Case Number: 2374916/2011

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr G Smith **Claimant**

AND

Pimlico Plumbers Limited **Respondent**

ON: **18 and 19 March 2019**

Appearances:

For the Claimant: **Mr D Stephenson (Counsel)**
For the Respondent: **Mr A Smith (Counsel)**

JUDGMENT

1. The Claimant's claim for unpaid wages arising from his final payslip is no longer contested by the Respondent. The Respondent shall pay the sum of £336.23 to the Claimant forthwith.
2. The Claimant has not shown that he was prevented from exercising a right to take leave under Regulations 13 and/or 13A Working Time Regulations 1998 ("WTR"). Any claim for compensation under Regulation 30(1)(a) WTR therefore fails and is dismissed. European law does not require the distinction between pay and leave in the WTR to be disapplied in the circumstances of this case.
3. The Claimant has not brought a claim for compensation related to entitlement to leave in the year of termination of his employment under Regulation 14 WTR and any claim for a payment under Regulation 30(1)(b) WTR in respect of payment under Regulation 14 therefore fails and is dismissed.
4. The Claimant was not paid for holiday during his employment in breach of Regulation 16(1) WTR.
5. The Claimant brought his claims for pay in respect of unpaid holiday pursuant

to Regulation 30(1)(b) WTR and s23(1)(a) Employment Rights Act 1996 ("ERA") outside the statutory three month time limits set out in Regulations 30(2) WTR and s23(3) ERA and he has not shown that it would not have been reasonably practicable for him to bring the claim for unpaid holiday within the requisite time limit. Nor has he shown that he brought his claim within such further period as was reasonable under Regulation 30 (2)(b) WTR or s23(4)ERA. EU law does not require the three month time limits in either Regulation 30(2) WTR or s 23(3) ERA to be disapplied. The Tribunal therefore has no jurisdiction to deal with his claims under Regulation 30(1)(b) WTR and s23(1)(a) ERA and those claims are therefore dismissed.

6. The questions of whether the decision in *Bear Scotland Ltd v Fulton [2015] IRLR 150* ("*Bear Scotland*") and the provision in s23(4A) ERA are compatible with EU law do not therefore arise on the facts of this case.
7. The tribunal has no jurisdiction to deal with the Claimant's claim for holiday pay by way of a claim for a breach of the Claimant's contract as the Claimant was a worker and not an employee.

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Reasons

1. These written reasons follow and provide more detailed reasoning in relation to an oral judgment delivered to the parties at the end of the two day hearing. I was first asked to deal with a jurisdictional question which itself raised complex issues. Ordinarily I would have preferred to reserve my judgment on that question. However I decided that it was preferable to reach a decision on the jurisdictional issue as soon as possible, in order to leave time if necessary to consider how the remaining issues should be dealt with. As a result the oral decision I gave was not as fully reasoned as I would have wished. Full reasons are now set out below.

2. Following my oral judgment I received a number of applications from the Claimant including an application for reconsideration. The Respondent sent communications in response. I wrote to the parties to say that an application for reconsideration was premature if submitted before the written reasons had been sent to the parties. For the avoidance of doubt these reasons have been produced without regard to those applications or the associated correspondence. It is of course a matter for the Claimant whether he wishes to make an application for reconsideration following receipt of these written reasons.

3. By a claim form presented on 1 August 2011 the Claimant, Gary Smith, brought to the tribunal claims of unfair dismissal, wrongful dismissal, disability discrimination, unpaid wages, including unpaid holiday pay, failure to provide written particulars of employment and payment in respect of medical suspension. The claim was listed initially for a preliminary hearing to deal with the question of the Claimant's employment status. It was determined by Judge Corrigan in a decision sent to the parties on 17 April 2012 that the

Claimant was a worker of the First Respondent but not an employee. That decision was appealed and eventually upheld in the Supreme Court in a judgment dated 13 June 2018. As a result of that judgment the case has now returned to the tribunal in which it originated in order that the underlying claims can be adjudicated. At the hearing on 18 and 19 March the matter to be determined was the Claimant's claim for holiday pay and unlawful deduction of wages. The claim for unpaid wages of £336.23 was no longer contested by the Respondent and thus only the holiday pay claim needed to be decided.

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4. I heard no oral evidence at the hearing – the Claimant had provided a written statement but the Respondent did not wish to cross examine him. There was a bundle of documents consisting of 371 pages and a supplemental bundle of 86 pages. References to page numbers in this judgment are references to page numbers in those bundles.

5. The majority of the hearing was taken up with reading and hearing the parties' detailed submissions on the law. I was grateful to both Counsel for their comprehensive and very helpful submissions on this complex area.

