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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr A Harman		**Cleshar Contract Services Limited**

DECISION ON RECONSIDERATION

Thank you for the correspondence from the parties that has ensued since the reserved judgment and reasons were issued in December 2020. I have read and considered: the letter from the Claimant's representatives dated 21 December 2020 applying for corrections under rule 69 of the Employment Tribunal Rules of Procedure 2013; the response to that letter from the Respondent's representatives and application for reconsideration dated 23 December 2020; and the Claimant's written submissions in response to the application for reconsideration dated 17 February 2021 and 4 March 2021. Having received and considered this correspondence I have also had the benefit of reading the recent EAT decision in the case of *Mr G Smith v Pimlico Plumbers Limited UKEAT/0211/19/DA.* I have reconsidered my judgment and reasons in the light of all this material. As the parties have both had the opportunity to make written representations and with their agreement I have concluded that it is in the interests of justice to carry out this reconsideration without a further

hearing. My response to each of the various applications made is as follows:

1. The application by the Claimant under rule 69 for a correction to paragraph 5 of the judgment, so as to correctly identify the Employment Rights Act 1996, is granted. A corrected judgment will be sent out.
2. The application under rule 69 for two additional paragraphs to be added to the judgment relating to the Claimant's entitlement to take paid holiday going forward is refused. It would not be appropriate for this matter to be dealt with under the 'slip' rule; the Claimant is requesting a significant expansion of the Judgment given. I will however treat the Claimant's application as including a request for reconsideration, and I deal with the substance of the points below.
3. I now turn to the Respondent's application for reconsideration dated 23 December 2020.
4. Firstly the Respondent asks me to consider **whether the Claimant was entitled to carry over holiday from the previous holiday year and if so, for which holiday years, and for which period of time.**
5. The Claimant commenced employment tribunal proceedings on 7 January 2019. I found that the Respondent had refused permission for him to exercise his right to paid annual leave under regulation 13 of the Working Time Regulations. At paragraph 113 of my Reasons I explained that I was awarding him a sum representing holiday pay for the period from March 2015 (when the Respondent started to treat him as a PAYE employee) to 7 January 2019.
6. The case of *Smith v Pimlico Plumbers Limited* that I have referred to above takes into careful consideration the principles set out by the CJEU in the case of *King v Sash Windows* that is referred to extensively in my judgment. In the appendix to the *Smith* judgment, the EAT sets out how regulation 13 of the Working Time Regulations should be

interpreted in light of the *King* decision. Wording is provided for a new regulation 13(16) to say: *'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).* A new regulation 13(17) provides: *'Leave to which paragraph (16) applies may be carried forward and taken in subsequent years until the termination of the worker's employment with the employer'.*

7. Having read the *Smith* decision I considered whether I had been incorrect to award the Claimant a sum equivalent to his accrued holiday pay for the period March 2015 to January 2019 and whether I should simply have made a declaration that the Claimant's rights had been breached and that he could carry over accrued leave from March 2015 to the present. Such an interpretation would mean that an employee could effectively only claim accrued holiday pay at the end of his employment and could not challenge an employer's failure to permit him to take *paid* holiday, and seek holiday pay, before that time. That would in turn seem to make regulations 30(3)(b) and 30(4) redundant. I have reached the conclusion that neither *King* nor *Smith* lead to such a conclusion. It so happens that Mr King did not bring his claim arguing that he had been refused the right to take paid holiday until his employment had ended. However there is nothing in the Directive or in the UK Regulations to prevent an employee from bringing a claim that he has been refused paid annual leave *during* his employment. The Claimant in this case did not seek simply a declaration that his rights had been breached and that he was entitled to carry over leave. His position is set out clearly in his written submissions dated 17 February, at paragraphs 3-7: he was not arguing for carry-over of holidays between March 2015 and January

2019 but for a declaration and compensation, and his claim in this regard was successful.

8. It would not seem fair that an employee who brings such a claim could both obtain an award for the holiday pay he has lost and retain the right to the accrued leave that he has not been able to take. I conclude that having brought his claim seeking a declaration and compensation, that the Claimant could not now seek to carry over leave that had accrued between March 2015 and 7 January 2019. To be fair, he does not ask for this. In their letter dated 21 December 2020 his representatives suggest an addition to the judgment stating that 'the claimant is entitled to take accrued annual leave for the period 7 January 2019 to date, to be paid when taken'.

