer concerned." (Emphasis added)**

82. Once again, the CJEU refers to an allowance in lieu of leave not taken and does not directly address the position of the worker who has taken unpaid leave.

83. The final post-**King** case to which I was referred is **Stadt Wuppertal v Bauer** C-569/16 [2019] 1 CMLR 36, in which the claim for holiday pay was made by the estate of the deceased worker and where national law precluded such a claim. The CJEU held as follows:

> **63. It follows that the answer to the first part of the question in Case C-569/16 and to the first part of the first question in Case C-570/16 is that art.7 of Directive 2003/88 and art.31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, upon termination of the employment relationship because of the worker's death, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance. (Emphasis added)**

84. The highlighted passages appear to confirm that this too was about untaken leave.

85. Taking account of the decision in **King** and the other authorities above, my views as to the Claimant's arguments under this ground of appeal are as follows:

86. I do not accept Ms Williams' submission that the Tribunal construed **King** too narrowly. At [21] of its Judgment, the Tribunal stated that the decision in **King** "was not concerned with leave that was taken but not paid for". That is correct; the factual context in **King** was that of a worker who had not taken some or all of his leave. Of course, that would not be determinative in itself as it would be open to the CJEU to decide issues of principle that were of more general application. Although some of the CJEU's remarks could be said to apply more broadly, there is nothing in **King** that dispenses with the distinction between untaken leave and leave which is taken but unpaid. Not only was that the factual context of the case in **King**, the CJEU's decisions as to carry-over, and the applicability of the right to an allowance in lieu under article 7(2), can only apply, in my judgment, in respect of leave that is not taken.

87. The Claimant places considerable reliance on the following statements by the CJEU in support of his contention that the effect of **King** was to create a right to carry over his entitlement to paid annual leave, even in respect of leave that was taken, and to claim an allowance in lieu on termination:

a. "*the right to annual leave and to a payment on that account [are] two aspects of a single right*": **King** at [35]. Whilst that may be the case, the CJEU was not thereby seeking to suggest that the taking of leave without pay would of itself give rise to the carry-over rights referred to subsequently in its judgment. The CJEU does not suggest anywhere in its judgment that the approach taken in the domestic provisions contained in WTR of separating the right to leave (under regulation 13) and the right to be paid for such leave (under regulation 16) was inappropriate or contrary to the exercise of the right. Indeed, at [42] of **King**, the CJEU expressly refers, without demur, to the UK's implementation of the WTD "by two separate regulations" and "following the same logic, regulation 30(1) … recognises workers' rights to two separate judicial remedies".

b. *"…the right to an effective remedy… preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave*": **King** at [47]. This statement of the CJEU in **King** is perhaps the principal plank on which the Claimant's case rests. However, in so stating, the CJEU was, in my judgment, merely establishing that a worker who had not taken any leave (by reason of his employer's failure) should not be denied the right to seek payment in respect of that untaken leave. The EAT in **King** had interpreted regulation 13 and 16, WTR to mean that a claim for payment could only be made in respect of leave that was refused and

where leave was actually taken: **King** at [43]. That interpretation would require the worker (where there is no express refusal) to take the leave in order to establish the right to be paid for it. It was that interpretation that was rejected by the CJEU and which led it to conclude as it did, thereby entitling the worker who does not take leave (because of his employer's refusal to pay for such leave) to carry over the right to be paid in lieu upon termination. However, the CJEU's conclusion does not assist the Claimant because he *did* take his leave and he was thereby in a position to exercise his right to claim a payment for it pursuant to regulation 16, WTR, subject to any procedural rules that apply.

88. The Tribunal in the present case concluded that, "The **King** judgment does not suggest that a worker who takes leave but is not paid for it is being deprived of a fundamental European right under the WTD, the Charter … or otherwise because this specific issue was not before the Court." In light of the importance attached by the CJEU to the pay element of the right, the first part of the Tribunal's conclusion misstates the position. It is clear, on my reading of **King**, that the absence of pay for annual leave does amount to the denial of a fundamental aspect of the right to paid annual leave. However, that misstatement does not affect the Claimant, whose position (as the Tribunal correctly identified) was different from that of Mr King in that he had taken the leave and was not thereby precluded by domestic legislation from bringing a claim for pay in respect of such leave.

89. I have considered whether, in the light of **King**, it can be said that the taking of unpaid leave can still amount to the taking of leave within the meaning of article 7, or whether such unpaid leave can never do so because of the omission of one of the two aspects of the same right,

namely the right to paid annual leave. On one view, it might be said that the CJEU's powerful statements as to the importance of being remunerated during leave mean that that any unpaid leave is tainted by uncertainties that would deprive a worker from fully benefitting from the intended rest and relaxation that he must be afforded. However, I do not consider that the CJEU did go as far as to suggest that. The CJEU's references to being dissuaded from taking leave and the deterrent effect of the employer's practices tend to suggest that its focus was on the situation where leave is not taken as a result of the uncertainties as to pay. Had it been the CJEU's intention to develop, through its judgment in **King**, a carry-over right in respect of leave that is taken but unpaid, one could have expected it to say so in terms, especially as the right to an allowance on termination only applies, as it stands, in lieu of leave not taken, and as a carry-over right to that effect would negate the procedural limits applicable in respect of regulation 16, WTR claims.

90. In my judgment, therefore, and contrary to Ms Williams' submissions, the Tribunal did not err in considering that the principles established in **King**, insofar as relevant to the present case, were limited to cases of leave that is not taken. The situations considered by the CJEU to be incompatible with article 7 of the Directive and article 47 of the Charter were all ones where the leave had not been taken.