The Claimant's case and the relevant findings of fact

6. For the purposes of this part of the Claimant's claims the findings of fact I need to make were limited. The Claimant was engaged by Pimlico Plumbers with effect from 25 August 2005. It is the Claimant's case that his engagement was terminated on 3 May 2011. His final payslip was issued on 21 May 2011 and shows the deduction of £336.26 which was conceded. All of the Claimant's payslips show the amount of holiday taken as zero and unsurprisingly there is no reference to holiday pay. Gross pay was expressed as a sum for labour and materials and tax was deducted from the labour component.

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);
    c. (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 Employment 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 pay 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 £223.26 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 pay 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.

The relevant law

13. The relevant provisions of the WTR are as follows:

13.— Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each

leave year.1
[...] 2

(3) A worker's leave year, for the purposes of this regulation, begins–

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply–

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

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] 1 [and regulation 13A] 2 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).

(3) The payment due under paragraph (2) shall be–

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

(A × B) − C

where–

A is the period of leave to which the worker is entitled under [regulation 13] 1 [and regulation 13A] 2;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

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 leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the

amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

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] 4, 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.

14. The relevant provisions of the ERA provide 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—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

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

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

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

(4) Where the employment tribunal 2 is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

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

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

15. A breach of contract claim in the employment tribunal is brought pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the "Extension of Jurisdiction Order"). This provides that a tribunal has jurisdiction to hear a claim for damages or any other sum where the claim arises or is outstanding on the termination of an employee's employment.

16. I was also referred to and took into consideration a large bundle of authorities and I set out below those on which I relied and my reasons for doing so.

The claims and the issues

17. There was no agreed list of issues. There was also disagreement about the claims that were before the tribunal for determination at the hearing. Furthermore it was submitted by the Respondent at the start of the hearing that there were jurisdictional issues that I ought to resolve before going on to consider the detailed questions about the amount of any payments due to the Claimant. The Claimant did not agree, but I considered that the overriding objective would be better served by dealing first with any jurisdictional questions. This was not a case in which it was impractical to do so by reason of the complexity of the facts. With that in mind and for reasons explained further below, I arrived at the view that the issues I needed to determine were as follows:

    a. Was the Claimant at any time denied the right to leave under Regulation 13 and 13A WTR?

    b. Did the Claimant bring a claim under Regulation 14 WTR in respect of leave accrued but untaken in the final year of his employment?

    c. Was the Claimant denied the right to payment for leave taken in breach of Regulation 16(1) WTR?

    d. If the Claimant established any of these three claims did he present his claims within three months of the date on which, in each case, he alleges that the exercise of the right should have been permitted or, as the case may be the payment should have been made and if not, was it reasonably practicable for him to have done so? If it was not reasonably practicable for him to have brought them within the primary time limit did he bring his claim within such further period as was reasonable (Regulation 30(2) WTR)?

    e. Did the Respondent make unauthorised deductions from the Claimant's pay in breach of s13 ERA by reason of not paying him for holiday he took?

    f. If so did the Claimant bring his claim within the three month time limit set out in s23 (2) and (3) ERA? If not, would it have been reasonably

practicable for him to do so? If not, did he present his claim within such further period as was reasonable (section 23(4))?

g. Was the extent of the Claimant's entitlement under s 23 ERA in any event limited by:

   i. The provisions of s 23 (4)(A) ERA?
   ii. The decision in *Bear Scotland*?

h. Was the effect of the decision of the CJEU in *King v The Sash Window Workshop* such that either of the limiting factors set out in sub paragraph (g) ought to be disapplied to ensure conformity of UK law with EU law?

i. Did the decision of the CJEU in King also mean that the normal three month time limit for a claim under Regulation 30(2) or section 23(2) should not apply?

j. Did the tribunal have jurisdiction to deal with a claim for holiday pay by the Claimant brought by way of a claim for breach of contract?

Submissions and conclusions

Breach of contract

18. I will start with a straightforward issue of jurisdiction. The tribunal does not have jurisdiction to deal with the Claimant's claim that failure to pay him for the holidays that he took was a breach of contract on the part of the Respondent, because the Claimant was not an employee of the Respondent but a worker. He cannot therefore rely on the Extension of Jurisdiction Order, the benefit of which is confined to employees.

Was the Claimant at any time denied the right to leave under Regulation 13 and 13A WTR?

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.

20. In his detailed submissions Mr Stephenson argued that in a case of this kind, in which a Claimant is deprived of a fundamental right because of the way in which the employer chooses to organise his business, which is calculated to limit the availability of certain fundamental rights, including those such as the right to paid leave derived from European law, I ought to be willing to construe UK law so as to give effect to the Claimant's rights. In particular he argued that:

    a. "*the Claimant's primary case is that his entitlement to normal holiday pay, as clarified by the CJEU on 8 November 2018, at the time of their holiday is, through European law and particularly Article 31(2) of the Charter [of Fundamental Rights of the European Union], horizontally directly effective as against the Respondent. The tribunal need pay regard to and the right is regardless to contrary provisions in domestic law. Howsoever domestic law is phrased and howsoever it is enacted, it has no bearing on the horizontally directly enforceable right to which each employee is personally entitled against the First Respondent*".