9. *Smith v Pimlico Plumbers Limited* now makes it absolutely clear that such a statement represents his rights going forward. To the extent that the Claimant has accrued annual leave from 7 January 2019 to the present, which he has been deterred from taking because if he did so it would not be paid, he is entitled to carry over that leave and take it during the course of his employment.

The statement set out above therefore correctly reflects the legal position. However upon reconsideration I do not consider that I am able to include such a statement in any corrected judgment. Regulation 30(3)(a) provides that I may make a declaration where I have found that a claim that regulation 13 rights have been breached is well founded. There is no provision for a declaration as to any future rights. If the Respondent now refused to permit the Claimant to take paid leave or refused to allow him to carry over leave accrued since 7 January 2019 then the Claimant would be entitled to bring another claim and seek a further declaration and compensation. I have understood from the correspondence however that the Respondent is seeking to implement new holiday arrangements however as a result of this judgment and

has approached the Claimant's representatives with a view to resolving the matter.

10. The second question raised by the Respondent is **whether the Claimant was obliged to give notice of his intention to take holiday and if so on what terms and whether he gave that notice of his intention to take holiday.**

11. I believe that this point was covered in paragraph 106 of my judgment but I am happy to make it clear here. The *King* case makes it very clear that a person does not have to take leave before claiming payment for it. There is nothing in *King* to suggest that even though an employee does not have to actually take the leave before claiming it, he is nevertheless obliged to give notice of the fact that he would like to take paid leave before bringing a claim. That was not the case in *King.* The Claimant's representative refers me to paragraph 62 of the *King* judgment which specifically states that the right to paid annual leave cannot be subject to preconditions and that it was irrelevant whether over the years Mr King made requests for paid annual leave. I conclude that the Claimant was not obliged to give notice.

12. The third question raised by the Respondent is **whether the Tribunal lacked jurisdiction to consider any claims for holiday pay and/or unlawful deduction of wages between 9 March 2015 and 8 January 2017 pursuant to regulation 2 of the Deduction from Wages (Limitation) Regulations 2014 and 23(4A) of the Employment Rights Act 1996.**

13. In their written submission dated 17 February 2021 the Claimant's representative states that the Claimant did not present his claim for unpaid holiday pay as a claim for unlawful deduction from wages but rather as a free-standing claim under regulation 30(1)(a) WTR 1998. The time limit for such a claim is in regulation 30(2): within three months beginning with the date on which it is alleged that the exercise of the right should have been permitted.

As the Claimant had never been permitted to take paid leave and therefore his leave had continued to accrue from year to year, his claim was in time under the Regulations.

14. The matter is further addressed in the Claimant's later written submissions dated 4 March 2021 where the Claimant argues that the 2014 regulations (which limited the period for which unlawful deductions from wages could be claimed to two years) did not amend the Working Time Regulations and impose any limitation on back payments.

15. In fact I had understood the Claimant to be arguing his claim for holiday pay in the alternative; first under the Working Time Regulations and second as an unlawful deductions claim under section 23(1)(a) of the Employment Rights Act 1996.

16. I did not address any claim for holiday pay under section 23 ERA 1996 however as having found for the Claimant under regulation 30 WTR I did not consider that it was necessary to do so.

17. In any case as I said to the Claimant's representative at the start of the hearing, I found it difficult to conceptualise the Claimant's claim for unpaid holiday as a claim for unlawful deductions. He had never tried to take holiday, and so had never been in the situation where he had taken leave without being paid for it. If he had done so, a claim for unlawful deductions would have made sense and he would have been subject to the two year limitation on backdating.

18. If the two-year limitation on claiming holiday pay applied to the Working Time Regulations, the decision of the CJEU in *King* would be negated. The Claimant's submissions point out that in that case Mr King was able to claim payment for a period from 1999-2012.

19. I accept the Claimant's submissions dated 4 March 2021 which argue that the backdating limitation set out in the 2014 regulations does not apply to a claim brought under regulation 30 of the WTR.

20. For the avoidance of doubt I therefore confirm that to the extent that any claim for arrears of holiday pay was brought as a claim under section 23 of the Employment Rights Act 1996 it does not succeed. If it had succeeded it would have been subject to the two-year limitation on backdating. I have amended my judgment accordingly.