91. It is suggested by the Claimant that the Tribunal had erred in holding, contrary to the EU caselaw, that he had to prove that he was deterred from taking leave. I am unable to discern from the Tribunal's Judgment, any requirement that the Claimant had to prove that he was deterred. The Tribunal does refer at [31] of the Judgment to the fact that "… the Claimant, unlike Mr King,

was not on the facts of this case dissuaded from taking leave and benefitting from periods of rest and relaxation". However, that is a finding that follows from the undisputed fact that leave was taken; it does not, in my judgment, disclose any inappropriate burden being applied. Had the Claimant sought to rely upon periods of untaken leave, he would not have been required to prove that this was because he was dissuaded from taking them: where the employer does not pay for leave, the deterrent effect of the employer's practices is likely to be assumed: **King** at [39].

92. I have not found the task of interpreting the effect of the CJEU's decision in **King** an easy one. However, I am fortified in my conclusion that Ms Williams' interpretation is not correct by the following three matters:

a. First, Ms Williams' interpretation, if correct in cases of leave that is taken but unpaid, would render the time limits for claims under regulations 13 and 16 ineffective. The worker who (as in the Claimant's case) exercised his contractual right to take unpaid leave over a number of years (and who can thereby be reasonably be assumed not to have been deterred from taking such leave) would be able to accumulate a claim for payment for such leave to be made at the conclusion of termination without regard to those time limits. However, there is nothing in the **King** judgment that suggests that the CJEU had any difficulty with those time limits, which are well within the scope of the procedural autonomy afforded to Member States in respect of rights under European law. On the contrary, as I have already mentioned, the separation in the WTR between the enforcement of the right to leave and the right to be paid for that leave was mentioned by the CJEU in **King** without demur.

b. Second, it would give rise to an inconsistency of approach as between cases of unpaid leave and those where a worker receives partial or incomplete payment for the leave taken in respect of leave years other than in the year of termination. Ordinarily, a worker in the latter case would be required to make a claim for the balance of his entitlement within three months of the date on which part-payment is made. Ms Williams did not suggest that the time limit should be disapplied in a part-payment case or that any right of carry-over could apply in respect of the shortfall in each leave year. However, that would mean (if the Claimant is correct) that the carry-over right would apply where no payment is made for leave taken, but would not apply where there was partial payment. I could see no principled basis for such a difference. The relevant time limits ought to apply whether the shortfall is partial or complete. It was suggested that there was a difference between an employer who refuses to provide any remuneration for leave (and who would thereby be denying the worker rights in respect of paid annual leave) and one who accepts that payment is due but makes an incorrect payment. However, it seems to me that the employer who underpays for annual leave is also denying the worker their right to paid annual leave and there is no distinction in principle.

c. The Claimant's approach would create a new right for the payment upon termination for carried over rights in respect of annual leave that goes beyond that sanctioned by article 7(2), WTD.

The Claimant's case below

93. There was considerable argument before me as to the way in which the Claimant's case was pleaded. The Respondent, not unjustifiably, complained that the pleaded case was all about payment for leave taken and not one for a payment in lieu upon termination in respect of unpaid leave, whether taken or not, accrued over the whole of his employment. The question is whether the Claimant is now, as the Respondent contends, seeking to recast his complaint below into something different.

94. The Grounds of Claim are not a model of drafting. They do, as Mr Jeans fairly points out, refer at certain points to the Claimant not being paid for leave taken. He submits that there is no suggestion in the Claim for a payment in lieu of leave (PILOL) or a claim under regulation 13, WTR that leave was refused, and that the only reference to a claim that might reflect what is now being argued appears under the heading "Unlawful Deduction of Wages". Ms Williams submits that the claim was one for paid annual leave, and that once the effect of **King** is understood, it becomes unnecessary to specify whether leave was taken or not, since any unpaid leave would not discharge the obligation to provide paid annual leave.

95. In my judgment, Mr Jeans' submissions are to be preferred. The Grounds of Claim at [21], state that, "As a worker I was denied paid holidays from the outset …". That is an accurate statement of the contractual position which precluded any paid annual leave. At [37] and [43], the Grounds of Claim provide:

> **Unlawful deduction of wages**
> **37.As an employee or worker R1 failed to allow my entitlement to paid holidays from the outset of my employment or at a later stage. This was a continuous**

failing connected to each annual leave year up to the date of termination on 3 May 2011.
…
Remedy
…
43.I seek compensation for … unpaid wages, unpaid holiday, …"

96. Now here in the Grounds of Claim does one find any express reference to a claim for a PILOL upon termination, which is what the Claimant sought before the Tribunal. At most, the Grounds of Claim can be said to include a claim for paid annual leave for each year of employment. However, even where that claim is made, it unhelpfully appears under a heading for a claim for unlawful deduction from wages. Ms Williams correctly points out that the conclusion of the House of Lords in **Stringer** was that the definition of wages under s.27, ERA includes payments for annual leave: **Stringer** at [24] to [29], and submits that, as such, the heading does not preclude the claim as one brought under the WTR. I agree that the heading does not preclude such a claim, but one can expect at the very least a correct statement as to the *substance* of the claim being made. That paragraph does not refer to a payment in lieu upon termination in respect of any accrued entitlement. In the context of holiday pay, where there are several distinct and separate rights that may be established, and which may give rise to different remedies, it is incumbent upon the Claimant to be specific. That should not be read as an injunction to stipulate specific statutory provisions in every case: in the relatively informal setting that is the employment tribunal, it is the substance of the pleaded case that matters. However, that relative informality cannot be relied upon to advance claims that are not, as a matter of substance, alleged.