    b. provisions of Directives that are sufficiently clear, precise and unconditional, such as the provisions of the WTD "*may have direct effect and as such may be relied upon against private parties in addition to public bodies: see for example Kreuziger v Berlin (C-619/16) and Max-Planck-Gesellschaft zur Forderung der Wissenschaften e.V. Tetsuji (C-684/16)*."

    c. The Claimant was relying on Article 31(2) of the EU Charter of Fundamental Rights which provides: "*Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave*".

    d. "There is a compelling obligation on Member States to interpret legislation implementing a Directive that is compatible with that Directive if it is possible to do so: see Litster v Dry Dock & Engineering Co ltd [1990] 1 AC 546; Marleasing SA v LA Commercial Internacional de Alimentacion [1990] ECR 1-4135. Where any inconsistency between directly effective Community law and national legislation cannot be resolved through the obligation to interpret national legislation so as to make it conform to "the superior order of EU law" (Fleming v Revenue and Customs Commissioners), then, where directly effective, a national court must disapply the offending provision".

21. Mr Stephenson then set out the relevant sections from the WTD and submitted that EU legislation should be read broadly and purposively, as must transposing domestic legislation. He relied on *Marleasing, Litster* and *Kucukdeveci v Swedez GmbH & KG [2010] ECR I-3650*. He then set out the relevant provisions of the WTR and the ERA.

22. He next submitted that holiday pay is a particularly important right and referred to the findings of the EAT in this case that the Respondent had

produced a "*carefully orchestrated set of procedures and contractual documents designed to negate the appearance given to the public at large and its customers and to present its operatives as self-employed in business on their own account*". He invited the tribunal to "*start from the principle that it is protecting this particularly important right from employers who may choose to conduct their business in their own way. The tribunal should be particularly keen to guard against an employer in such a way that the right is not fully vindicated over time and then choses to use all technical arguments to defeat this central European Right (Maschek v Magistratsdirektion der Stadt Wien [2016] IRLR 801)".* He relied on *King* in submitting that "*the full right cannot be vindicated without the employer, in whose gift the right lies, giving the employee both normal pay and holiday"* (submissions paragraph 33) and that "*It is a central proposition of European law that the worker must be able to benefit from the remuneration to which he is entitled (normal pay) when he is taking his leave. Without normal pay the worker is not able to benefit from his rights to relaxation and leisure and may be dissuaded from taking that leave*" (submissions paragraph 35).

23. In *King* the CJEU said: "*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 (judgment of 22 May 2014, Lock, C-539/12, EU:C:2014:351, paragraph 17 and the case-law cited*)". Mr Stephenson appeared to me to start from the premise that as the right to leave and the right to pay for leave are two indivisible aspects of the same right the denial of one aspect was tantamount to denial of both. Hence his submission that it was of no consequence that the Claimant had in fact taken periods of leave during his employment. He concludes "*Accordingly, and in light of the CJEU's ruling in King v The Sash Window Workshop Ltd, the Claimant is entitled to a payment on termination in lieu of untaken Reg 13 and 13A leave that accrued in years prior to the leave year in which the Claimant's employment ended, under WTR Reg 14, or, if not, under Reg 16*". Accordingly I understood Mr Stephenson to be in effect submitting that the leave that the Claimant took during his period of employment with the Respondent did not amount to leave under the WTR as he was never paid for it. It followed according to Mr Stephenson's submission that the Claimant had in effect been denied the right to WTR leave throughout his employment. Hence in accordance with European case law and in particular the decision in *King*, he submitted, the Claimant's entitlement to paid leave had accumulated throughout his employment and he was entitled to compensation on termination.

24. He also submitted (submissions paragraph 44) that there was no burden on the Claimant to show when he had taken holiday in a case in which the Respondent had not understood or complied with its own obligations. He pointed to the opinion of Advocate General Pitruzella in *Federacion de Servicios de Comisioners Obreras (CCOO) v Deutsche Bank SAE (C-55/18)* as imposing an obligation on employers to set up a system for recording the daily working time of workers (I note that that case, in which the decision of

the CJEU is awaited, concerns the recording of daily working time and not holiday).

25. Mr Stephenson invited the tribunal to disapply domestic legislation that was inconsistent with the Claimant fully vindicating his rights. *He referred to NHS Leeds v Larner [2012] ICR 1389* and *Plumb v Duncan Print Group Ltd [2016] ICR 125*, (both of which are concerned with leave that a worker has been unable to take as distinct from leave that has been taken but for which no payment has been made). He went on in paragraph 49 of his submissions to suggest that '*the same approach should be adopted in respect of leave under reg13 that has not been taken because the employer refuses to pay for such leave. The WTR can be interpreted to give effect to the WTD, as interpreted by the by the CJEU in King, by construing Reg 13(9) as permitting such untaken leave to be carried forward, construing Reg 14 as requiring an employer to make a payment in lieu of any such leave as remains untaken on termination and construing Reg 30 as including claims for non-payment of such lieu pay. Such an interpretation does not go against the grain of the WTR and is, therefore, one the Claimant invites the tribunal to make in the light of Marleasing*'.

