EMPLOYMENT TRIBUNALS

Claimant: **Mr R Somerville**

Respondent: **Nursing and Midwifery Council**

Heard at: **East London Hearing Centre (By Video)**

On: **6, 7 & 8 September 2023 (7 & 8 September 2023 in Chambers)**

Before: **Employment Judge Crosfill**

Representation

Claimant: **In person**

Respondent: **Ms Clair Darwin KC**

JUDGMENT

1. **The Claimant's claim for payment in respect of annual leave taken but unpaid succeeds by reason of the direct effect of Article 7 of the Working Time Directive 2003 his rights to payment having accrued up to and including the date he presented his claim.**

2. **The Claimant is entitled to payment of 4 weeks pay per annum subject to the principle of pro rate temporis.**

3. **The Working Time Regulations 1998 may be read as affording the rights above in domestic law.**

4. **The Claimant's claim to payment in respect of 1.6 weeks of annual leave accruing by reason of Regulation 13A of the Working Time Regulations 1998 and brought through Sections 13 and 23 of the Employment Rights Act succeed (by consent) to the extent of the leave due in the 2 years prior to the presentation of the ET1 subject to the principle of pro rate temporis.**

5. **As al alternative remedy to that provided by paragraphs 1- 3 above the Claimant's claim to payment in respect of 4 weeks of annual leave accruing by reason of Regulation 13 of the Working Time Regulations 1998 and brought through Sections 13 and 23 of the Employment Rights Act succeed**

(by consent) to the extent of the leave due in the 2 years prior to the presentation of the ET1 subject to the principle of pro rate temporis.

6. All further issues of remedy (if any) are not determined by this judgment.

REASONS

Introduction

1. This case concerns the scope of the Claimant's right to claim what I shall refer to as holiday pay. It is not now disputed that the Respondent had, since the inception of the Claimant's engagement, failed to recognise that he was a worker and unlawfully failed to provide him with the facility to take paid annual leave.

2. The Claimant's case is that, at least, he ought to be paid a sum equivalent to the pay he ought to have received had he had that facility from the outset of his employment. He says that he ought to receive the same remedy as Mr Smith in his case against Pimlico Plumbers and recover sums going back to the outset of his employment.

3. The Nursing and Midwifery Council say that the Claimant is in a different position to Mr Smith because they say, he worked on successive contracts. They say cannot do any better than bringing a claim under Section 23 of the Employment Rights Act 1996 and, by reason of Section 23(4A), his claim is limited to the period of two years before he presented his claim.

4. The Claimant presented an ET1 to the Employment Tribunal on 20 July 2018. He named the Medical Practitioners Service and the Nursing and Midwifery Council as respondents to his claims. The claims against the Medical Practitioners Service which included a claim for age discrimination have been dismissed for want of jurisdiction and it is unnecessary to refer to them any further. I shall refer to the Nursing and Midwifery Counsel as the NMC.

5. The Claimant described his claims in his ET1 as 'status claims'. He had ticked the box on the ET1 indicating that he was bringing a claim for 'holiday pay'. His pleaded case in the attachment to his ET1 said:

   '12. is the Claimant's case that in respect of both Respondents, notwithstanding the provisions of the contract between the parties, that he was not a self-employed contractor but was either an employee or a worker.

   13. The Claimant therefore claims for loss of the various benefits to which he was entitled for the duration of his engagement, by virtue of being an employee or worker for the Respondents'

6. At paragraphs 4 and 5 of their ET3 the Respondent complained about a lack of particularity by the Claimant. The Claimant provided further particulars of his case on 6 March 2019. Having set out his case that he was an employee or a worker he said:

   11. The Claimant therefore claims the Respondents made unlawful deduction of wages for loss of the various benefits to which he was entitled for the duration of his engagement, by virtue of being an employee or worker for the Respondents flowing from Sections 230(1) or 230(3) and Section 13(1) of the Employment Rights Act 1996

and Regulation 16 of the Working Time Regulations 1998. The Claimant is unable to assess the specific quantum of such benefits at this time until such time as the Respondents have complied with their disclosure requirements.

7. By a judgment dated 20 July 2020 EJ Massarella held that the Claimant was not an employee of the Respondent but that he was a worker for the purposes of s.230(3)(b) ERA 1996, and Reg 2(1)(b) of the Working Time Regulations 1998. The manner in which the Claimant's case was described in paragraph 10 of the EJ Massarella's judgment of 20 July 2020 is:

The Claimant alleges that both Respondents failed to pay him in respect of his statutory annual leave entitlement, contrary to Regs 13, 13A and 16(1) Working Time Regulations 1998 ('WTR'), and had thereby made unauthorised deductions from his wages, contrary to s.13(1) ERA. He confirmed, both orally and in the final agreed list of issues, that he was not advancing his claim under Reg 14 WTR: his case was not that he was not permitted to take annual leave, rather than a payment should have been made in respect of annual leave each time he was paid; his was solely a claim under Reg 16 WTR.

8. The Respondent appealed EJ Massarella's decision. The appeal was ultimately dismissed by the Court of Appeal by a judgment handed down on 25 February 2022. The Court of Appeal held that the Claimant had the necessary status as a worker for the periods when he was actually working for the NMC. In response to a submission made by Mr Jupp on behalf of the Claimant that the overarching contracts under which the Claimant had performed his work were of themselves contracts under which the Claimant was a worker Lewis LJ said:

'I doubt that that submission is correct. The 2012 and 2016 Agreements were contracts (as they included mutually enforceable obligations) but they were not worker's contracts. They did not themselves impose any obligation on the claimant to do work or perform services personally. If the claimant did agree to provide services, then the overarching contracts contained a definition of the services to be provided under the individual contract and included obligations applicable to the way in which those services were to be provided. As such, the overarching agreements assisted in determining that the individual contracts were contracts under which the claimant undertook to provide services personally. That is what the employment tribunal meant in paragraph 219 of its reasons. I would not, however, be minded to regard the claimant as being a worker when there was no individual contract in place and the only set of obligations governing the relationship between the claimant and the Council were the 2012 and 2016 Agreements as those Agreements did not include any obligation on the claimant to do work or provide services personally.'

9. The matter was remitted to deal with the Claimant's substantive claims against the Respondent.

10. By a judgment dated 18 November 2022 EJ Massarella determined that the Claimant's claims encompassed his work both as a Chair of the Respondent's Fitness to Practice panel and his work as a Chair on Registration Appeals.

11. A case management hearing took place before (then) Acting Regional Judge Burgher on 13 January 2023. AREJ Burgher dealt with two contentious issues. The first of these applications by the Claimant was to amend his case to rely upon Regulation 14 of the Working Time Regulations 1998 on the basis that his (overarching) contract

with the NMC had terminated in 2020. The second application was to seek to claim loss included in a schedule of loss for the period between the presentation of the ET1 to the date his contract with the NMC terminated.

12. AREJ Burgher refused both applications. In respect of the second application REJ Burgher was persuaded by Ms Darwin KC that a tribunal could not allow an amendment to include a claim brought under regulation 30 of the Working Time Regulations 1998 or Section 23 of the ERA 1996 in relation to claims that arose after the presentation of an ET1. There was no appeal against either of those decisions and it follows that, whether I would have acceded to the NMC's submissions, I am bound by the decisions of AREJ Burgher. I address some case law not cited to REJ Burgher and the relevant Presidential Direction – not apparently brought to his attention - in my discussions and conclusions below.

13. At the hearing before AREJ Burgher a list of issues was agreed between the parties. Each party had made some concessions and those, together with the decisions made by EJ Burgher, were incorporated in the list of issues included as a schedule to the Case Management Order. That schedule is reproduced below as a schedule to this judgment and reasons.

The hearing

14. The parties had been directed to and did (although a little late in the Claimant's case) provide written submissions. In addition, Ms Darwin KC had prepared a speaking note for the hearing. There was an agreed bundle of documents. I was provided with a bundle of authorities that ran to 1344 pages.

15. The hearing took place via CVP. There were no significant difficulties with any parties' connection.

16. The hearing had been listed for 3 days to include deliberation. I had some opportunity to read some of the less familiar authorities before the hearing but indicated that I would need the assistance of the parties if they were relying on any particular passages in any authority.

17. Mr Somerville made very short submissions in support of his case. Despite being a barrister he asked me to have regard to the fact that he did not hold himself out as an employment lawyer. He said that his position was much the same as a litigant in person. Other than in his written submissions he did not direct me to any passages in the authorities bundle.

18. Ms Darwin KC addressed me by reference to her speaking note and responded to my questions in respect of how the matter was put. The oral submissions were completed in the afternoon of the first day of the hearing. I indicated that I might be in a position to give an oral judgment at some point on the third day. The parties were quite rightly sceptical of that, and, in the event, I deliberated over the remaining two days of the hearing before formally reserving my decision. I spent a great deal of that time familiarising myself with the authorities bundle.

19. In my deliberations I reminded myself that when the case of ***King v Sash Windows*** was before the Employment Appeal Tribunal Simler P as she was, had indicated that where an employer had refused to recognise the right to paid annual leave there

could be no recourse to a claim under Section 13 ERA 1996 and the remedy provided was found in Regulation 30(1)(a) and such a remedy was in the form of a claim for unliquidated damages and could not be brought as a claim under Sections 13/23 of the ERA 1996. I asked the parties if that decision had any bearing on the matters that I had to decide. Both parties made further submissions.

20. Before I had started writing these reasons the Supreme Court handed down its decision in the ***Chief Constable of the Police Service for Norther Ireland & others v Agnew & others*** **[2023] UKSC 33**. I took the view that that decision had little direct influence on the issues on this case but in an abundance of caution asked the parties whether they agreed. They did. A consequence of those further issues was that I was unable to start writing this judgment until after a rather long period when I was not sitting (due to the part time nature of my appointment). I am sorry for the delay that this has caused.

My abbreviations/shorthand

21. I was referred to a number of cases from the European Court. The name given to that Court has changed but for simplicity I have referred to the court by its most recent abbreviated name – the CJEU.

22. I have referred to the most recent iteration of the relevant Working Time Directive as the WTD 2003 and have abbreviated the names of the principal statutes and regulations. Hopefully the legislation I have referred to is obvious from the abbreviations used.