97. Part of the Claimant's case as to the Tribunal's mischaracterisation of his claim is based on the contention that the Tribunal misconstrued the scope of **King**. I accept that if **King** were to be construed as the Claimant contends then that might have cast his claim in a different light. As it is, however, the Tribunal did not err in its analysis of **King**. Without the benefit of a favourable interpretation of **King**, the Claimant is left with the pleaded case as it stands.

98. The Claimant sought to bolster his contentions as to the pleaded case by reference to subsequent Schedules of Loss and his witness statement. I found these documents to be of limited assistance for the simple reason that they cannot of themselves be treated as amending or adding to the pleaded case. I accept that the Schedules of Loss are at least consistent with the broad non-specific claim that the Claimant was not afforded his right to paid annual leave. The Schedule of Loss dated 4 October 2018, for example, states that the Claimant was "denied paid annual leave pursuant to contract and/or [regulation 13 WTR and article 7 WTD] …", and included a claim for the sum of £74,086.76 in respect of "gross unpaid holiday pay accrued at the date of termination…".

99. The witness statement contained a claim for a similar sum. It included a table in support which indicated that the leave taken fell short of the annual leave entitlement each year. The sum claimed was based on the full entitlement to annual leave over the years of employment. It is possible to infer from this that the Claimant's claim included one for untaken leave as well as for payment in respect of unpaid leave that was taken. However, there is no clear statement to that effect anywhere in the Statement. The Claimant says that this evidence, which was not challenged

by the Respondent, cannot be reconciled with the Tribunal's statement that, "If it is the Claimant's case that he had accrued leave but not taken it during his employment that case is unsustainable on the facts": Reasons [28]. That statement must, however, be read with the rest of that paragraph:

> **"On the Claimant's own evidence he took leave in most if not all the years of his employment. If it is Mr Stephenson's submission that the lack of accurate records of the leave the claimant took means that I must assume that he did not take any or all the leave to which he was entitled I disagree with that submission. It would be going too far to suggest that the Claimant who has not made any meaningful attempt to explain the dates on which he took annual leave in all but the most general terms can then claim the benefit of the doubt and be treated as though he has not taken any leave because the respondent has not kept leave records…"**

100. What the Tribunal highlights here is the lack of clarity as to the Claimant's claim in respect of untaken leave and explains why it would not be appropriate to give him the benefit of the doubt. That conclusion falls within the broad discretion available to Tribunals in such matters and is not undermined by the fact that one could potentially infer an unspecified claim for untaken leave from the Schedule of Loss and/or the Statement. Those documents do not fill in the evidential gaps and/or ameliorate the lack of clarity that the Tribunal mentions.

101. Thus, even allowing for the fact that the Claimant's claim is to be taken at its highest at this preliminary stage, the case for accrued but untaken leave was simply not put in a way that the Tribunal would be bound to accept.

Conclusion on Ground 2

102. For these reasons, Ground 2 of the appeal fails and is dismissed.

Reinterpretation of the WTR in the light of King

103. Of course, the WTR draws a distinction between the right to take leave and the right to be paid for it, each such right giving rise to separate routes to remedy. Both parties are agreed that the effect of **King** is that regulation 13(9), WTR, which requires that leave be taken in the leave year in respect of which it is due and may not be replaced by a payment in lieu except upon termination, is incompatible with article 7, WTR. However, they disagree as to the nature and extent of that effect and the way in which regulation 13 would need to be reinterpreted so as to render it compatible.

104. The Respondent submits that regulation 13, WTR can be re-interpreted by inserting an exception in respect of untaken leave that follows the model established by recent amendments to the WTR to account for those who could not take some or all of the leave to which they are entitled as a result of the effects of coronavirus: see regs 13(10) and (11), WTR. The Respondent's proposed amendment permits carry-over where, in any leave year, a worker was "unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because of the employer's refusal to remunerate the worker in respect of such leave".

105. Ms Williams's objections to the Respondent's formulation are largely based on her arguments on Ground 2 being upheld. Accordingly, I accept that the Respondent's formulation is correct, as it appears to me to be consistent with what the CJEU said at [65] in **King** as to "paid

annual leave rights not [being] exercised … because his employer refused to remunerate that leave". The full reinterpreted wording of regulations 13, 14 and 30, WTR (which also takes into account the interpretation applied by the Courts in **NHS Leeds v Larner** and **Plumb v Duncan Print Group**) is set out in the Appendix to this Judgment.

Ground 5 – Did the Tribunal err in law in finding the Claimant had not brought a claim under regulation 14, WTR?

106. As set out above, regulation 14, WTR entitles a worker to a PILOL in respect of untaken leave in the year of termination. The Claimant contends that his claim did include a regulation 14 claim. The significance of this is that, as such payment would be due on termination (3 May 2011), the claim (which was presented on 1 August 2011), would be in time.

107. Ms Williams submits that, read fairly, the Claimant's claim: (a) included a claim for holiday pay accrued on termination; and (b) included a pro-rata element for the termination year. The Tribunal's reasons for rejecting the claim included the absence of any reference to regulation 14 in the Grounds of Claim. Ms Williams submits that this cannot suffice since the Tribunal accepted that there were claims under regulation 16, WTR, which was also not expressly pleaded. A further reason given by the Tribunal was that paragraph 37 of the Grounds of Claim, which was relied upon by the Claimant as containing the regulation 14 claim, appeared under the heading, "Unlawful deduction of wages". Ms Williams submits that, notwithstanding the heading, the substance of the complaint was clear and certainly did not exclude a regulation 14 claim.