26. In King the CJEU ruled as follows:

> **"1. Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, and the right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights of the European Union, 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 under the first of those articles, 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.**
> **2. 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."**

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 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 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 to pay 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 the 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 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 form 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 benefiting 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.

Was there a Regulation 14 claim?

34. A claim under Regulation 14 WTR is a claim for pay for holiday accrued but untaken in the final year of employment. The Regulation contains a formula for calculating the relevant entitlement.

35. At pages 41.1 to 41.4 there was a draft list of issues that had been prepared by the Respondent for the purposes of a preliminary hearing before Judge Martin on 6 September 2018. As regards the holiday pay claim, this set out the main issue as whether the Claimant was entitled to an award of holiday pay under regulation 30 of the Working Time Regulations 1998 and if so how much. The draft sought clarification from the Claimant as to the particulars of his holiday pay claim, setting out the sums claim and the basis for them. It also sought clarification as to whether the claim for holiday pay was also pursued as a claim of unauthorised deduction from wages in which case he was invited to provide proper particulars of each unauthorised deduction, including the date and amount claimed.

36. At page 41.5 there was a draft list of issues prepared by the Claimant for the same hearing. The holiday pay element was initially described at page 41.5 as "Unauthorised deductions under s13 ERA and/or breach of contract by failing to pay holiday pay". It was then described in entirely different terms at page 41.9 as a claim under Regulation 13 WTR:

    a. "The Claimant was denied paid annual leave pursuant to section 13 (sic) of the Working Time Regulations 1998 (as amended); The issue to be determined pursuant to Regulation 30 WTR 1998 is:
    b. Did R1 refuse to permit the Claimant to exercise any right under regulation 13(1)?
    c. [*sets out the wording of regulation 30(3) WTR 1998 – see paragraph 12 above*]
    d. The Claimant says he is entitled to:
        i. Four weeks paid leave from August 2005 to 31 March 2009, s 13(2) (c) WTR 1998;
        ii. Additional leave of 1.6 weeks per year on and after 1 April 2009 to 3 May 2011, totalling 5.6 weeks thereafter".

37. The Claimant also included an unauthorised deductions from wages claim at page 41.10, but that made no reference to holiday pay – it referred only to the sum of £336.23, and hire and phone charges, which were not particularised.

38. The Claimant then prepared, as a supplement to the third version of the schedule of loss a document (the "4 October document") which amplified the third version of the list of issues by adding further paragraphs as follows:

    a. "The Claimant was denied paid annual leave pursuant to contract and/or Section (sic) 13 of the Working Time Regulations 1998 (as amended) and Article 7 of the Working Time Directive 2003/88EC, which has now been replaced by the Working Time Directive 93/104 EC (the WTD);
    b. The Claimant claims holiday pay as part of his entitlement to "wages" pursuant to s27 ERA 1996. Those payments are based on the Claimant's gross earnings per year, Section 27(4) ERA 1996."

39. The Claimant's claim for holiday pay was therefore not consistently expressed. I am satisfied that there was a claim both under the WTR and the ERA in the original claim form, but the claim under the WTR was not precisely pleaded and in particular no reference was made to pay for accrued but untaken leave in 2011, the year in which the Claimant's employment ended, or any reference to Regulation 14 WTR. Nevertheless there were a number of references to Regulation 14 WTR in the Claimant's skeleton argument for the hearing, skeleton arguments having been exchanged by the parties on 12 March. The Respondent therefore made a supplemental skeleton argument objecting to the Claimant's advancing a claim under Regulation 14 in respect of the final year of his employment. I was then asked to make a ruling on the point during the course of the hearing.

40. I heard detailed submissions from both Counsel and gave an oral decision to the effect that the Claimant had not brought a Regulation 14 claim to the tribunal. Mr Stephenson had sought to persuade me that the third version of the list of issues implicitly contained a claim under Regulation 14 because row 7 of the table setting out the amounts sought referred to a pro rata figure. In my judgment that did not amount to the articulation of a claim under Regulation 14. More important in my view was the claim that was originally pleaded, no application to amend that claim having been made. As to the original claim Mr Stephenson could point only to paragraph 37 of the Claimant's particulars of claim in support of his contention that both a Regulation 13 and Regulation 14 claim had been made. That paragraph appears under the heading "Unlawful deduction of wages" and makes no reference to the WTR at all. In my oral decision on this point I took the view that it was not possible to construe that paragraph as a claim under Regulation 14 and 30(1)(b) WTR, particularly as the Claimant was legally represented at the time the claim was submitted. This paragraph was plainly in my view a claim for holiday pay advanced as a claim for unlawful deduction of wages only.