21. Finally the Respondent asks for clarification as to **whether the Respondent can set off rolled-up holiday pay paid on top of the pay rate provided that the pay rate is calculated in accordance with paragraph 83 of my Judgment.**

22. With respect to the Respondents, that is a theoretical question as it invites me to comment upon arrangements that the Respondent might put in place in the future, and would not form an appropriate part of my judgment. However I will seek to set out the legal principles that should be taken into account in the hope that this will be helpful to resolving the issue of the Claimant's holiday pay arrangements going forward.

23. I refer to paragraphs 101-112 of my written reasons. I refer specifically to that part of the CJEU judgment in *Robinson-Steele* where the court says: '*[Article 7] precludes the payment for annual leave within the meaning of that provision from being made in the form of part payment staggered over the corresponding annual period of work and paid together with the remuneration for work done rather than in the form of a payment in respect of a specified period during which the worker actually takes leave'.* That provides the short answer to the Respondent's question.

24. I am aware that some employers have continued the practice of paying rolled up holiday, by way of an addition to the hourly rate, in cases where there is no practical alternative. This can often apply to seasonal or casual workers, or workers whose hours vary considerably from week to week. As stated in paragraph 101 of my written reasons, that situation did not apply to the Claimant.

25. As the Claimant was not a casual worker and nor did his hours vary from week to week, I am not clear as to the practical reasons why the Respondent feels that it could not pay its employees holiday pay at the time that they take their leave, as opposed to paying it on a rolled up basis.

26. I accept that in *Robinson-Steele* the court acknowledged that an employer who had been paying rolled up holiday pay could be given credit for those payments, despite the fact that they considered the practice to be incompatible with the Directive. In my written reasons I found that the Respondent was not entitled to set off in the circumstances of this case because the holiday pay did not represent a genuine addition to the hourly rate.

27. The Respondent refers me to the case of *Lyddon v Englefield Brickwork Limited UKEAT/0301/07/CEA* in which the EAT considered whether an employer was entitled to set off rolled up holiday pay. This case was considered after the *Robinson-Steele* decision and took its principles into account.

28. The view of the EAT was that set off was permissible under the Working Time Regulations provided that there was a contractual agreement as to the amount that would be paid by way of holiday pay. At paragraph 15 the EAT says that '*the essential question is whether there is a true agreement providing a genuine and identifiable payment for holidays'.* It is not permissible for the employer to unilaterally specify a sum referable to holidays (paragraph 16) and the other requirements of transparency and comprehensibility must be met. The EAT noted that the case of *Smith v Morrisons and Sons Limited* which I have referred to in my judgment offered guidelines as to how the existence of an agreement on holiday pay could be established.

29. Having considered the cases further I conclude that rolled up holiday pay continues to be precluded by the Working Time Directive. However an employer that pays rolled up

holiday pay can set these sums off against holiday pay that falls due at the point at which an employee takes holiday provided certain conditions are met.

30. The current contractual arrangements between the Claimant and the Respondent do not meet the conditions set out in either *Lyddon* or *Smith.* Going forward, it would be inappropriate for the Respondent to ***impose*** a revised rolled up holiday pay arrangement upon the Claimant or any other member of staff. For set off to be permissible they would have to show a 'true agreement' between the parties 'providing a genuine and identifiable payment for holidays'. It would clearly be a requirement of such an agreement that the Claimant had consented to it. In the absence of such consent, any rolled up holiday pay arrangement would continue to be unlawful and set off could not apply.

31. In light of this I decline to amend my judgment at paragraphs 5 and 6 to include specific wording that the Respondents should put into any revised written particulars issued under section 1 of the ERA 1996 in relation to holiday pay. The current provisions in the written terms relating to holiday pay are unlawful and breach the Claimant's rights under the Working Time Regulations. New arrangements for paid holiday need to be put in place. I acknowledge that new, lawful holiday provisions could be expressed in a number of different ways. I urge the parties to continue their discussions to agree revisions to the existing terms in order to avoid the need for any further litigation.

32. I have considered what both the Claimant and the Respondent have had to say in relation to paragraphs 5 and 6 of my judgment. The decision amounts to a substitution of terms under section 11(2) of ERA 1996. At the request of the respondent I have included wording to make it clear that the written particulars shall be deemed to include the wording at paragraph 6 in accordance with the effect of that provision.

33. In conclusion following reconsideration I confirm my judgment and reasons save for the correction referred to above.

Employment Judge Siddall
Date: **26 March 2021**