108. Mr Jeans submits that the Tribunal's conclusions are unimpeachable in this regard and that if the Claimant had wanted to raise a regulation 14 claim, as he now contends, it was open to him to seek leave to amend. He was professionally represented throughout, and one can infer that the reason for not seeking an amendment, even after concerns were flagged by the Respondent in its skeleton argument for the hearing below, was that there were no instructions to do so or that there was some other tactical reason for not pursuing an amendment at that stage. Neither is a good reason for not amending, and it is not open to the Claimant to seek effectively to amend his case at this stage in order to put forward the case that he wished he had back in 2011: see **Khatun v HSBC Bank plc** [2018] UKEAT/0198/17/DA (unreported) at [41].

109. Ms Williams' retort to Mr Jeans' failure to amend point is that, as the regulation 14 claim was already included, there was no need to amend.

Discussion

110. Tribunals are to be afforded considerable latitude in decisions as to the scope of pleaded cases. Bearing in mind the relative informality required of pleadings in the employment tribunal, in construing the pleaded case, tribunals should consider the substance of the case being alleged, and not necessarily treat the failure to refer to a particular statutory provision as being determinative.

111. In the present case, the Claimant relies upon paragraph 37 of the Grounds of Claim as including a regulation 14 claim. I have already considered this above under Ground 2 – see paragraphs 92 to 99 above - and concluded that paragraph 37 does not, in substance, encompass a PILOL claim. That suffices to dispose of this ground of appeal. I deal briefly however, with Ms Williams' further argument in support of this ground, namely that the Tribunal was wrong to rely upon the failure to refer expressly to regulation 14 when it accepted that there were claims under regulations 13 and 16 even though they too were not mentioned in terms. The Tribunal's conclusions in this regard are at [41] of the Judgment. Once again, it is necessary to look at the whole of the passage to understand why the Tribunal considered the absence of any reference to regulation 14 to be particularly significant:

> **"41. Nor did any of the three versions of the Claimant's list of issues refer to Regulation 14. The second and third versions of the Claimant's list of issues referred specifically to Regulation 13, but there was no mention of Regulation 14 in any of the Claimant's versions of his claims or the issues arising under them. The Respondent also drew my attention to Claimant's document headed "Claimant's reply to Respondent's submission dated 1 November 2019" served on 10 January that stated: "*For the avoidance of doubt these Particulars to do not replace, amend or otherwise change what is pleaded in the Grounds of Claim. Specifically it does not change or replace the Claimant's entitlement to paid annual leave under Regulation 13 and 16 WTR*". Again, there is no mention of Regulation 14. I concluded that there was no claim under Regulation 14 and accordingly no basis on which the tribunal could make an order for the Respondent to make a payment to the Claimant under Regulation 30(1)(b) for pay in respect of holiday accrued but not taken in the final year of employment."**

112. It is apparent that in written submissions the Claimant had expressly stated (in relation to further particulars provided): "For the avoidance of doubt these Particulars do not replace, amend or otherwise change what is pleaded in the Grounds of Claim. Specifically it does not change or replace the Claimant's entitlement to paid annual leave under Regulation 13 and 16 WTR". It is in that context that the Tribunal remarked that there was no mention of regulation 14. Thus, there is a clear reason for the different and less generous approach taken in respect of regulation 14, namely that even when clarifying his case, the Claimant did not seek to rely expressly on that

provision, whereas he did refer to regulations 13 and 16. In the circumstances, I do not consider that the Tribunal erred in its approach to this issue.

113. Accordingly Ground 5 of the appeal also fails and is dismissed.

<u>Ground 1</u>: Did the Tribunal err in finding that the claim was brought outside of the three-month time limit?

114. This ground arises if (as is the case) I find against the Claimant on Grounds 2 and 5. The result of dismissing those grounds is that the Claimant's claim can only be a claim under regulation 16, WTR for payment in respect of leave taken in the 2010/2011 year. Any claim under regulation 16(1) and 30(1)(b) WTR in respect of that period of leave would have had to have been presented under regulation 30(2)(a), WTR before the end of the period of three months beginning with the date the payment should have been made. A period of leave was taken between 18 December and 4 January 2011. The relevant payslip for that period was dated 5 February 2011. On that basis the Tribunal found that that claim should have been presented by 4 May 2011. The Claimant contends that the Tribunal failed to take into account his pleaded case, which made reference to two Bank Holidays on Friday 29 April and Monday 2 May 2011. The relevant passages in the Grounds of Claim provide:

> **"27. On Thursday 28th of April 2011 I had a job in Blackheath which was a free estimate. I rang the control room after completing the estimate. I spoke to Katie. She gave me a job upturn. I said I did not feel well and was going home. We had a heated conversation. She said I could not go home. I said I was going home and she put the phone down on me. There was a bank holiday from Friday, 29 April 2011 until Monday 2 May 2011. I did not work.**
> **28. I went to my GP on Tuesday, 3 May 2011 and was signed me (sic) off work for two weeks due to stress. I was having uncontrollable heart palpitations."**

115. Ms Williams submits that the natural reading of this passage in the Grounds of Claim is that the Claimant: (a) worked on 28 May; (b) did not work on 29 April and 2 May because they were Bank Holidays; and (c) did not work on 3 May because he was signed off sick. The taking of two Bank Holidays in respect of which the Claimant was entitled to paid annual leave meant that the relevant payslip for any claim for holiday pay was his final payslip dated 21 May 2011. On that basis the claim, which was presented on 1 August 2011, was presented in time.