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 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.

42. In my judgment, it was incumbent on the Claimant, who had the benefit of legal representation throughout this 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).

Was the Claimant denied the right to payment for leave taken in breach of Regulation 16(1) WTR?

43. The answer to this question is yes. The Claimant took leave and was not paid for it, as a result of the Respondent's misclassification of the Claimant as self-employed and not entitled to holiday pay. For reasons of time and because the issue was not contested I did not make this point explicit in my oral judgment, but it was clear that a claim arose under Regulation 16(1). For completeness I would add that although the claim under the WTR was not pleaded by reference to any of the specific Regulations that deal with holiday rights, it is clear from the substance of the particulars of claim (paragraph 6 above) that the Claimant was claiming that he had taken holiday and not been paid for it. The Respondent did not in any event dispute that it had not paid the Claimant for any leave taken. In principle therefore a claim under Regulation 16 in conjunction with Regulation 30(1)(b) arose, and the preliminary issue I needed to decide was whether the claim for pay for holiday taken but not paid under Regulations 16 and 30(1)(b) had been brought within the statutory time limit and therefore whether I had jurisdiction to determine it.

Did the Claimant suffer unauthorised deductions from his pay in breach of Section 13 ERA?

44. The answer to this is also yes, for the same reasons as set out in the previous paragraph – the Claimant took annual leave and was not paid for it. Following the decision of the House of Lords in *HMRC v Stringer [2009] ICR 985*, a claim for holiday under the Working Time Regulations may be brought

as an unlawful deduction under s23 ERA:, as a matter of construction of the statute: “statutory annual leave falls to be regarded as coming within the normal meaning of the word wages in section 27”.

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 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.

Reasonable practicability

48. If a claim has been submitted under either the WTR or the ERA outside the statutory time limit, time may be extended if the tribunal is persuaded that it was not reasonably practicable for the claim to be submitted in time. It is for the Claimant in such circumstances to explain why it was not reasonably practicable for him to present his claim sooner than he did.

49. As regards reasonable practicability the Claimant did not in my judgment advance any argument other than his ignorance of his legal rights at the time (witness statement paragraph 49). The point was not addressed at all in Mr Stephenson's written submissions, which implicitly accepted that the claims were out of time and focused on arguing that the normal limitation rules should be disapplied (see below). Nevertheless a submission that it was not reasonably practicable for the claims to be submitted within the statutory time limits based on the Claimant's ignorance of his rights, (ignorance that arose at least in part from the Respondent's calculated mischaracterisation of the nature of the relationship between the parties), does have strong attractions. It is an aspect of the submission made by Mr Stephenson that an employer ought not to benefit from his own strenuous attempt to avoid granting employment rights to his staff. In oral submissions he referred me to *Walls Meat Company v Khan [1978] IRLR 499* and argued that it could not have been reasonably practicable for the Claimant to bring his claims before he did, because he did not have knowledge of the material facts giving rise to his right to holiday pay. I also considered carefully Mr Stephenson's submission that given the nature of the right in question, its origin in European law and its inclusion in the Charter of Fundamental Rights, the test of reasonable practicability ought to be liberally interpreted in a case such as this.

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 not 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 Biggs 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 Biggs. 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.

Such further period as was reasonable

53. If a tribunal determines that it was not reasonably practicable for a claim to be submitted within the primary time limit it must go on to consider whether the claim was then submitted within such further period as was reasonable. The claim was presented to the tribunal almost three months after the expiry of the statutory time limit. The Claimant put forward no explanation as to why this additional delay occurred. Mr Stephenson briefly referred to the fact that the Claimant was recovering from a heart attack at the relevant time, but the facts do not bear that out – the Claimant's unchallenged evidence (witness statement paragraph 13) was that he was on sick leave until 31 January 2011. As I have decided that the Claimant did not meet the first part of the test in Regulation 30(2) WTR and section 13(2) ERA, I do not need to decide this point, but if I had had to do so, the Claimant would not have persuaded me that he brought his claims within a reasonable further period – he simply did not explain the delay between the dates on which the right arose and the date on which he ultimately commenced proceedings.

Should the domestic law on time limits be disapplied?

54. Mr Stephenson submitted that even if the claim for holiday pay were time barred, I ought to determine it nonetheless as holiday pay is a European derived right of such significance that I ought to disapply the provisions of UK law dealing with limitation in order to allow the claims to proceed. He invited me to disapply (submissions paragraph 55):

    a. The three month primary limitation period;
    b. The three month period breaking the series of deductions (following the decisions of the EAT in Bear Scotland Ltd v Fulton [2015] IRLR 150 and Fulton v Bear Scotland Ltd UKEAT/0010/16) which he contended were wrongly decided;
    c. The Deduction from Wages (Limitation) Regulations 2014 (which brought into effect section 23(4A) ERA).