The statutory provisions

23. The obligation for the United Kingdom to adopt measures to provide paid annual leave was first imposed by the Council Directive 93/104/EC of 23 November 1993 and later in the 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 (usually referred to as the Working Time Directive(s)). The material parts are, with emphasis added:

Article 1

Purpose and scope

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave……

Article 7

Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions

for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

24. Article 7 WTD 2003 has been implemented in UK law by Regulation 13 Working Time Regulations 1998 ('WTR 1998'). The material parts of those regulations in force at the material time are as follows:

Entitlement to annual leave

13.—(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year…..

(3)-(8)

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

(a) it may only be taken in the leave year in respect of which it is due, and

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

25. An additional period of 1.6 days annual leave granted in domestic law only is provided by Regulation 13A of the WTR 1998. I shall not reproduce that hear as, by reason of concessions made by Mr Somerville, it is not necessary to do so.

26. Regulation 14 provides a right to payment in lieu of annual leave only where annual leave is accrued but untaken at the termination of the employment.

27. Regulation 16 provides for a right to payment for annual leave. It has been amended by the Deduction from Wages (Limitation) Regulations 2014 and the amended parts are highlighted in bold. The material parts of Regulation 16 provide as follows:

Payment in respect of periods of leave

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 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…….

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

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

28. Regulation 30 provides a means of enforcing the rights above. It says:

Remedies

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

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

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

(ii) – (iv) or

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

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

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

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

(2A) …

(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.

29. It was held in ***Her Majesty's Revenue & Customs v. Stringer, Ainsworth and Others*** **[2009] UKHL 31** that Section 23 of the ERA 1996 ('ERA 1996'provides an alternative route for employees seeking to recover unpaid holiday pay. The definition of wages in Section 27 was sufficiently wide to include holiday pay under the Working Time Regulations. That section has been subsequently amended by the Deduction from Wages (Limitation) Regulations 2014. The relevant amendments are shown in bold.

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) ….

(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.

(3A)…

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

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction

was made was before the period of two years ending with the date of presentation of the complaint.

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

(5) ..

The Issues I was asked to consider

30. At the outset of the hearing I suggested that the list of issues that had been drawn up and agreed was not necessarily in the most logical order. What emerged was that the preparation of the list of issues had been contentious and that the list I was provided with had been approved by REJ Burgher. The parties did not ask me to revisit the list of issues. I have therefore reproduced that list as a schedule below. Despite this I have not followed the order suggested by that list of issues as I considered it illogical given the supremacy of EU law (at the time). At the end of this decision I cross refer to each issue.

31. In his submissions Mr Somerville conceded that the right to carry over leave where the employer had not provided an adequate facility for it to be taken applied only to the 'EU leave' (Reg 13) and not to the UK leave (Reg 13A).

32. The parties were in agreement that subject to me deciding points of principle they would be able to resolve any calculations between themselves. I have left it open for the parties to revert to me if that proves impossible.

The Claimant's Primary Submissions

33. The Claimant addressed me very briefly. Essentially he adopted his written submissions. He indicated that as he was not a specialist employment lawyer he was unable to develop his arguments any further than he had done in writing. He urged me, as a judge of a specialist tribunal, to apply the law to the facts of his case.

34. In the Claimant's written submissions he took the points set out below.

35. He stated that his claims were brought under regulation 16 and regulation 30(1)(b) of the WTR 1998. He said that the 'sums owed' were recoverable either through the WTR 1998 or Part II of the ERA 1996.

36. He argued that the two-year limitation provided by Section 23(4A) of the ERA 1996 should be disapplied as the WTD 2003 had direct effect. He suggested that that meant that the rights he had could be enforced directly against the Respondent which he said was an 'emanation of the state'.

37. He said that as he could enforce his rights under the WTD 2003 directly against the Respondent it was unnecessary for him to show that Section 23(4A) of the ERA was incompatible with EU law but that if he needed to do so he would say that that was the case. He acknowledged the Respondent's reliance on the first instance decision in ***Battan v Lloyds Bank plc & Ors*** **Case No: 2200055/2018**. He argued that as a first instance decision its reasoning was not binding on the present tribunal and was in any event inconsistent with the cases of ***King***, ***Smith***, and ***Agnew*** (citations elsewhere).

38. Mr Somerville said that the effect of the 2014 Regulations and Section 23(4A) could not be retrospective and therefore could not affect any accrued rights he had up to the introduction of Section 23(4A) of the ERA.

39. Mr Somerville had the benefit of seeing the Respondent's written submissions before his were prepared. In answer to a point raised by the Respondent that claims brought through Regulation 30 of the WTR had to be made within 3 months (as extended by early conciliation) of each infringement Mr Somerville suggested that the issue of limitation had already been dealt with and it was not open to the Respondent to take this point. When that was challenged in oral submissions by Ms Darwin KC Mr Sommerville accepted that his written submissions overstated the position.

40. In his oral submissions Mr Somerville addressed me on the effect of 'Brexit'. He said that his claim was presented before completion day and that therefore the law that should be applied is the law that was in force prior to that date. He argued that subsequent changes could not have any retrospective effect relying on ***Walker v Innospec Limited and others*** **[2017] UKSC 47** for ***Sash Window Workshop Ltd v King*** **[2018] IRLR 142** and ***Smith v Pimlico Plumbers*** **[2022] EWCA Civ 70** for that proposition.

41. Mr Somerville had initially sought to argue that he was entitled to treat the leave he was entitled to under regulation 13 (which I shall call EU Leave) and the leave he was entitled to under Regulation 13A (which I shall call UK leave) in the same way. Before me he accepted that he could not do so.

42. Mr Somerville pointed to the fact that in both ***Sash Window Workshop Ltd v King*** **[2018] IRLR 142** and ***Smith v Pimlico Plumbers*** **[2022] EWCA Civ 70** it had been recognised that where a worker had not been afforded paid annual leave the right to do so carried over to the termination of the contract. Mr Somerville implicitly suggested that at the time he brought his claim he still had a contractual arrangement with the Respondent. He said that to refuse him an equivalent remedy is contrary to the purposes of the Working Time Directive.

The Respondent's Primary Submissions

43. The Respondent had prepared written submissions in advance of the Claimant and when he indicated that he would be delayed their submissions were, very fairly, provided to him. The Respondent was required in some respects to anticipate the arguments that might be made by the Claimant.

44. In their written submissions the Respondent takes the points below.

45. The Respondents accept that the Claimant is entitled to bring a claim through Section 23 of the ERA 1998 and concede that he is entitled to recover both EU and UK holiday pay for a period of two years before he presented his claim. If I understand the Respondent correctly the concession in respect of the earlier of the two years in respect of UK holiday entitlement is made as a gesture of goodwill (it not being conceded that there was any right to carry this over).

46. The Respondent says that the Claimant is barred by reason of Sub-section 23(4A) of the ERA from recovering sums in respect of any earlier period. Anticipating an argument by the Claimant that Sub-Section 23(4A) might breach the principles of equivalence the Respondent relied on ***Battan v Lloyds Bank plc & Ors*** **Case No:**

2200055/2018 where EJ Goodman had accepted that Section 23(4A) did not offend against the principle of equivalence. Many of the authorities provided to me were authorities deployed by the parties in ***Battan***. Ms Darwin KC told me that they had been provided in order that I could see what the decision in that case had been based on.

47. The Respondent accepted in principle that the Claimant could as an alternative bring a claim under Regulation 30 of the WTR. However, the argument put forward to shut out that claim is that any claim needed to be presented within 3 months of the infringement. That was said to arise *'within 3 months of the date which it is alleged that the Claimant should have been paid holiday pay*' [Written submissions para 22]. Reliance was placed on ***The Corps of Commissionaires Management Ltd v. Hughes*** **[2009] ICR 345** and ***Scottish Ambulance Service and Truslove and another*** **EATS 0028/11**. It was argued that this limited the Claimant's claims to the period of 20 April 2018 to 20 July 2018 a less favourable remedy than under Section 23 of the ERA 1996 even with the backstop.

48. In a speaking note and further oral submissions Ms Darwin KC developed the arguments above.

49. In her speaking note Ms Darvin KC set out the NMC's position in respect of the Claimant's contention that he could rely directly on the WTD 2003 (his position being that the NMC was an emanation of the state). At paragraph 27 of her speaking note Ms Darwin accepted that the Claimant could rely on the *'vertical effect of his Article 7 WTD rights*'.

50. I shall deal with the parties' additional submissions made after I raised the issue of the unavailability of Section 23 of the ERA 1996 to refusal claims in my discussions and conclusions below.

Analysis and conclusions

Direct effect/Brexit

51. In his written submissions Mr Somerville argues that the WTD 2003 is of 'direct vertical effect'. He says that the NMC is a body created by statute and is accordingly an emanation of the state. Ms Darwin KC deals with that submission in her speaking note. She does not accept that the Respondent is an emanation of the state but says: *'it is accepted that section 4(1)(a) EUWA 2018 incorporates into domestic law the effect of Articles 7(1) and (2) of the WTD (but not the WTD itself)'.*

52. In ***Smith v Pimlico Plumbers Ltd*** Simler LJ dealt with the effect of 'Brexit' on the question of whether Mr Smith could rely on the WTD 2003 and to what extent.

'13 First, I record the position relating to the European Union Withdrawal) Act 2018(as to which there is no dispute). This provides that although the principle of the supremacy of EU law no longer applies to any enactment or rule of law passed or made on or after "IP completion day" (31 December 2020), nor is the Charter part of domestic law on or after IP completion day (section 5(4)), the supremacy principle continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day: see section 5(2). Section 5(4) does not apply where

proceedings are begun but not finally decided before IP completion day: see paragraph 39, Schedule 8 to the 2018 Act. Further, the provisions of the Charter recognise established fundamental principles of EU law. The Charter is no longer part of domestic law, but "fundamental rights or principles" that exist irrespective of the Charter are retained in domestic law after IP completion day (section 5(5)). The provisions of the Charter, to the extent that they embody those "fundamental rights and principles", continue to apply. The tribunals below accordingly proceeded on the basis that the European Union (Withdrawal) Act 2018 has no substantive effect on the issues in this appeal, as do I.'