116. The Bank Holiday claim was not addressed in the Holiday Pay Judgment, but was addressed in the Reconsideration Judgment. The Tribunal concluded that there was no basis for varying the finding of fact that the last period of leave taken was in January 2011. This was because the Tribunal interpreted the passage at paragraph 27 of the Grounds of Claim as meaning that he was unwell and taking sick leave in respect of those two days rather than taking annual leave. Its conclusions were as follows:

> **"20. The whole of the Claimant's argument about the time limit in this application is based on paragraph 27 of his Grounds of Claim and specifically this passage: "I said I did not feel well and was going home. We had a heated conversation. She said I could not go home. She said that if she did not feel well she still had to work. I said I was going home and she put the phone down on me. There was a bank holiday from Friday 29 April 2011 until Monday 2 May 2011. I did not work." The Claimant's application turns on whether I can interpret this passage as meaning that he took holiday over that weekend. What he actually says suggests that he was unwell and taking sick leave. The two are not however mutually exclusive – an individual can take annual leave and be unwell on the same day.**
>
> **21. But that is not what the Claimant says was what happened. He did not say, even in his witness statement for the hearing, that on the weekend of 29 April 2011 he took annual leave and happened to be feeling unwell throughout. He does however say in his witness statement that he had taken a period of leave over Christmas, from 18 December to 4 January. He was clear about that, whilst in paragraph 27 he is not clear. He mentions the bank holiday, but does not say that he was not working because it was a bank holiday. If he had said that, or had given evidence that he never worked on bank holidays, but always took them as leave, a different interpretation might have been possible. But as noted, a clear statement of when he took leave, was not made available to me at the hearing and in no part of the evidence available to me did Mr Smith say that he always took leave when there was a bank holiday. There is no statutory right to leave on bank**

holidays per se in UK law, so that the mere fact that there was a bank holiday does not establish that the Claimant was on holiday that day. If that is the premise of Mr Stephenson's submission, in my view it is an incorrect premise. In my judgment the onus was clearly on the Claimant to establish on the facts that he was on holiday on 29 April and 2 May 2011 and the evidence he has produced falls short of establishing that. A more natural interpretation of what he chose to say is that he was not working because he was ill. It cannot be assumed from the mere fact that there was a bank holiday that the Claimant was in fact on holiday."

117. Ms Williams submits that those conclusions were contrary to the evidence and perverse. The only evidence was that which appeared in paragraphs 27 to 28 of the Grounds of Claim and these clearly distinguished between the Claimant not working due to the Bank Holidays and subsequently being signed off sick. There could be no reason other than that he was taking leave for mentioning that there was a Bank Holiday on those two days.

118. Mr Jeans commenced his submissions on this issue by pointing out an inconsistency in the Claimant's case: the Claimant's skeleton argument below stated that he was written to by the Respondent on 3 May 2011 "After a period of absence due to ill health…". That makes it clear, submits Mr Jeans, that the Claimant accepted that the absence was for ill health up to that date, and it is not now open to the Claimant to contend otherwise. The Tribunal's conclusions were, in any event, well within the latitude afforded to Tribunals on the presentation of the claim and are not open to serious challenge.

Discussion

119. In my judgment, the natural and ordinary meaning of the relevant passages in the Grounds of Claim is that the Claimant had a bout of illness that commenced on Thursday 28 April 2011,

and that that was the reason for going home that day. Whilst there is reference to the two Bank Holidays and to not working, the fact that the reason for absence was ill health is confirmed by the following paragraph which refers to being signed off for work due to stress. There is, in other words, a continuum between the illness on 28 April and being signed off on 3 May 2011, with nothing unambiguously asserting or suggesting that the Bank Holidays in between were in fact taken as leave. It is relevant in this regard that the Claimant's case as presented below was, or at least appeared to be, consistent with that reading of the passages in the Grounds of Claim. Insofar as there might have been any ambiguity about the matter, it would appear to be resolved by what was said in the skeleton argument.

120. The interpretation contended for by Ms Williams fails to give effect to the express statement in the Grounds of Claim that the Claimant said to the controller on Thursday, 28 April 2011 that he "did not feel well and was going home". Had it been the intention to allege that the absence on subsequent days was for some reason other than ill health, it would have been incumbent upon the Claimant to say so. However, he does not. There is, I accept, a reference to the fact that two of the subsequent days were Bank Holidays. However, in the absence of any assertion that these were being taken as leave, the Tribunal cannot be faulted for not drawing that conclusion. That is all the more so where, as the Tribunal correctly noted, there was no other evidence to suggest that the Claimant always took Bank Holidays as leave, and nor was there any clear evidence setting out the days being claimed as leave.

121. In any event, this is, as Ms Williams fairly acknowledged, a perversity challenge. It seems to me that even if, contrary to my view, there is some ambiguity as to what is set out in the Grounds of Claim, the conclusion that the Tribunal reached was one that was plainly open to it and was supported by the evidence.

122. This ground of appeal fails and is dismissed.

Ground 3 – Did the Tribunal err in concluding that the Claimant had not shown that it was not reasonably practicable for him to bring the claim within the primary time limit?

123. As the Tribunal found that the Claim was not presented within the applicable three-month time limit, the next issue was whether or not it was reasonably practicable to have done so. If it was not reasonably practicable, then the Tribunal may extend time if it considers that the claim was presented within a reasonable period thereafter. The Tribunal considered that the only basis on which the Claimant contended that it was not reasonably practicable was his ignorance of his legal rights at the time. As to that, the Tribunal considered that it was bound by the decision of the Court of Appeal in **Biggs v Somerset County Council** [1996] ICR 364. In that case, the claimant, a part-time teacher, was dismissed in 1976 and remained unaware of the possibility of bringing a claim for unfair dismissal until 1994 when the House of Lords ruled that the longer qualifying periods for part-time workers in respect of such claims were discriminatory and incompatible with EU law. The industrial tribunal found that although it had not been reasonably practicable to bring the claim in time, it would not be reasonable to extend time. The Court of