    He also invited me to:

    a. avoid taking a restrictive approach to what he referred to as the "past amendment applications" although he did not specify what he meant;
    b. take an expansive and liberal approach to the construction of the "not reasonably practicable" test, although he did not explain why that test is itself incompatible with EU law, or why EU law would require a more lenient interpretation of the test than would be applied in a case concerning a purely domestic right. In any event it seems to me that the reasoning I have adopted in respect of the compatibility of the primary time limits with EU applies equally to the question of whether

those time limits ought to be relaxed in a case involving an EU derived right.

55. Mr Stephenson seemed to me to be making several distinct submissions:

    a. The Claimant was seeking an effective remedy in respect of the infringement of his EU law rights;
    b. The Respondent's conduct was such that that an expansive interpretative approach to limitation provisions or the disapplication of domestic provisions which limit recovery by reason of time was warranted;
    c. The Respondent was in breach of EU law and had deliberately and serially underpaid the Claimant (and others) through its "carefully choreographed procedures and contractual documents". It should not be open to an employer to deliberately flout EU law rights and yet rely on domestic statutory limitation provisions to frustrate a Claimant who was seeking a remedy;
    d. The tribunal ought to be slow to validate conduct of this nature on the part of an employer;
    e. Accepting the Respondent's submissions would be tantamount to providing Claimants with a remedy in relation to holiday pay claims that was not equivalent to other employment related claims;

56. I do not accept Mr Stephenson's submissions, even if the principle that an employer should bear the consequences of having sought to avoid the effect of EU law has superficial attractions.

57. I preferred Mr Smith's submission that effectiveness and equivalence is already provided for in the UK statutory regime. There is a regime of rights and remedies which incorporates time limits for sound reasons of legal certainty. That domestic time limits are in principle compatible with the effective exercise of EU law rights has been recognised repeatedly in decisions of the CJEU. The Court has also stated however that EU law rights must not be made more difficult to enforce than domestic law rights by the application of relatively unfavourable time limits.

58. The issue of the compatibility of domestic law time limits with EU law was in fact considered in *Biggs* which referred to a number of decisions of the CJEU on the compatibility of time limits in national law with EU law rights:

> **"It was argued in the alternative on behalf of Mrs Biggs that whatever the position might be according to the UK legislation if considered in isolation, domestic tribunals and courts had to disapply time limits if the application of the limits made it impossible in practice to enforce a Community right. In this context we were referred to a number of cases decided by the ECJ.**
>
> **In *Rewe v Landwirtschaftskammer Saarland [1976] 2 ECR 1989* the ECJ was concerned with customs duties. The first question for consideration was whether a Member State, which had, in breach of Community law, exacted from a trader a charge having an effect equivalent to a customs duty, might rely on a limitation period prescribed by its own national law. In dealing with this question the ECJ said at 1997:**

> **'... In the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.**
>
> **The position would be different only if the conditions and time limits made it impossible in practice to exercise the rights which the national courts are obliged to protect. The laying down of such time limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.'**
>
> **A similar principle limiting the right of national courts to restrict the recovery of charges levied contrary to Community law was considered *in Amministrazione Delle Finanze Dello Stato v San Giorgio [1983] ECR 3595*. In that case the Member State had made the repayment of charges conditional upon proof that those charges had not been passed on to other persons. The ECJ held that Community law did not prevent a national legal system from disallowing the repayment of charges where to do so would entail unjust enrichment of the recipients, but added at 3612 that the conditions as to recovery:**
>
> **'... may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law.'**
>
> **Statements to the same effect can be found in other cases including *Johnson v Chief Adjudication Officer [1995] ICR 375, at 404,* and *Francovich v Italian Republic, C-6/90 [1995] ICR 722 ([1992] IRLR 84), at 772*, where it was said that the conditions for reparation of loss and damage laid down by the national law 'may not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.'**
>
> **It was therefore argued on behalf of Mrs Biggs that the statutory time limit should be disapplied because its application would run counter to the principle that it must not be impossible or extremely difficult to present a claim.**
>
> **In my judgment, however, this argument too must be rejected. Section 2 of the European Communities Act 1972 recognises the primacy of Community law. Accordingly, as I have already stated, persons in the position of Mrs Biggs were able to present a claim by invoking Community law and s.2 of the 1972 Act so as to ensure that the restriction on claims by part-time workers was disapplied. Furthermore, the time limit itself does not offend Community law and indeed is compatible with the principle of legal certainty.**
>
> **I appreciate the hardship which may be caused to individual claimants, but I can see no satisfactory basis for disapplying a time limit to enable a claim to be advanced which as a matter of law was capable of being enforced at the moment of dismissal. I am not persuaded that one can relax a time limit to assist a claimant who was ignorant of the law, when the same time limit would have to be enforced against a claimant in a similar situation who was fully aware of his or her legal rights, including the right to rely on the principle in *Defrenne v Sabena*.**

(*Biggs* paragraphs 29-35).