53. In common with Mr Smith, Mr Somerville commenced the present proceedings before IP completion date. It follows, for the reasons given by Simler LJ that such pre-existing fundamental rights and principles will continue to benefit Mr Somerville in this case.

54. At paragraphs 30 and 31 in ***Smith v Pimlico Plumbers Ltd*** Simler LJ goes on to deal directly with the question of whether the rights under Article 7 of the WTD 2003 are directly effective. She said:

'30 Although it has been held that article 7 WTD is sufficiently unconditional and precise to be directly effective, it cannot be invoked directly in a dispute between private individuals, such as the dispute here: see Shimizu at para 68.

31 However, the CJEU has also held that the right to paid annual leave is an essential principle of EU social law. Further, that right is affirmed for every worker by article 31(2) of the Charter and is both mandatory and unconditional; it entails, by its very nature, a corresponding obligation on the employer to grant such periods of paid leave or an allowance in lieu of paid annual leave not taken upon termination of the employment relationship; it can be relied on directly in a dispute between private individuals: see Shimizu at paras 74—79. Accordingly, if it is impossible to interpret the national legislation at issue consistently with article 31(2) of the Charter, it will be for the national court hearing a dispute between a worker and his former employer (who is a private individual) to ensure judicial protection for individuals and to guarantee the full effectiveness of article 31(2) by disapplying (if need be) that national legislation: Shimizu at para 80.'

55. It follows that that the question of whether the Respondent is an emanation of the state is, as recognised by Ms Darwin KC immaterial. Article 7 of the WTD 2003 can be relied upon directly in a dispute between private individuals (at least in a claim started before completion day).

The scope of the Article 7(1) right

56. Having accepted that Mr Somerville can rely on Article 7 of the WTD 2003 for its direct effect I need to examine the scope of the right afforded by Article 7 of the Working Time Directive. In particular I need to consider what rights it confers on workers who, like Mr Somerville worked intermittently but regularly.

57. Article 7(1) of the WTD 2003 gives a right to paid annual leave. The nature of that right was explained in ***Smith v Pimlico Plumbers Ltd*** **[2022] ICR 818** by Simler LJ who, at paragraph 71, explained the reasoning of the CJEU in ***King v Sash Window Workshop Ltd*** **[2018] ICR 693**,as follows (my emphasis added):

'..significantly, the CJEU regarded it as clear from established case law that the right to annual leave and to a payment on that account are two aspects of a single right: see para 35. In other words, there are not two distinct legal entitlements, no matter how the domestic regulations are drafted: there is a single, composite legal entitlement to paid annual leave'

58. The decision in ***King*** drew support from the earlier case of ***C.D. Robinson-Steele and Others v R.D. Retail Services Ltd and Others*** **Cases C-131/04 and C-257/04**. The issue in that case was the legality under EU law of what is usually referred to as 'rolled up holiday pay'. The CJEU said that the practice in the case before it was not compatible with EU law. Of significance to the present case is the conclusion at para 61:

'A regime such as that referred to by the questions at issue may lead to situations in which, without the conditions laid down in Article 7(2) of the directive being met, the minimum period of paid annual leave is, in effect, replaced by an allowance in lieu.'

59. The right afforded by Article 7(1) WTD 2003 applies to '*every worker'.* The WTD 2003 applies without distinction to full-time workers and part-time workers see para 48 of ***Nicole Wippel v Peek & Cloppenburg GmbH & Co*** **Case C-313/02** a case which, in common with the present case, Ms Wippel was only offered work when it was available and was free to decline any such offer.

60. In ***R v Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*** **Case No C173/99** the court was concerned with the then Regulation 13(7) of the WTR 1998 which imposed a 13 week qualifying period before a worker was entitled to the right to take annual leave. The reasons why the Court held that this precondition was incompatible with the directive are set out in the following passages (emphasis added):

46. Furthermore, Directive 93/104 draws no distinction between workers employed under a contract of indefinite duration and those employed under a fixed-term contract. On the contrary, as regards more specifically the provisions concerning minimum rest periods contained in Section II of that directive, they refer in most cases to 'every worker', as indeed does Article 7(1) in relation to entitlement to paid annual leave.

47 It follows that, with regard to both the objective of Directive 93/104 and to its scheme, paid annual leave of a minimum duration of three weeks during the transitional period provided for in Article 18(1)(b)(ii) and four weeks after the expiry of that period constitutes a social right directly conferred by that directive on every worker as the minimum requirement necessary to ensure protection of his health and safety.

48 Legislation of a Member State, such as that at issue in the main proceedings, which imposes a precondition for entitlement to paid annual leave which has the effect of preventing certain workers from any such entitlement not only negates an individual right expressly granted by Directive 93/104 but is also contrary to its objective.

49 By applying such rules, workers whose employment relationship comes to an end before completion of the minimum period of 13 weeks' uninterrupted work for the same employer are deprived of any entitlement to paid annual leave and

likewise receive no allowance in lieu even though they have in fact worked for a certain period and, under Directive 93/104, minimum rest periods are essential for the protection of their health and safety.

50 National rules of that kind are also manifestly incompatible with the scheme of Directive 93/104 which, in contrast to its treatment of other matters, makes no provision for any possible derogation regarding entitlement to paid annual leave and therefore, a fortiori, prevents a Member State from unilaterally restricting that entitlement which is conferred on all workers by that directive. Article 17 makes the derogations for which it provides subject to an obligation on Member States to grant compensatory rest periods or other appropriate protection. Given that no such condition is laid down in relation to the right to paid annual leave, it is all the more clear that Directive 93/104 was not intended to authorise Member States to derogate from that right.

51 Furthermore, rules of the kind at issue in the main proceedings are liable to give rise to abuse because employers might be tempted to evade the obligation to grant the paid annual leave to which every worker is entitled by more frequent resort to short-term employment relationships.

52 Consequently, Directive 93/104 must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.

61. ***BECTU*** does not in itself assist with the question of whether article 7(1) rights persist between short term assignments. What it does demonstrate is that the right to paid annual leave is a day one right, available to every worker, that cannot be cut down by national rules if it is to be compatible with EU law.

62. Mr Somerville says that the contract which the Tribunal ought to regard as governing the employment relationship were the contracts by which he was appointed and not the individual agreements as to when he would or would not work. He says that the 2016 contract he had with the Respondent did not terminate until after he presented his claims. The Respondent says that Mr Somerville's worker status did not subsist between any sitting dates. It is said that the effect of this is that his contract terminated at the conclusion of any assignment.

63. If Mr Somerville is right then he will, as he suggests, be entitled to the accumulation of paid leave that applied in both ***King*** and ***Smith*** many of the arguments in respect of effectiveness and equivalence will fall away. I return to this below.

64. Ms Darwin KC relies upon the passage of the judgment of Lewis LJ that I have set out above and in particular the following parts '*I would not, however, be minded to regard the claimant as being a worker when there was no individual contract in place and the only set of obligations governing the relationship between the claimant and the Council were the 2012 and 2016 Agreements as those Agreements did not include any obligation on the claimant to do work or provide services personally'.* She says that if the Claimant was not a worker outside the periods that he actually worked it follows that his contract had been terminated and that the time limits for any claims arising from an individual assignment ran from the end of each assignment.

65. It is essential that I consider how Article 7 needs to be understood in the case of a worker working like the Claimant on what is, in effect, as required/agreed basis, with an agreement in place that sets out terms of the engagement when work is offered but which does not place any obligations to carry out personal services in between assignments. The present case is an example of the ever more prevalent 'gig economy'. The point is therefore of some importance.

66. The right given by Article 7 is a right to 4 weeks *'paid annual leave'*. If, as Ms Darwin KC suggests the right arises and expires at the beginning and end of every assignment then there is simply no possibility of taking paid annual leave within the scope of the contract under which the worker is engaged qua worker. The only possible right that the worker would have would be the right to a payment in lieu of annual leave upon termination of the contract – permissible under Article 7(2) where *'the employment relationship is terminated'*. If that was the only possibility then in my view this would substantially conflict with the established purposes of the right to paid annual leave. The worker in the gig economy would have no rights at all to paid leave but would have a right to a sum of money in lieu on every occasion that they worked. An employer would have no means to encourage the worker to ensure that they take the necessary time for rest and relaxation envisioned by the directive. The risks of gig workers forgoing rights to paid leave in return for short term financial betterment is self-evident. Mr Somerville's level of remuneration is not the norm.

67. In my view the purposes of Article 7 can only be met by approaching the phrase '*the employment relationship'* in manner consistent with the purposes of the directive. It is not in my view necessary or in accordance with the purposes of the directive to interpret that phrase to mean *'the periods of time during which personal services are or must be rendered'*. To do so is to exclude vast numbers of people in the so-called gig economy from the right afforded by Article 7(1) with only the rights afforded by Article 7(2) as a poor substitute. It is a licence to substitute cash for rest and relaxation even if the rights are recognised.

68. I have considered whether the fact that the Court of Appeal has said that Mr Somerville was not a worker during the periods when he was not actually working means that the conclusions above are not open to me. I do not think that is the case. I consider there is a distinction between having the status of a worker on any given day and a broader concept of being in an employment relationship. The jurisprudence of the CJEU has recognised the breadth of whet might properly be regarded as an employment relationship.

69. In the course of the hearing I floated this concern with Ms Darwin KC. I suggested that conformity with the purposes of the directive might be achieved if the expression *'the employment relationship'* was approached in the same way as the decision of the CJEU in ***Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*** **Case C-78/98**. The passages I had in mind were as follows (my underlining):

'64 By its third question, the House of Lords seeks essentially to ascertain whether Community law precludes a procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) to be brought within six months after the end of any contract (or contracts) of employment to which the claim relates.

65 This question relates to a number of actions before the national court which are distinguished by the fact that the claimants work regularly, but periodically or intermittently, for the same employer, under successive legally separate contracts. According to the order for reference, in the absence of an umbrella contract, the period prescribed in section 2(4) of the EPA starts to run at the end of each contract of employment and not at the end of the employment relationship between the worker and the establishment concerned. It follows that workers are unable to secure recognition of periods of part-time work for the purpose of calculating their pension rights unless they have instituted proceedings within six months after the end of each contract under which the work concerned was performed.