Appeal concluded that it was reasonably practicable to have brought the claim in time. Neil LJ, giving the judgment of the Court in **Biggs**, said as follows at 374A-G:

> **"It seems to me that in the context of section 67 of the Act of 1978 the words "reasonably practicable" are directed to difficulties faced by an individual claimant. Illness provides an obvious example. In the case of illness the claimant may well be able successfully to assert that it was not "reasonably practicable" to present a claim within three months. But the words "reasonably practicable," when read in conjunction with a "reasonable" period thereafter, point to some temporary impediment or hindrance. It is to be noted that in the E.O.C. case, at p. 325, Lord Keith of Kinkel expressed the view that Mrs. Day, who was an individual party to the proceedings, could bring her private law claim for a redundancy payment before an industrial tribunal and argue there that the restrictions imposed on part-time workers were not objectively justified and should be disapplied. Mrs. Biggs could have taken a similar course in 1976.**
>
> **I have found this to be an anxious point because Mrs. Biggs's employment came to an end in 1976. At that time it had been the generally accepted doctrine for centuries that courts and tribunals were required to apply the law as passed by Parliament. The fact that after 1 January 1973 Acts of Parliament and other United Kingdom legislation might have to yield to provisions determined by a different and superior system of law was, I suspect, fully appreciated only by a comparatively small number of people. But in my view it would be contrary to the principle of legal certainty to allow past transactions to be re-opened and limitation periods to be circumvented because the existing law at the relevant time had not yet been explained or had not been fully understood.**
>
> **If this analysis is correct, it follows that the fact that it was not until 3 March 1994 that the House of Lords declared that the threshold provisions in the act of 1978 were indirectly discriminatory, unless objectively justified, cannot be taken into account as a ground for arguing that it was not "reasonably practicable" before that date to present a claim within the time limit.**
>
> **If, however, this analysis is not correct, I would respectfully agree with the chairman of the industrial tribunal that the claim by Mrs. Biggs was not presented within a reasonable period after the expiry of the time limit. In deciding what is a reasonable further period for the purpose of paragraph 21(4) of Schedule 1 to the Act of 1974 and section 67(2) of the Act of 1978 the tribunal has to take all the circumstances into account in order to achieve a fair balance. At this stage the tribunal is not concerned only with the difficulties faced by the claimant. An extended further period may be unreasonable if the employer were to face difficulties of substance in answering the claim."**

124. The Tribunal considered the Claimant's position to be similar to that of Mrs Biggs in that his failure to assert his right to holiday pay was his ignorance of the effect of the law as it is now understood in his particular circumstances. It concluded that, notwithstanding the employer's efforts to conceal the true position in relation to worker status, there was no impediment to the

Claimant inquiring as to his rights so as to be in a position to present a claim for holiday pay within the prescribed time limits.

Submissions

125. Ms Williams submits that the Tribunal erred in considering itself bound by **Biggs** so as to conclude that the Claimant's ignorance as to his true status was a mistake of law. It is said that the Tribunal wrongly treated Neil LJ's analysis of the kinds of difficulties to which the term "reasonably practicable" is directed as being exhaustive. Instead, the Tribunal ought to have recognised that it can include other matters such as the employer adopting measures to conceal the true status of a worker. Such measures would render it not reasonably practicable for a worker to assert his true status and bring a claim, just as much as a temporary incapacitating illness might do. If such measures could not be taken into account then it would give unscrupulous employers licence to obfuscate the true status of their workers/employees.

126. Mr Jeans submits that the Tribunal reached a fact-based conclusion based on the Claimant's awareness of the material facts necessary to bring a claim within time. He was, if anything, in a better position than Mrs Biggs whose claims were expressly precluded by statute at the time of her termination. As for the employer's obfuscation of the true nature of the employment relationship, that is something which, says Mr Jeans, the Tribunal expressly considered at [52] of the Judgment. The situation here was not one where the employee was tricked by the employer into not making a claim. The Tribunal's application of **Biggs** was, in these circumstances, entirely correct, in that the Claimant cannot rely on his own ignorance of

the true legal position as sufficient to render it not reasonably practicable for him to bring a claim within the three-month period.

Discussion

127. The test of reasonable practicability is long-established as setting a high bar for a claimant, as the Tribunal below acknowledged: see [50] of the Judgment. Since the earliest decisions such as **Walls Meat Company v Khan** [1978] IRLR 499, it is known that some temporary impediment or hindrance to making a claim could provide one means of satisfying the 'not reasonably practicable' requirement. The Court of Appeal in **Biggs** made the same point when considering whether a mistake as to the claimant's rights in that case gave rise to reasonable impracticability, and gave, as an example, a temporary incapacitating illness: see **Biggs** at 374A-B. In applying the approach taken by the Court of Appeal in **Biggs**, the Tribunal in the present case was not treating that approach as exhaustive of the kinds of situation that could give rise to reasonable impracticability. Were that not so then the Tribunal would not have entered into an analysis of the Claimant's state of knowledge of the material facts and of the feasibility of him taking steps to find out more about his rights, as it did in [50] and [52] of the Judgment.

128. Ms Williams' main point is that the Tribunal erred in not distinguishing the situation in **Biggs**, in which the claimant was labouring under a misapprehension as to the state of the law, from the present one where any mistake as to the true position was the result of the Respondent's "carefully choreographed" suite of documents seeking to conceal the Claimant's true employment status. In my judgment, however, the mistake of law in each case is one that could have been remedied or challenged had inquiries been made, and there was no impediment on the

facts to making those inquiries. In Mrs Biggs' case, it might have been said on her behalf that such inquiries would have been in pursuit of the apparently forlorn hope of establishing that UK legislation was incorrect, and yet it was still considered reasonably practicable for her to have made them. I accept Mr Jeans' submission that, if anything, the Claimant's position was not as apparently futile at the time as that of Mrs Biggs. There was in existence a clear legal entitlement to holiday pay for employees and workers. The Claimant took annual leave and knew he was not being paid for it. As the Tribunal found, there was no real impediment to him making inquiries about his position and seeking legal advice.