59. It is clear from this judgment that the submission Mr Stephenson was making as regards the primary three month time limit has been considered and

rejected not only by the Court of Appeal in *Biggs* but by the CJEU in a number of decisions, as referred to in the Court of Appeal's judgment. If it is the Claimant's submission therefore that I should disapply the three month time limits under Regulation 30 (2) WTR and s23(2) ERA because they are incompatible with EU law I reject that submission. I am bound to follow decisions of superior courts that have held the contrary to be the case.

Bear Scotland and s23(4A) ERA

60. At its highest, the Claimant's case could only be that it was not reasonably practicable for him to have brought a holiday pay claim under s23(1) ERA sooner than he did and that the last holiday payment claim that he made should therefore be allowed to proceed as the last in a series of deductions. But even if he had brought his claim in time, or I am wrong about the issue of reasonable practicability *Bear Scotland* would have operated to prevent the Claimant from bringing a claim in respect of any underpayment that arose more than three months after that final payment. S23(4A) ERA would also have prevented him recovering any payment where the date of payment fell more than two years before 1 August 2011.

61. Strictly speaking I do not need to consider the effects of either *Bear Scotland* or s 23(4A) ERA because I have found that the Claimant in this case did not present his claim within the primary three month time limit when it was reasonably practicable for him to do so and neither *Bear Scotland* or s23(4A)ERA affect the operation of that primary time limit. I also concluded for the reasons set out in the preceding section that EU law does not require me to disapply the primary three month time limit. If the whole claim was therefore out of time then the questions of (a) whether it is incompatible with EU law for gaps exceeding three months between periods of leave to break the chain of deductions (*Bear Scotland*) or (b) for the period for which retrospective claims can be made to be limited to two years (s23(4A) ERA) do not arise in this case. However as Mr Smith made detailed submissions on this issue which I referred to in my oral judgment I will explain my reasons more fully.

62. In respect of the claims under both the WTR and s23 ERA Mr Smith referred me to the recent decision of the London Central employment tribunal in *Battan* which considered the specific issues raised by the effect of the CJEU decision in *King* on the EAT decision in *Bear Scotland* and s 23(4A) ERA.

63. Mr Stephenson did not make extensive submissions on the effects of *Bear Scotland* save to suggest that it was wrongly decided in respect of the question of whether any series of deductions is broken by a gap of more than three months. He did not address s23(4A) explicitly at all. He seemed to be suggesting in paragraph 60 of his submissions that *Bear Scotland* represents an incorrect reading of s23 ERA irrespective of any EU law issues. However he also appeared to concede that from the perspective of domestic law this tribunal is bound by the EAT's decision in *Bear Scotland* and must apply it. (He also made a reference to *Coletta v Bath Hill Court [2017] IRLR 764* which

established that for claims issued before 1 July 2015 there was no limit on the period for which a claim of unlawful deductions could be made (and in particular no 6 year limit under the Limitation Act 1980). That decision has of course been superseded by s23(4A) ERA, but would apply if it were the case that s23(4A) was incompatible with EU law). I have nevertheless proceeded on the basis that Mr Stephenson did want me to consider whether *Bear Scotland* and s 23(4A) ERA should be treated as incompatible with EU Law as paragraph 55 of his submissions suggested that that was the case.

64. The issues in Battan, insofar as they are relevant to this case, were as follows:

    a. whether, in the light of *King v The Sash Window Workshop Ltd [2018] IRLR 142 (C-214/16*), the ruling in *Bear Scotland v Fulton [2015] ICR 221 (EAT)*,to the effect that a gap in underpaid holiday of more than 3 months interrupts the series of deductions, is still good law;
    b. whether the ruling in *Bear Scotland* as set out above is correct, having regard to section 23 Employment Rights Act 1996. The claimants in Battan conceded that the employment tribunal is bound by the statutory construction in *Bear Scotland*, but indicated an intention to raise the issue on any subsequent appeal;
    c. whether, in the light of *King*, the two-year backstop contained in subsection 23(4A) Employment Rights Act, introduced by the Deductions from Wages (Limitation) Regulations 2014,is still good law, in so far as it applies to holiday pay claims like the present.

65. The judgment of the tribunal in *Battan* was that:

    a. The interruption of three months or more in a series of unlawful deductions is not unlawful as interpreted by the CJEU in *King v Sash Windows*.
    b. In respect of UK law on interruption of a series, the tribunal is bound by the Employment Tribunal decision in Bear Scotland.
    c. The two year limitation on arrears of unlawful deduction claims introduced by the Limitation Regulations 2014 does not breach the EU principle of equivalence.

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 also 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.