66 In its written observations, the Commission maintains that the application of a procedural rule of that kind to actions brought by such workers is incompatible with the principle of effectiveness in two respects. First, that procedural rule compels workers wishing to have their periods of part-time employment recognised for the purpose of calculating their pension rights to bring a continuous series of actions in respect of each contract under which they have performed the work concerned. Second, such a rule precludes inclusion of all past service of the workers concerned in the calculation of their retirement benefits even where such service formed part of a continuous employment relationship. Any such workers who brought their first legal actions within the six months following the end of their last contract of employment would be deprived of the possibility of having service under their previous contracts recognised.

67 As pointed out in paragraph 33 of this judgment, the Court has held that the setting of reasonable limitation periods is compatible with Community law inasmuch as the fundamental principle of legal certainty is thereby applied. Such limitation periods cannot therefore be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law.

68 Whilst it is true that legal certainty also requires that it be possible to fix precisely the starting point of a limitation period, the fact nevertheless remains that, in the case of successive short-term contracts of the kind referred to in the third question, setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by Article 119 of the Treaty excessively difficult.

69 Where, however, there is a stable relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies, it is possible to fix a precise starting point for the limitation period.

70 There is no reason why that starting point should not be fixed as the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment as that to which the same pension scheme applies.

71 A requirement, in such circumstances, that a claim concerning membership of an occupational pension scheme be submitted within the six months following the end of each contract of employment to which the claim relates cannot therefore be justified on grounds of legal certainty.

72 The answer to the third question must therefore be that Community law precludes a procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) to be brought within six months of the end of each contract of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies.'

70. In ***Preston*** the CJEU were dealing not with any question of interpretation of an EU directive but with the issue of whether the then Equal Pay Act provided an effective remedy for a breach of EU law. That is very different to the question I have been dealing with above. Nevertheless, I find the approach instructive in the interpretation of the rights conferred by Article 7(1).

71. The ***Preston*** approach to a stable employment relationship will not catch every form of atypical working. The scope of the ***Preston*** definition have been integrated into domestic law and the meaning of a stable employment relationship domestically is now well established in equal pay cases.

72. I agree with Ms Darwin KC that as a matter of domestic law in the WTR 1998 the expression 'terminated' in regulation 13(9) and 14 would appear to refer to the termination of a contract. That is consistent with the definitions in regulation 2 and in particular that: *'"employment", in relation to a worker, means employment under his contract, and "employed" shall be construed accordingly'*. The reference is to the contract rather than the concept of a relationship. However, these are rules of domestic law and cannot be used to cut down the rights afforded to 'every worker' if that is inconsistent with EU law – See BECTU. At this stage I am simply attempting to ascertain the effect of the directive on an employee with the working arrangements that Mr Somerville had.

73. I have come to the conclusion that the expression 'the employment relationship' in Article 7(2) of the WTD 2003 must be regarded as having the same meaning as a stable employment relationship in ***Preston*** although I have reached that conclusion not for the reasons given in ***Preston*** but because to hold otherwise is to effectively exclude those people in a like the Claimant in a stable working relationship from the rights and benefits afforded by Article 7(1). It cannot have been the intention behind the directive to exclude a large proportion of the workforce from its scope otherwise it would not apply to 'every worker'. It imposes no onerous obligation on employers to monitor the work done by the workers on an annual basis, to encourage the use of paid time off and to keep records that allow a running calculation of entitlement to be kept. Even in the gig economy many responsible employers do exactly that.

74. I am of course alive to the formalisation of 'rolled up holiday pay' provided by the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (S.I. 2023/1426). The fact that the law has now changed does not in my view alter the analysis I have set out above.

Was there a breach of Article 7(1) in this case?

75. Mr Somerville was never paid during any period he did not work by the Respondent. The nature of the role was that Mr Somerville accepted sitting obligations. He either fulfilled those obligations or the booking was cancelled by one of the parties. There

was no system or scheme in place where Mr Somerville could accept a booking and say that he was taking holiday instead of sitting. I have no doubt that Mr Somerville had periods when he was not working for the Respondent, but those periods were no more 'annual leave' than a weekend is for a person contracted to work only on weekdays.

76. I consider that, on the undisputed facts, Mr Somerville has established that the Respondent unlawfully failed to afford him paid annual leave as required by Article 7(1). It neither afforded him leave nor pay let alone the composite right of paid leave.

77. Article 47 of the EU Charter of Fundamental Rights provides that the contracting states are required to give an effective remedy to any person whose rights and freedoms guaranteed by the law of the Union are violated.

The effect of King and Smith

78. In ***King v Sash Window Workshop Ltd*** the CJEU held that the WTD 2003 and the case law of the ECJ precluded any national implementation of the directive that required a worker to actually take unpaid annual leave before being able to claim for pay. The court held that (at para 63) (emphasis added):

'It follows from the above that, unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer that does not allow a worker to exercise his right to paid annual leave *must bear the consequences'.*

The consequences that were said to follow was that:

'art.7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.'

79. The decision in ***King v Sash Window Workshop Ltd*** left open the question of where the ability to carry over the right to paid leave applied only where the leave was not taken or whether it applied in the same way where leave had been taken but was unpaid. In ***Smith v Pimlico Plumbers Ltd*** **[2022] ICR 818** the Court of Appeal accepted that it did. Mr Smith, who's pleaded case was that he had not been paid for leave that he had taken, was able to carry over the right to paid annual leave until the termination of his contract. He was able to recover in respect of the entirety of his employment as he had brought his claim within three months of his dismissal.

80. It is a matter for each member state to set procedural rules in respect of claims to enforce these EU rights. If limitation provisions are to be included in those rules then it is necessary to fix a starting point to any limitation period. The submissions of the Respondent are to the effect that as Mr Somerville could not be regarded as a worker between assignments that must trigger national rules relating to limitation. What that overlooks in my view is that the very decision that the limitation periods would be triggered is a national rule of procedure itself (whether found in the legislation or in case law). What is made clear in ***King*** and ***Smith*** is that such national rules must be disregarded where the employer has refused to facilitate paid annual leave.

The effect of that conclusion

81. It follows from my conclusion that it is immaterial that Mr Somerville's individual assignments were not continuous and that in between those assignments there were periods where he could not be regarded as a worker. It is beyond any reasonable argument that he, and the Respondent, regarded themselves as being in a stable employment relationship. The fact that the contracts that would govern the terms of engagement were periodically renewed (and eventually terminated) is a finding made by EJ Masserella and in my view is sufficient to determine this point. I note that the Respondent's objections to the Claimant's application to amend were in part based upon the subsistence of a relationship.

82. It follows that I have come to the conclusion urged upon me by Mr Somerville that his case in EU law cannot be distinguished from that of Mr King and Mr Smith. He, like them, was denied the right to paid annual leave and he, like them, is entitled to carry over the accrued rights until the he is either afforded an opportunity to take the leave or the employment relationship is terminated.

83. I have perhaps reached that conclusion for somewhat different reasons than those urged upon me by Mr Somerville nevertheless I consider his instinctive approach to the rights conferred by direct application of EU law to be correct.

Can the domestic legislation be interpreted to give a remedy?

84. The finding that there is a breach of EU law does not in itself guarantee Mr Somerville a particular remedy. However, I am required to interpret domestic legislation in a way that provides Mr Somerville with a remedy that satisfies the requirements of effectiveness and equivalence.

85. In ***Smith v Pimlico Plumbers Ltd*** Simler LJ explained the obligation on courts and tribunals. She said:

> *'29 The approach to interpreting and applying the WTR is not in dispute. The relevant provisions must be interpreted, as far as possible, in the light of the wording and purpose of the WTD in order to achieve the result pursued by the WTD: see Marleasing SA v La Comercial Internacional de Alimentacin SA (Case C-106/89) [1990] ECR I-4135. This includes, as the CJEU made clear in Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu (Case C-684/16) [2019] 1 CMLR 35 ("Shimizu") at para 60,*
> *"the obligation for national courts to change established case law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a Directive."*

86. Having come to the conclusion that Mr Somerville is entitled to carry over his rights to paid annual leave until the termination of the employment relationship (as opposed to each worker contract) then I must deal with the position in the domestic legislation. A difference between Mr Somerville' position and Mr King and Mr Smith is that in the latter cases the employment relationship had terminated. I need to address the question of whether that makes any difference.

87. It is quite clear from the decision of the CJEU in ***King v Sash Window Workshop Ltd & others*** that there can be no restriction or precondition in national law on a worker's rights to seek a remedy for a breach of the rights given by Article 7 of the

Working Time Directive. It follows that a worker, denied a right to paid annual leave by reason of her/his employer's failure to recognise that right, cannot be required to terminate the relationship in order to enforce the right.

88. In ***Smith v Pimlico Plumbers Ltd*** Mr Smith had advanced his claim on the basis that he had taken annual leave and not been paid for it. He contended that the manner in which he had pleaded his case was sufficiently wide that it should be taken to include a claim brought under Regulation 14 of the WTR 1998. The Court of Appeal disagreed holding at paragraphs 56 and 57 that the Employment Tribunal had been entitled to conclude that: *'in substance a claim on termination, pursuant to regulation 14, for pay in lieu of leave which had not been taken (whether throughout the engagement or its final year), was not pleaded'*. His claim was therefore confined to a claim that he took annual leave each year but was not paid for it. Domestically that claim could not have succeeded because Mr Smith had not brought his claim within 3 months of his last day's holiday.