129. I do not consider that the Respondent's 'careful choreography' of the contractual documents created such an impediment. No doubt, the documentation would be a disincentive to challenge: many workers could well be dissuaded from the ominous task of questioning what would appear to be clear contractual statements negating any entitlement to worker status. However, the mere fact that a course of action might be difficult or daunting does not render it not reasonably practicable. Were that not so, then any employee who, daunted by the prospect of claiming against his employer, delays in issuing proceedings could invoke the terms of the s.23 test. The authorities certainly do not countenance that kind of approach to what is a relatively strict test.

130. None of this is to say that employer obfuscation can never create a situation whereby the making of a timeous claim is rendered not reasonably practicable. The Tribunal's decision in the present case was based on the Claimant's status as an "intelligent man carrying out a professional

service" (for which he received substantial remuneration) and that it was "reasonably feasible [for him] to enquire about his rights … as indeed he did once his health deteriorated." The position might be different in respect of other workers, including those doing insecure and considerably less well paid manual work. Such workers may lack the resources to challenge documentation imposed on them or to inquire about their rights, and might well be able to establish that the employer's actions have rendered it not reasonably practicable to bring a claim within the primary time limit of three months. Each case will, however, depend on its own facts. It is also possible to envisage a scenario whereby an employer had engaged in an active deception such that the putative claimant would have been prevented from discovering the true position even if reasonable inquiries had been made. However, that was not the finding in this case. On the contrary, the Tribunal made findings of fact that it was reasonably practicable for the Claimant to have made inquiries as to his position. In my judgment, the Tribunal made no error of law in so concluding.

131. For these reasons, Ground 3 of the Appeal fails and is dismissed.

Ground 4 – Was the Tribunal wrong to apply Bear Scotland v Fulton [2015] ICR 221?

132. The Claimant's final ground of appeal is that the Tribunal was wrong to conclude that he was precluded from claiming for deductions under s.23, ERA where there was a greater than three months' gap since the last 'in time' deduction, and that it erred in applying the EAT's decision in **Bear Scotland v Fulton** [2015] ICR 221.

Submissions

133. Ms Williams submits that the decision of the Northern Ireland Court of Appeal ("NICA") in **Chief Constable of the Police Service of Northern Ireland and Northern Ireland Policing Board v Agnew** [2019] NICA 32, in which **Bear Scotland** was not followed in respect of a similar statutory provision concerning series of deductions under Articles 45 and 55 of the **Employment Rights (Northern Ireland) Order 1996** ("the **ERO**"), is preferable to that in **Bear Scotland**.

134. The conclusion in **Bear Scotland** is clear that deductions that are more than three months apart cannot be said to form part of a series of deductions for the purposes of s.23, ERA. The then President of the EAT, Langstaff P, held as follows:

> **"79. Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link.**
> **80. I accept Ms Rose's submission that the precise force of the word, common though it is, has to be understood in the legislative context. That is one in which a period of any more than three months is generally to be regarded as too long a time to wait before making a claim. The intention is that claims should be brought promptly. I doubt, therefore, that the draftsman had in mind that a deduction separated by a year from a second deduction of the same kind would satisfy the temporal link. It would have been perfectly capable of justifying a claim at the time, and within three months of it. Whereas when considering a series, as when considering whether there has been "conduct extending over a period" (the analogous provision in the Equality Act 2010) some events in the series may take colour from those that come either earlier or later, or both, so that the factual similarities can only truly be appreciated when a pattern of behaviour is revealed, the essential claim here is for payment in a sum less than that to which there is a contractual entitlement. The colour of such a deduction is, though not inevitably, at least likely to be clear within a short time after it occurs, if not at the time.**
> **81. Since the statute provides that a tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (**

> **section 23(2) and (3) of the 1996 Act taken together) (unless it was not reasonably practicable for the complaint to be presented within that three-month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. 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."**

135. The Tribunal considered itself bound by that decision. The question for me is whether I should accede to Ms Williams' invitation to depart from **Bear Scotland** in light of the decision of the NICA in **Agnew**, where it was held as follows:

> **"105. As indicated in *Harvey on Industrial Relations and Employment Law* and as conceded by Mr Beggs holding that a three month gap breaks a series of deductions leads to arbitrary and unfair results. For instance if a three month gap broke a series it would do so when the unlawful deductions occurred consistently and persistently at six monthly intervals but not when they occurred at two monthly intervals. There is nothing in the ERO which expressly imposes a limit on the gaps between particular deductions making up a series. We do not consider that there is anything implied from the terms of the ERO which compels to such an interpretation of a series. As a matter of the proper construction of the ERO we conclude that a series is not broken by a gap of three months or more.**
> **106. We consider that identification of the factual link in the alleged series answers the question as to whether correct payments of holiday pay breaks the series. We consider that the factual link in these cases is the common fault of paying basic pay as holiday pay regardless of any consideration of overtime or allowances. On some occasions that common fault led to unlawful deductions but on others if the worker concerned was not paid overtime and did not receive any relevant allowance during the reference period it would have led to the correct amount being paid as holiday pay because normal pay and basic pay would have been the same. However we consider that a payment of the correct amount was still factually linked with its predecessor by the common fault of paying basic pay regardless of any consideration of overtime or allowances during the reference period. We do not consider that a series is broken by a lawful payment of holiday pay if the lawful payment comes about by virtue of the common fault or unifying or central vice that holiday pay was calculated by reference to basic pay rather than normal pay.**
> **(iv) Conclusions in relation to this part of the appeal**
> **107. Whether there is a series is question of fact to be decided in each individual case.**
> **108. A series is not ended, as a matter of law, by a gap of more than 3 months between unlawful deductions nor is it ended by a lawful payment."**

136. The NICA's conclusion represents a clear departure from the decision of the EAT in **Bear Scotland**. The question is whether I too should depart from that decision.