67. On the remaining issues before the tribunal in Battan Mr Smith recites at paragraph 17 of his supplemental skeleton, the five principles of EU law that are at issue: national procedural autonomy; effectiveness; equivalence;

legitimate expectation and legal certainty. The tribunal in *Battan* described them as follows:

1. National procedural autonomy. It is for member states to establish procedural conditions to enforce EU rights of direct effect by bringing proceedings in domestic courts and tribunals, provided these rules respect the principles of effectiveness and equivalence. This was first laid down in *Rewe v Landswirtschaftkammer fur das Saarland (1976) ECR 1989*, as cited in the Advocate-General's opinion in *Unibetand* relied on by the Court of Appeal in *Oyarce v Cheshire County Council (2008) ICR 1179*.There is nothing in principle wrong with a time limit for enforcing an EU right.

2. Effectiveness. Article 47 of the EU Charter of Fundamental Rights provides the right to an effective remedy and to a fair trial: "everyone whose rights and freedoms guaranteed by the law of the union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article". Under this, member states should ensure that the exercise of EU rights by citizens in the national court is neither "virtually impossible" nor "excessively difficult".

3. Equivalence. National procedural rules for EU law should be "not less favourable than those governing similar domestic actions". What is a "similar domestic action", was considered by the UK Supreme Court in *Totel Limited v HMRC (2018) 1 WLR 4053*. The question whether any proposed domestic claim is a true comparator with an EU law claim is context specific. The domestic court must focus on the purpose and essential characteristics of allegedly similar claims. The question should not be addressed at a very high level of generality; CJEU case law shows that alternative types of claim for exactly the same loss are common true comparators. The principles are also set out in *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc and others (2018) EWHC 2839*, reviewing the authorities, including: "the principle of equivalence requires that the limitation rule at issue be applied without distinction, whether the infringement alleged is of community law or national law, where the purpose and cause of action are similar". In addition, "the principle is not to be interpreted as requiring member states to extend the most favourable to all actions brought in the relevant area of law" where there is a range of limitation rules, the EU right need not be equivalent to the most favourable; it need only be within the range.

4. Legitimate expectation–member states are required to exercise their powers over a period of time such that situations and relationships lawfully created under EU law are not affected in a manner which could not have been foreseen by diligent person.

5. Legal certainty, which recognises that national limitation periods are necessary and desirable, provided that the principles of equivalence, effectiveness and legitimate expectation are not infringed –Test Claimants in the *FII Group Litigation v HMRC (2012) UKSC 19*.It is also permissible

to shorten time limits, provided there is a reasonable transition period, compatible with legitimate expectation.

68. The parties in *Battan* were agreed that if the Deduction from Wages (Limitation) Regulations 2014 were held to infringe effectiveness or equivalence, the tribunal could strike them down, having regard to *Levez v Jennings (1999) ICR 52*1, and more recent CJEU decisions on direct effect.

69. EJ Goodman's conclusions on the issues before her were set out in paragraphs 63-83 of her judgment. Although I am not bound to reach the same view, I found her reasoning to be compelling in response to the submission that the judgment of the CJEU in *King* rendered the decision in *Bear Scotland* and the provision on s23(4A) ERA incompatible with EU law. Mr Smith helpfully summarised EJ Goodman's conclusions in paragraph 18 and 19 of his supplemental submissions. In short:

    a. The three month gap rule in *Bear Scotland* does not deny workers an adequate facility for taking leave. The rule addresses enforcement of the right and does not operate as a pre-condition to taking it;
    b. The CJEU in *King* did not suggest that there was a 'community rule' that displaced national procedural rules;
    c. The ruling by the CJEU that Regulation 13(9) operated as a precondition to the exercise of the right to paid holiday and was therefore incompatible with EU law, was not relevant where the issue was the enforcement of a right exercised but underpaid as distinct from a right not exercised at all;
    d. Even if King had been about holiday taken but not paid for there was no reason to think that that would have led to the disapplication of the normal time limit for bringing claims;
    e. The decision in *Bear Scotland* did not infringe the principle of effectiveness;
    f. Neither the decision in Bear Scotland nor the 2014 Regulations offend the principle of equivalence – they apply also to deductions claims based on purely domestic rights such as the right to the national minimum wage and do not therefore single out an EU right for a less favourable enforcement regime than a comparable domestic claim.

70. If I had had to decide this issue, which in practice I do not for the reason set out above, I would have adopted the reasoning of EJ Goodman in this case to reject the Claimant's argument that I ought to find the decision in *Bear Scotland* and the provision in s23(4A) to be incompatible with EU law by virtue of the decision in *King*.

71. For all these reasons my conclusion is that the tribunal does not have jurisdiction to determine the claim in respect of holiday brought by way of a claim under Regulation 30(2) WTR or s23(2) ERA.

72. It is not therefore necessary for me to deal with the remaining issues concerning the basis on which the Claimant's holiday pay should have been

calculated and the nature of the remedy to which he was entitled including any entitlement to an award for injury to feelings or interest.

Employment Judge Morton
Date: 10 May 2019