89. The route through which Mr Smith succeeded through the domestic legislation is not spelt out in terms. Having set out her reasons for concluding that the approach in ***King*** should apply to circumstances where annual leave was taken but unpaid Simler LJ said (with my emphasis):

Accordingly, I can see no principled basis in the CJEU's judgment in King (or the subsequent cases) for treating the worker who takes unpaid leave differently from the worker who takes less than the full leave to which he is entitled, in circumstances where both are unable to exercise the right to paid annual leave because of the employer's refusal to recognise the right and remunerate annual leave. It does not matter what means are adopted for transposing the right to paid annual leave or what the domestic system for remedies is. The single composite right in EU law is to take annual leave and to have the benefit of the remuneration that goes with it when the leave is taken. This is a particularly important health and safety right guaranteed by the WTD and by the Charter. Failure to pay for annual leave or uncertainty about pay is liable to detract from the rest and relaxation that should be afforded by periods of paid leave and to deter workers from taking it. The employer must bear the consequences of the refusal to recognise and remunerate the right; is under a duty to establish the correct position; and cannot be allowed to benefit from not paying for annual leave to the detriment of the worker's health and of the purpose of the WTD. In these circumstances, it seems to me that properly understood, the CJEU's reasoning in King (confirmed in the subsequent cases) extends to cover the worker who takes unpaid leave because the employer refuses to recognise the worker's right to paid leave and remunerate the leave, and means that this worker too is prevented from exercising the single right to paid leave afforded by article 7(1) WTD.

87 Contrary to the reasons relied on by the Employment Appeal Tribunal [2021] ICR 1194, at para 92, this interpretation does not make the time limits for claims under regulations 13 and 16 ineffective. Whatever the position might be in other cases (for example, when a worker is paid in part for annual leave, or is underpaid) a worker can only carry over and accumulate a claim for payment in lieu on termination when the worker is prevented from exercising the right to paid annual leave, and does not take some or all of the leave entitlement, or takes unpaid leave, for reasons beyond his control, because the employer refuses to recognise the right and to remunerate annual leave. The principles which justify treating these two cases differently from other cases derive from King (and the subsequent cases), as explained above. The

three-month time limit for making a claim, which runs from the termination of employment, applies in either case. Provided a claim for payment in respect of the breach of these rights is made within a period of three months beginning with the date of termination, it will be in time.'

90. The Court of Appeal had expressly determined that Mr Smith had not brought a claim relying on Regulation 14 of the WTR 1998. Furthermore the Employment Tribunal, and the Employment Appeal Tribunal had both held that Mr Smith had presented his claim for non-payment of holiday actually taken brought under Regulation 16 outside the statutory time limits in Regulation 30. There was no appeal against that conclusion.

91. In order to be able to read the WTR 1998 in a manner compliant with the obligations imposed by the WTD 2003 the Court of appeal proposed that Regulation 13 be read as including an additional paragraph reading as follows:

'(16) Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.'

92. Further changes are read into Regulation 14 to provide for a payment in lieu accumulated leave. Those changes have now been incorporated into the Amended WTR 1998.

93. I shall now deal with all the potentially available domestic remedies in turn. In doing so I shall deal with the potential remedy afforded by treating the situation in the present case as a 'refusal claim'. Below I accept the Respondent's submission that there is no such claim before me. The reason I considered it sufficiently important to deal with this potential claim in some detail is in case I am wrong about the scope of the claim. In addition I may be wrong in accepting that I am entitled to assume that Mr Somerville has taken sufficient unpaid leave as to extinguish any EU rights to do so. If I were wrong about that it seems to me that I could not treat the claim as being a claim for unpaid wages.

A refusal case - Regulation 30(1)(a)?

94. Regulation 30(1)(a) of the WTR 1998 provides a route through which a worker denied the right to paid annual leave can complain prior to termination of the employment relationship. I consider it necessary to examine the scope of that right.

95. In ***King v Sash Window Workshop Ltd & others*** Mr King had taken some unpaid leave during his engagement but not enough to exhaust his entitlement under Article 7(1). The Employment Tribunal ordered the Respondent to pay the Claimant for any untaken leave holding that there was an unlawful deduction of wages when the Respondent failed to ensure that the Claimant took leave. In the Employment Appeal Tribunal Simler J (as she was) held that it was not open to the Tribunal to infer that Mr King would have been prevented from taking leave by his employer. That conclusion relied on the fact that Mr King did take some unpaid leave without protest by his employer. On that basis she allowed the appeal and remitted the case to the Employment Tribunal. She went on to deal with the fact that the Tribunal had dealt with the matter as a series of unlawful deductions from wages. She said:

'37. There is another difficulty with the Tribunal's reasoning. The Tribunal's conclusion in paragraph 46 indicates that it viewed this claim (for Holiday Pay 3) as based on the Respondent's refusal to permit the Claimant to take paid leave. Whilst it is undoubtedly the case that claims for non-payment of holiday pay due under regulation 16(1) or for non-payment of pay in lieu of holiday not taken in the termination year under regulation 14(2) can be brought as claims for unlawful deductions from wages properly due (Stringer, particularly at 29 and 31), the same conclusion does not obviously follow in relation to a complaint based on refusal to permit a worker to take annual leave in accordance with regulation 13.

38. Here, the Claimant was paid his wages for the periods he would otherwise have taken as annual leave. What he lost was not wages but the health and welfare benefits of taking annual leave. Regulation 30 WTR recognises the difference. Under regulation 30(5) where a Tribunal finds that there has been a failure to pay in accordance with regulation 16 (1) (or on termination 14(2)) the remedy is an order requiring the employer to pay the worker the amount found to be due to him in that regard. However, where the complaint is based on a refusal to permit the exercise of these rights, an award of compensation on such basis as is considered just and equitable shall be made, having regard both to the employer's default in refusing to permit that exercise and to any loss sustained by the worker as a consequence. Such an award of compensation cannot in my judgment be regarded as "wages" within section 27(1) ERA. It is not paid as part of the consideration for work done or to be done under the contract but rather as unliquidated damages for the refusal to allow a right to be exercised or in respect of leave that has not been taken. Whilst a remedy for such a complaint is expressly afforded by regulation 30 WTR, a remedy based on unlawful deduction from wages under section 23 ERA is not available on such a complaint.'

'Unliquidated damages'

96. At the level of the Employment Tribunal the question of whether Simler J was right to regard the compensation that may be ordered where a claim is advanced through Regulation 30(1)(a)('a refusal case') as not being 'wages' falling within Section 27 of the ERA 1996 is that I am bound by her conclusion. The decision is clearly part of the reasoning and is not disturbed by the later decision of the CJEU. If that were not the case I would have come to the same decision for the reasons set out below.

97. In response to my request for further submissions on this point Mr Somerville says, *'Para 38 of King appears, on its face, to be an authority that compensation for the loss of health and welfare benefit is available by regulation 30 WTR and not section 23 ERA, subject to any other later or higher authority'*. What he says above is that as he is claiming both the loss of welfare benefits and the wages he says he ought to have been paid his case can be distinguished from ***King***. Ms Darwin KC said: *'Mr Somerville's complaint, as the Respondent understands it, is that the Respondent failed to pay him the whole or any part of any amount due to him under Regulation16(1) WTR 1998. It is a claim brought under Reg 30(1)(b) WTR 1998. Accordingly, the Employment Tribunal is concerned with the remedies available under Regulation 30(5) WTR 1998. The Respondent accepts that a claim for unlawful deduction of wages can be brought in relation to amounts owed under Regulation 30(5) WTR 1998. This is also consistent with the EAT's judgment in **King**, as set out above'*. Accordingly whilst both parties dispute that this aspect of the reasoning in

King has any bearing on this case they both accept that Simler J has properly stated the position.

98. Whilst the definition of 'wages' in Section 27 of the ERA 1996 is broad and has been held to include any sums payable as 'holiday pay' (see ***Revenue and Customs Commissioners v Stringer*** **2009 ICR 985, HL**) any claim for wages must relate to a quantified/liquidated sum and not to a claim for damages see ***Delaney v. Staples (t/a De Montfort Recruitment)*** **[1992] IRLR 191**, ***Coors Brewery Ltd v Adcock*** **[2007] EWCA Civ 19**.

99. In ***Revenue and Customs Commissioners v Stringer*** the House of Lords were dealing with the question of whether the expression 'holiday pay' in Section 27 of the ERA 1996 was apt to include failures to make payment under Regulation 14 of the WTR 1998 Lord Walker made the following observations:

41. Because the WTR are concerned primarily with health and safety, breaches of some of the provisions in Part II of the WTR, such as regulations 10 (Daily rest), 11 (Weekly rest period), 12 (Rest breaks) and 13 (Entitlement to annual leave) do not give rise to readily quantifiable monetary claims. If a worker works and receives a week's pay, when he should have had a week's holiday with pay, it is rest and recreation, not money as such, that he has lost. Consequently regulation 30 (Remedies) provides for statutory compensation to be awarded by the employment tribunal as is just and equitable in the circumstances, having regard to the employer's default and any loss sustained by the worker (see regulation 30(1)(a)(i), (3) and (4)). Some other claims under Part II, that is under regulations 14 (Compensation related to entitlement to leave) and 16 (Payment in respect of periods of leave), are liquidated in nature. For them the remedy is an order for payment of the amount due: see regulation 30 (1)(b) and (5)……

46. The purpose of section 13(3) is not immediately apparent but it has been interpreted as having two important effects. In Delaney v Staples [1991] 2 QB 47 the Court of Appeal (Lord Donaldson of Lymington MR, Ralph Gibson LJ and Nicholls LJ) relied on its predecessor (section 8(3) of the Wages Act 1986) for the conclusion that "a deduction from wages" can for this purpose cover a total failure to pay any wages when due (in that case, contractual commission and holiday pay). But the Court of Appeal also held that the employment tribunal had no jurisdiction to make an award in respect of an unliquidated contractual claim for a payment in lieu of notice. The House of Lords [1992] 1 AC 687 dismissed the ex-employee's claim on the latter point (on which the law has since been changed, in 1994, to give employment tribunals a limited jurisdiction to hear certain contractual claims for unliquidated sums). There was no cross-appeal against the Court of Appeal's decision as to the meaning of "a deduction from wages", nor was it challenged before your Lordships.

47. The other decision of the Court of Appeal on section 13(3) is New Century Cleaning Co Ltd v Church [2000] IRLR 27. In that case the Court of Appeal (Beldam and Morritt LJJ, Sedley LJ dissenting) held, on unusual facts arising out of the way a team of window cleaners operated, that the effect of the words "properly payable by him to the worker on that occasion" excluded anything in the nature of an unliquidated claim from coming within section 13. Again, that decision has not been challenged before your Lordships. It is not directly relevant to Mr Ainsworth's claim but it shows that the very wide definition of "wages" in section 27 of the ERA (the last section in

Part II) must in effect be filtered, for the purposes of a claim under section 13, by eliminating any unliquidated amounts. The definition of "wages" in section 27 (to which I now proceed) does contain some items (for instance, some of those in subsection (1)(e) and (f): see sections 60(3) and (4) and 70(6) and (7) of the ERA) which, like statutory compensation under regulation 30(3) and (4) of the WTR, cannot be quantified until the employment tribunal makes its own evaluative judgment on a claim.