137. The principles to be applied in the face of an invitation to depart from a previous authority of the EAT were summarised by Singh J (as he then was) in **British Gas Trading Ltd v Lock** [2016] ICR 503 (incidentally in respect of another aspect of the **Bear Scotland** decision):

> **"75. In the light of the authorities to which I have referred it may be helpful if I summarise the applicable principles when this appeal tribunal is invited to depart from an earlier decision of its own. Although this appeal tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:**
> **(1) where the earlier decision was per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered;**
> **(2) where there are two or more inconsistent decisions of this appeal tribunal;**
> **(3) where there are inconsistent decisions of this appeal tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;**
> **(4) where the earlier decision is manifestly wrong;**
> **(5) where there are other exceptional circumstances.**
> **76. In the present case it seems to me that none of the first three categories is relevant. Therefore the question is whether the decision in Bear Scotland is "manifestly wrong" or there are "exceptional circumstances" such as to justify departure from it.**
> **77. I would not wish to add any further gloss to the concept of "manifestly wrong": it means a decision which can be seen to be obviously wrong ("manifest"). If the error in the decision is manifest it should not be necessary for there to be extensive or complicated argument about the point."**

138. Ms Williams contends that the present appeals falls within (3) and/or (5) above in that there are now inconsistent decisions between the EAT and the NICA on the issue, and/or that the reasoning in **Agnew** is highly persuasive and such as to give rise to "exceptional circumstances" justifying a departure.

139. Mr Jeans submits that this issue is academic if the claim is out of time. In any event, **Bear Scotland** was correctly decided and none of the grounds for departing from previous EAT authority, as set out in **BGT v Lock**, apply. The decision in **Agnew** was not one of co-ordinate jurisdiction and was in relation to a different statute (albeit one that is in similar terms) in a different jurisdiction. The fact that one party considers the reasoning in **Agnew** to be highly persuasive does not get anywhere near to establishing the sort of exceptional circumstances that would be needed to justify a departure.

Discussion

140. In my judgment, the Claimant's failure to establish that the Tribunal erred in finding that his claim was out of time (see Ground 3 above) does mean that this issue is rendered academic. Success in establishing that gaps of more than three months could found a series of deductions claim would not assist him in circumstances where the claim was not brought within three months of the last of those deductions. The **Bear Scotland** issue is not therefore one that falls to be determined.

141. In any event, it seems to me to be clear that, for all the apparent merit in the judgment of the NICA in **Agnew**, it does not provide grounds for departing from the principle that this Appeal Tribunal will generally follow its own previous decisions. The decision in **Agnew** is not that of a court of coordinate jurisdiction. Whilst a decision of the NICA is highly persuasive, it would take more than mere persuasiveness to warrant a departure from a domestic decision that is directly in conflict. It is relevant to note that (as I am told) **Agnew** is itself the subject of a further appeal to the Supreme Court in respect of which permission has been granted. It cannot be said, therefore,

that its reasoning is the final word on the issue in that jurisdiction. It would be undesirable and contrary to legal certainty to introduce an inconsistency in the Appeal Tribunal at this stage on the basis of a judgment of the NICA that may itself shortly be overturned. Far from providing an exceptional circumstance warranting a departure, it seems to me that the current 'subject to appeal' status of **Agnew** provides a further reason against taking such a step. There are no other exceptional circumstances relied upon and it was not suggested that **Bear Scotland** was manifestly wrongly decided.

142. In these circumstances, had the matter arisen for consideration, I would have declined Ms Williams' invitation to depart from **Bear Scotland** as none of the established grounds for doing so are present.

143. Ground 4 of the Appeal therefore also fails and is dismissed.

Conclusion

144. For these reasons, and notwithstanding the outstanding quality of Ms Williams' submissions, this appeal fails on all grounds and is dismissed. It just remains for me to thank all Counsel for their extremely helpful written and oral submissions and for their forbearance in conducting this hybrid hearing under somewhat challenging circumstances.

APPENDIX

The material parts of the reinterpreted Reg. 13 WTR would read:

13 Entitlement to annual leave

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

(a) subject to the exceptions in paragraphs (10) and (11), (14) and (15), and (16) and (17), it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).

(14) Where in any leave year a worker was unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because he was on sick leave, the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (15).

(15) Leave to which paragraph (14) applies may be carried forward and taken in the period of 18 months immediately following the leave year in respect of which it was due.

(16) Where in any leave year a worker was unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because of the employer's refusal to remunerate the worker in respect of such leave, the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (17).

(17) Leave to which paragraph (16) applies may be carried forward and taken in subsequent leave years until the termination of the worker's employment with the employer.

The material parts of the reinterpreted regulation 14 would read:

14.— Compensation related to entitlement to leave

(5) Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave which carried over under regulation 13(10) and (11), 13(14) and (15), or 13(16) and (17), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.

The material parts of the reinterpreted regulation 30 would read:

30.— Remedies

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

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

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

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

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

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

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2), 14(5) or 16(1).

(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) , 14(5) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.