100. I do not consider that these observations amount to a binding conclusion that the unliquidated damages available under Regulation 30(3) and (4) cannot amount to wages as the remarks do not form part of the essential reasons. That said, they provide highly persuasive authority that such unliquidated sums would not ordinarily fall within Section 27.

101. According to Simler J (as she was) the route by which Mr King could complain of a refusal to permit him to take paid annual leave was through Regulation 30(1)(b) of the WTR 1998. The remedies available are those in Regulation 30(3) read with 30(4). A tribunal must make a declaration but may award compensation in an amount that is just and equitable having regard to the factors set out in regulation 30(4). The word may connote a discretion to be exercised by the Tribunal (albeit in a principled way) – see ***Miles v. Linkage Community Trust Limited*** **[2008] IRLR 602** where no compensation was awarded despite a breach.

102. In many cases where there had been a refusal to allow paid annual leave the compensation that would be just and equitable would be the equivalent of the wages payable for the period of leave. The wages being thought to be the value of the employee's time. It is easy to construct an example where that would not be the case. If the worker had booked an expensive and non-refundable family holiday on the assumption that the employer would respect the right to paid annual leave the worker might be out of pocket to the value of the holiday costs. It is difficult to see why those costs should not be included in what it is just and equitable to order the employer to pay.

103. In ***Santos Gomes v Higher Level Care Ltd*** **(CA) [2018] ICR 1571** the Court of Appeal were invited to overturn the decision of the Employment Tribunal which, having found a breach of Regulation 12 of the Working Time Regulations, declined to make an award for injury to feelings under Regulation 30(3). The Court of Appeal declined to do so saying (Per Singh LJ at para 64) *'the phrase just and equitable does not confer a general power on tribunals to award what they think ought to be awarded in a form of palm tree justice'*. The Court of appeal agreed with the Tribunal that the appropriate measure of compensation should be calculated as the wages for the time of the missing rest breaks. I do not consider that ***Santos Gomes*** is authority for the proposition that the compensation that might be awarded under regulation 30(4) is always calculated by reference to the time worked (which should have been a form of leave). In ***Grange v Abellio London Ltd*** **UKEAT/0304/17** The Employment Appeal Tribunal held that ***Santos Gomes*** did not preclude an award for personal injury. I am unsurprised by that conclusion. As the case law of the CJEU has consistently made clear the purpose of the WTD 2003 is aimed at health and safety. Where a failure to respect the rights conferred by the Directive is shown to have caused personal injury perhaps with consequential financial loss it would be remarkable if the loss could not be recovered in national law.

104. I do not consider it possible to construe the phrase 'holiday pay' in Section 27(1) of the ERA 1996 as including unliquidated damages for personal injury or compensation for a cancelled holiday. Such sums are in no sense holiday pay. Equally as Lord Walker remarked in ***Revenue and Customs Commissioners v Stringer*** '*If a worker works and receives a week's pay, when he should have had a week's holiday with pay, it is rest and recreation, not money as such, that he has lost'.* The fact that a Tribunal might fix compensation at a level referable to wages does not convert that compensation into 'holiday pay'.

105. The conclusion I reach is that the domestic remedy afforded by Regulation 30(1)(a) does not amount to wages and cannot be pursued as an alternative claim via the mechanism of a claim for unlawful deduction from wages.

106. If a claim had been brought under Regulation 30(1)(a) I need to consider whether it had been brought in time. I see no difficulty whatsoever reading the WTR 1998 consistently with the obligation I have identified imposed by Article 7(1) of the WTD 2003 to a person in Mr Somerville's position to enable him to bring a claim through the mechanism of Regulation 30(1)(a). The time limit runs from *'the date on which it is alleged that the exercise of the right should have been permitted'.* In a case where the right has accumulated that will be a continuous state of affairs up to the point where the right to paid annual leave is recognised or the employment relationship is terminated. No additional words need be written into the legislation to give effect to the EU right.

107. It follows that I find that Regulation 30(1)(a) of the WTR 1998 can be read as including the right to bring an accumulated right to paid annual leave which is not recognised by the Employer resulting in a 'refusal' for the purposes of that regulation. A claim can be brought at any time during the continuance of the refusal up to the date, within three months (plus any early conciliation extension) from the date that the right is recognised or the employment relationship (as opposed to any individual contract) is terminated. On this basis a claim brought in those terms by Mr Somerville would have succeeded.

108. I further conclude that where because of a 'refusal' by the employer to recognise the right to paid annual leave the worker takes no time off work there can be no claim brought under Part II of the ERA 1996 because any claim is in respect of unliquidated damages which are not in the nature of 'holiday pay' and therefore fall outside the definition of wages in Section 27 of the ERA 1996.

109. Whilst I would have found for Mr Somerville on this basis I consider that it is not open to me to do so for two reasons. The first is that this is not the way that Mr Somerville has put his case. Ms Darwin KC is correct in her submissions to that effect. Through successive case management hearings the Claimant has pinned his colours to the mast of Regulation 16/30(1)(b) and/or Section 23 of the ERA 1996. The fact that I have identified a different route risks me 'entering into the arena' and is arguably improper.

110. A further reason for me not putting Mr Somerville's own characterisation of his case to one side and deciding the claim on the basis above is a matter of jurisdiction. Section 4(3)(ce) of the Employment Tribunals Act 1996 (at the time) provided that a judge sitting alone could hear claims *'proceedings on a complaint under regulation 30 of the Working Time Regulations 1998 relating to an amount due under regulation 14(2) or 16(1) of those Regulations'*. It follows that a complaint brought under

Regulation 30(1)(a) is not a complaint that I have determine other than with a full tribunal.

111. I have concluded that it is not open to me to take a point not run or adopted by Mr Somerville. I would be improperly entering into the arena and what is more having taken the point of my own volition I would need to take steps (if that were possible) to reconvene as a full tribunal.

Claims under Regulation 30(1)(b)

112. In the WTR 1998 claims may be brought where there is a failure to make any payment due under Regulations 14 and 16.

Regulation 14/Regulation 30(1)(b)

113. Where the employer does not recognise the worker's right to paid annual leave there is no difficulty seeing how a claim under Regulation 14 (in the alternative to a claim under Regulation 30(1)(b)) might be brought upon termination of the contract.

114. For a person with a continuous contract (such as Mr King or Mr Smith). The reasoning in ***King*** and ***Smith*** is that the rights to paid annual leave accumulate until they are afforded paid annual leave or termination. Upon termination they would have been entitled to a payment in lieu of the accrued rights. Such a claim can be brought domestically through Regulation 14. The Court of Appeal in ***Smith*** read words into Regulation 14 in order that that regulation has that effect. The fact that Mr Smith had not brought such a claim was not fatal to him for the reasons I have set out above. I have held that the rights under Article 7(1) to paid annual leave accumulate until the end of the employment relationship (and not an individual contract). That means that Mr Somerville is in the same position.

115. A claim under Regulation 14 can only be brought upon termination. It follows that it is not possible to use this route unless termination has occurred. To permit an employee to do otherwise is to breach the prohibition in Article 7(2) of the WTD 2003 that the right to paid leave may not be replaced with money unless the employment relationship has ended.

116. If Mr Somerville's employment relationship with the Respondent had terminated then it would have been open to him to have brought a claim under Regulation 14. He says, and I have found, that it had not terminated. Furthermore, Mr Somerville, has expressly disavowed any intention to rely on Regulation 14.

117. I conclude that it would be possible in a hypothetical case to bring a claim for rights accumulated under the principles in ***King*** and ***Smith*** through Regulation 14. In the present case I find that that is not open to Mr Somerville for two reasons. Firstly the employment relationship with the Respondent had not terminated. Secondly, he has expressly disavowed such a claim.

Regulation 16/Regulation 30(1)(b)

118. I turn to the issue of whether in the circumstances of this case it is possible to bring a claim under Regulation 16/30(1)(b). I have come to the conclusion that it is. My reasons are below.

119. It is not open to a worker to bring a claim under regulation 16 of the WTR 1998 unless she/he has taken annual leave. If it were possible to bring a claim under Regulation 16 without taking leave then that would be a substitution of cash for leave which is prohibited by Article 7(2) in the WTD 2003 and Regulation 13(9)(b) domestically. Importantly, interpreting the rights under Regulation 16 as arising only when leave is taken is consistent with the grain of the legislation. Were it otherwise an employee might both work and receive wages being paid twice for the same period of time.

120. It follows in my view that it is only open to a worker to bring a claim under regulation 16 if they have actually taken time off work. If they have taken time off work, even if the employer has refused to pay them, then in my view there is nothing to prevent the worker bring a claim relying on Regulation 16. In a case where the employer refuses to recognise the right to paid holiday, the fact that, there is no need to do so because the rights would continue to accumulate, is beside the point.

121. For reasons I do not fully understand, the Respondent has conceded that Mr Somerville does not have to demonstrate that he actually took any annual leave. For the reasons I have set out above I can see why that is the proper approach in a case relying on Regulation 30(1)(a) ('a refusal') or a claim relying on Regulation 14. I do not see why it is thought to be irrelevant in a claim relying on Regulation 16.

122. Whilst Mr Somerville may not have taken paid annual leave from the NMC that is not to say that he did not have time that he regarded as a break from work taken at his own volition and at times he chose. It appears that the position taken by Mr Somerville was that it was impossible for him to attribute any unpaid annual leave that he actually took to his engagement with the Respondent. EJ Masserella sets out Mr Somerville's 'portfolio career'. I accept that it would be impossible to identify particular dates as being time off from working for the Respondent. I am also prepared to accept that Mr Sommerville did take time off. Given that the Respondent has not required Mr Somerville to prove when he took any such break I consider that the concession is such that I should accept that Mr Somerville did take annual leave (albeit unpaid) exhausting his entitlement to leave under Regulation 13 of the WTR 1998.

123. In ***Smith*** it appears that the Court of Appeal accepted that Mr Smith was able to bring his claim through Regulation 16 (his only pleaded claim) as the domestic route to a claim brought under EU Law. I see no grounds to distinguish the position of Mr Somerville (once I have disposed of the argument that the employment relationship terminated). The Court of Appeal in ***Smith*** have held that the rights under Article 7(2) accumulate until termination. There is no reason why a worker could not bring an earlier claim. It could not be a precondition or seeking pay for holiday taken but unpaid that the Worker would have to resign from their employment.

124. As explained in ***Smith*** the time limit set out in Regulation 30(2) of the WTR 1998 remains effective, but a claim will only be presented out of time where three months (plus any early conciliation extension) have elapsed from the point at which the right is recognised, or the employment terminated. In Mr Somerville's case the NMC had not recognised his rights to paid annual leave at the point that he presented his claim. His claim is therefore in time.

125. There is no difficulty reading the WTR 1998 as affording Mr Somerville a remedy. The Court of Appeal in ***Smith*** having read in the words now found in Regulation 13(16) WTR 1998 no further reding down is necessary.

126. It follows that the domestic route through the WTR 1998 affords an effective remedy for the breach of Mr Somerville's rights to paid annual leave conferred by Article 7(1) of the Working Time Directive. He does not need to rely on Sections 13/27 of the ERA 1996 or concern himself about the limitation provisions applicable to such a claim.

If I am wrong about 'termination of the employment relationship'

127. My conclusions above all rest on my finding that Article 7(1) requires to be read as subsisting throughout an employment relationship evidenced by a stable employment relationship. If I am wrong about that I need to revisit most if not all my conclusions. I should assume that the obligations under Regulation 7(1) terminated at the end of each agreed period of work. For the purposes of the WTR 1998 the effect of that would be:

    127.1. That any 'refusal' for the purposes of Regulation 30(1)(a) would have taken place at the point of each termination; and

    127.2. That any claim under Regulation 14 would have arisen at the day when payment ought to have been made (presumably the next payroll); and

    127.3. Any claim under Regulation 16 would have arisen at the point of the next payroll after the leave was taken (assuming that there ever was any).

128. This would mean that Mr Somerville's remedy would be limited to only the last few months before he presented his claim. The decisions in ***King*** and ***Smith*** relating to the accumulation of the rights to paid annual leave would be of no application to Mr Somerville's case. The rights would never accumulate because of the terminations. What Mr Somerville would be left with is a number of unlawful acts. The time limits in any domestic legislation would be applicable to any claims unless Mr Somerville can show that they breach the EU principle of effectiveness and/or equivalence.

129. If the claims are brought under the WTR 1998 then the time limits run from each alleged unlawful act. There is no provision in the Regulations for stringing together a series of similar acts. It is for that reason that the Respondent says that the Claimant would be better off bringing a claim for unlawful deduction of wages under Part II of the ERA 1996. The Respondent goes on to say that the Claimant's claims under Section 23 are limited to 2 years before he presented his claim by reason of Sub-section 23(4A).

130. Mr Somerville says that I should disapply Section 23(4A) he says that a failure to do so offends against the principles of effectiveness and equivalence.

131. As I have held above claim for unliquidated damages in a refusal case is not a claim for wages and cannot be pursued through the Part II of the ERA 1996. The domestic remedy is through Regulation 30(1)(a). The only claims that might be made through Part II of the ERA 1996 are claims for holiday pay which may include sums due under regulation 14 or 16.

132. The Respondent concedes that Mr Somerville is entitled to claim 'holiday pay' for the last two years before he presented his ET1. The Respondent does not say whether that concession is on the basis that Mr Somerville is entitled to rely on Regulation 14 in respect of each termination of his worker contract or whether it

accepts that Mr Somerville took some annual leave and is entitled to be paid for it. I have presumed it is the latter.

Effectiveness and equivalence – Law

133. As I have set out above Article 47 of the EU Charter of Fundamental Rights requires member states to provide an effective remedy for any breach of EU law. It is well established that there are two facets to this. The first is that the remedy must be effective in the sense that there is an available practical legal route for the enforcement of the right before a domestic court or tribunal. The second the domestic route to a remedy for any breach of EU law must be no less favourable than for a breach of a similar domestic law. This second requirement has been referred to consistently as a requirement of equivalence.

134. In ***R (on the application of UNISON) v Lord Chancellor*** **[2017] UKSC 51** in the context of deciding upon the legality of the requirement to pay fees in order to bring tribunal claims enforcing EU rights the court addressed the issue of whether the fees order meant that claimants did not have an effective remedy. The basic approach is set out in the Judgment of Lord Reid in paragraphs 106 to 109. In particular:

134.1. *'EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be "liable to render practically impossible or excessively difficult" the exercise of rights conferred by EU law'* – para 108

134.2. *In terms of article 52(1): "Any limitation on the exercise of the rights and freedom recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."* – para 107

134.3. *'The burden lies on the state to establish the proportionality of restrictions where, as in the present case, they are liable to jeopardise the implementation of the aims pursued by EU directives.'* – para 107

134.4. *one general point to note is the emphasis placed by the Strasbourg court on the protection of rights which are not theoretical and illusory, but practical and effective. That is consistent with the recognition in domestic law that the impact of restrictions must be considered in the real world*. – para 109

135. There is no objection in principle to a domestic rule of procedure that imposes a limitation period. In ***Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*** **ECJ Case 33/76 [1976] ECR 1989** the CJEU held that (with emphasis added):

135.1. *'It is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law'*

135.2. *'in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law 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.'

135.3. *'the right conferred by Community law must be exercised before the national Courts in accordance with the conditions laid down by national rules.....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....This is not the case where reasonable periods of limitation of actions are fixed.....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 tax-payer and the administration concerned.*

136. Ms Darwin KC, adopting the approach of EJ Goodman in ***Battan & others***, relied on ***Test Claimants in the FII Group Litigation v HMRC*** **(2012) UKSC 19** for the proposition that it is also permissible to shorten time limits, provided there is a reasonable transition period, compatible with legitimate expectation. In that case the Supreme Court made a reference to the CJEU asking whether the enactment of a provision that retrospectively removed the ability of the test claimants to rely upon a cause of action to reclaim wrongly paid tax infringed EU law. In ***FII Group Litigation v HMRC*** **Case C-362/12** the CJEU held that it did. In doing so the CJEU identified the following points of principle:

'31 In the absence of EU rules on the recovery of national taxes unduly levied, it is for the domestic legal system of each Member State, in accordance with the principle of the procedural autonomy of the Member States, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which taxpayers derive from EU law. The Member States none the less have responsibility for ensuring that those rights are effectively protected in each case (see Case C-93/12 Agrokonsulting-04 [2013] ECR, paragraph 35 and the case-law cited).

32 The detailed procedural rules governing actions for safeguarding a taxpayer's rights under EU law must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, inter alia, Joined Cases C-317/08 to C-320/08 Alassini and Others [2010] ECR I-2213, paragraph 48 and the case law cited, and Agrokonsulting-04, paragraph 36).

33 As regards the latter principle, the Court has held that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned. Such time-limits are not liable to render impossible in practice or excessively difficult the exercise of rights conferred by EU law. However, in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance (Marks & Spencer, paragraphs 35 and 39 and the case-law cited).

34 As regards the recovery of domestic taxes unduly levied, the Court has already held that a time-limit of three years under national law, calculated from the date of the contested payment, appears reasonable (see Case C-228/96 Aprile [1998] ECR I-7141, paragraph 19, and Case C-255/00 Grundig Italiana [2002] ECR I-8003,

paragraph 34). Thus, a limitation period of six years, such as that applied to the Woolwich cause of action, which starts to run on the date of payment of the tax concerned, appears, in itself, to be reasonable.

35 Nor does the principle of effectiveness present an absolute bar to the retroactive application of a new period for initiating proceedings that is shorter and, as the case may be, more restrictive for taxpayers than the period previously applicable, where such application concerns actions for the recovery of domestic taxes contrary to EU law which have not yet been commenced by the time the new period comes into force but which relate to sums paid whilst the old period was still applicable (Grundig Italiana, paragraph 35).

36 Given that the detailed rules governing the recovery of national taxes unduly levied are a matter for national law, the question whether such rules may apply retroactively is equally a matter for national law, provided that any such retroactive application does not contravene the principle of effectiveness (Grundig Italiana, paragraph 36).

37 However, as the Court held in paragraph 38 of Marks & Spencer, whilst national legislation reducing the period within which repayment of sums collected in breach of EU law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the previous legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.'

137. In ***Levez v T H Jennings (Harlow Pools) Ltd*** **[1999] ICR 521** the CJEU held that a time limit for presenting an equal pay claim breached the principle of effectiveness in circumstances where the employer had misrepresented the facts to the employee meaning that she was unaware that she had a claim and that the domestic legislation (at the time) provided no possibility of an extension of time. Section 130 of the Equality Act 2010 reflects the decision of the CJEU on this point.

138. In ***Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*** the CJEU held that fixing the start of a limitation period of six months at the end of each of a succession of short contracts in the context of a stable employment relationship rendered enforcing the right to recognition of membership of an occupational pension scheme excessively difficult – see the passages quoted above and in particular para 68. Again Section 130 of the Equality Act 2010 displaces the ordinary 6 month time limit for equal pay claims reflecting this decision.

139. Questions of effectiveness and equivalence were raised in ***Chief Constable of the Police Service for Norther Ireland & others v Agnew & others*** and that case contains a useful summary of the relevant principles relating particularly to equivalence are set out at paragraphs 50 through to 57. The extensive quotes set out in those paragraphs make it impractical to reproduce them here. The key points are as follows:

139.1. *'The principle of equivalence is a qualification to the general principle of EU law that Member States have autonomy when it comes to setting the procedural rules governing how EU rights conferred on the citizens of the Union by EU enactments are to be enforced'.* – para 50

139.2. That the following principles can be extracted from ***Levez v T H Jennings (Harlow Pools) Ltd***:

139.2.1. 'The principle of equivalence requires that the 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; and

139.2.2. However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought, like the main action in the present case in the field of employment law.

139.2.3. In order to determine whether the principle of equivalence has been complied with in the present case, the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and the essential characteristics of allegedly similar domestic actions.

139.2.4. Furthermore, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts'.

139.3. *'When comparing procedures available to a claimant, it was appropriate to consider whether an action before the tribunal would be simpler and, in principle, less costly'* – para 52

139.4. *'there may be no similar action available in domestic proceedings for the purposes of the comparison' para 56.* In which case the principle of equivalence will have no bearing on any national procedural rules – see the judgment of Lord Clyde at paragraph 43 of ***Preston & Others v. Wolverhampton Healthcare N.H.S. Trust & Others and Fletcher & Others v. Midland Bank Plc*** **[2001] UKHL 5** ('***Preston No: 2***') (which applied the ruling in that case of the CJEU).

139.5. *'The court is not therefore driven to find the nearest comparison but to decide whether there really is a similar action to enforce the rights in question'* para 56 and quoting the judgment of Lord Slynn in ***Preston No 2*** where he said:

> *"... one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under article 119 that somehow or other a claim could be framed in contract."*

140. It was conceded by the Police Officers in ***Agnew*** that the 3 month limitation period that applied where holiday had been taken but was underpaid did not infringe the EU

principle of effectiveness – see paragraph 58. Whilst the Supreme Court was therefore not invited to adjudicate on the point it quoted ***Rewe-Zentralfinanz eG*** and it is clear that the court did not consider that the point was wrongly conceded.

141. The issue of what domestic action was truly comparable to an EU right was central in the case of ***Totel Ltd v Revenue and Customs Commissioners*****[2018] UKSC 44**. The following points may be extracted from the Judgment of Lord Briggs (with whom the other JSCs agreed):

141.1. *'it is for the courts of each member state to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis'* – para 6

141.2. *'the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific'*- para 9

141.3. *'The domestic court must focus on the purpose and essential characteristics of allegedly similar claims'*- para 10

141.4. *'Of particular importance within the relevant context is the specific procedural provision which is alleged to constitute less favourable treatment of the EU law claim. This is really a matter of common sense…… This is because it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the divergences in those procedural requirements are attributable to, or connected with, differences in the underlying claims.' – para 11*

Application of those principles.

142. I shall deal with all potential claims despite the fact that I have held that Mr Somerville has elected to put his case on a particular basis. I consider this necessary for the following reasons. I may be wrong in my analysis of the scope of Mr Somerville's claims in which case it may be useful for any appellate court to see what my conclusions would have been had I taken a broader view of his case. In addition it seems to me that in assessing whether domestic law provides an effective and equivalent remedy it is necessary to look at the remedies which are available and not only those which a claimant has sought to pursue.

Refusal claims - effectiveness

143. I shall deal firstly with a claim brought pursuant to Regulation 30(1)(a) of the WTR 1998 ('a refusal claim'). As should be apparent from my reasons above I have concluded that this would be the only claim a worker could bring domestically where (1) the employer had refused to allow any annual leave and no leave was taken at all (precluding a claim under Regulation 16) and (2) the employment relationship had not terminated (precluding a claim under Regulation 14).

144. I have further concluded that it is not possible for a worker to bring a refusal claim through Section 27 of the ERA 1996. It follows that the sole route in those

circumstances is through Regulation 30 and is subject to the time limit in Regulation 30(2) of the WTR 1998. That time limit is 'within 3 months' plus any extension of time relating to ACAS early conciliation. The time limit is subject to the strict 'reasonable practicality' test.

145. For these purposes I am assuming that the Respondent is correct and that the time limit relates to each particular assignment. It was suggested that the time limit must run from the date of the assignment itself. I do not agree the wording of Regulation 30(2)(a) is that the time limit runs from *'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)'*. The date of the assignment cannot be the date on which the right to leave should have been permitted because the worker cannot both work and take leave at the same time. It follows that the leave would have to be given at some other time. As it is annual leave the latest that the right should have been permitted is the same holiday year as the assignment. Calculating the last possible day in the holiday year would require knowing how many days of leave had accrued. These difficulties illustrate how difficult it is to treat every assignment as crystalising any rights under Article 7(1) as opposed to having regard to an employment relationship.

146. The wording of Regulation 30(2) appears to presuppose that there has been a request to take leave. It is now clear that the burden is on the employer to put the worker in a position to exercise the right – see recently ***LB v TO*** **Case no: C-120/21 CJEU**. If the worker does not request leave because either they are unaware of the right or they know or believe that it will be refused what then is the date of the refusal?

147. The date of the assignment cannot be the date on which the right to leave should have been permitted because the worker cannot both work and take leave at the same time. It follows that the leave would have to be given at some other time.

148. The Respondent's approach is to say that the rights engaged in this case accrue at the end of each assignment. I bear in mind that it is the Respondent's case (which I have accepted) that Mr Somerville has not brought a refusal case. I need to decide for myself when the starting point would be in a refusal case where there was no express refusal but a failure to recognise the right to paid annual leave. One approach would be to say that at the end of any assignment the worker would know that there had been a refusal to permit annual leave. That may be the case but that does not fit well with the wording of Regulation 30(2) which presupposes that leave could be taken on a particular date.

149. As it is annual leave, the latest that the right to annual leave should have been permitted is the end of same holiday year as the assignment. Calculating the last possible day in the holiday year would require knowing how many days of leave had accrued. These difficulties illustrate how difficult it is to treat every assignment as crystalising any rights under Article 7(1) as opposed to having regard to an employment relationship. Equally they illustrate how difficult it can be to fix the date from which the limitation period runs.

150. As illustrated by the case law above, in order to comply with the principle of effectiveness, limitation periods need to be clear and certain. I find that the starting point in a case where the employer refuses to recognise the right to annual leave (at all rather than specific leave dates) is not certain.

151. I have reached the conclusion that the absence of certainty about when any limitation period would start to run in a case on the present facts means that Regulation 30(1)(b) read with Regulation 30(2) does not provide an effective remedy for a breach of the rights afforded by Article 7(1).

152. Certainty could be provided by the same approach as was taken by the CJEU in ***Preston*** and subsequently adopted in the Equality Act 2010 as the test for limitation for equal pay cases. The limitation period would expire 3 months after the termination of the stable employment relationship. There is no difficulty ascertaining when that date might be as those principles are well established in domestic law. That is not the only option in reading Regulation 30(2) of the Working Time Regulations in conformity with the requirement for an effective remedy. I did not understand the decision of the CJEU to say otherwise.

153. I accept below that there is no difficulty whatsoever determining when the time limit starts running in a claim brought under Article 7(2) of the WTD 2003 and Regulation 14 of the WTR 1998. However, I consider that both domestically and under EU law there is a choice of causes of action. A worker may wish to pursue a refusal claim rather than a claim for a payment in lieu. Domestically, for the reasons I address above the remedies might not be the same. I conclude that the possibility of bringing a succession of claims pursuant to Regulations 14/30(1)(b) does not mean that there is an effective domestic remedy for a breach of Article 7(1) in a refusal case such as this one.

154. I have said above this is not a case brought by Mr Somerville. In the circumstances, other than saying that I find that the uncertainty about the starting date of any limitation period breaches the principle of effectiveness I do not need to consider whether or how the WTR 1998 might be read to comply with the requirement to provide an effective remedy.

155. For reasons I set out below I do not consider that a 3 month limitation period of itself breaches the principle of effectiveness where the right to arise at the conclusion of each assignment. It follows that in a case where there is a request and express refusal for a period of annual leave the starting point would be clear and the wording of Regulation 30(2) of the WTR 1998 provides a clear commencement date for any limitation period.

Regulation 14/30(1)(b) of the Working Time Regulations 1998 - effectiveness

156. I have found this is not a claim brought by the Claimant. The time limit for bringing a claim under Regulation 14 is three months from the date that the payment should have been made. There is no difficulty whatsoever fixing a starting date in respect of such a claim. It will be the date that payments are due.

157. A 3 month limitation period where the starting point is clear would ordinarily not mean that there was not an effective remedy. In ***Rewe*** a shorter limitation period was not considered to breach the principle of effectiveness. The question for me is whether the fact that the Claimant worked on an intermittent basis makes any difference to that conclusion.

158. Some support for the suggestion that there is a distinction to be drawn between the position of atypical workers such as the Claimant and those who have a single contractual relationship with their employers can be drawn from ***Preston***. Ms Darwin

KC suggested that the approach of the CJEU in that case can be distinguished on the basis that ***Preston*** was concerned with the recognition of past membership of pension schemes. I think she is partially right. One matter referred to the CJEU was the question of whether Section 2(5) of the Equal Pay Act 1970 as amended by the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976. That did concern the question of retrospective membership and the domestic provisions limiting the jurisdiction to a period of two years prior to the presentation of a claim. However an additional question that the CJEU was asked to determine was whether the 6 month time limit for the institution of claims from the termination of the workers contracts was itself contrary to the principal of effectiveness. In the case of those workers on a single contract the answer given by the CJEU was no. However in the case of the workers with a succession of contracts the CJEU said that a 6 month limitation period running from the end of each contract was contrary to the principle of effectiveness as the worker would need to bring a succession of claims in order to include her full length of service.

159. I accept that the decision of the CJEU in ***Preston*** in respect of the time limits under the Equal Pay Act 1970 does not mean it follows that the time limit in Regulation 30(2) makes it impossible or excessively difficult to enforce a right to payment under Regulation 14. However, it does give that proposition some support. I do accept Ms Darwin KC's broader point that claims for recognition of past service for pension purposes are not the same as claims for holiday pay.

160. I have noted above that in ***Agnew*** the Supreme Court appear to have recognised that a concession that a requirement to bring a claim for a shortfall of pay within three months of every holiday taken was not contrary to the principle of effectiveness was properly made.

161. I would accept that there would be some real inconvenience in bringing a claim essentially every three months. That inconvenience is mitigated once it is recognised that the employment tribunal can grant permission to amend an existing claim to deal with facts that arise after the claim form is issued. Contrary to the stance taken by the Respondent when resisting the Claimant's application to amend his claim such an application is permissible – see ***Okugade v Shaw Trust*** **EAT 0172/05,** ***Prakash v Wolverhampton City Council*** **EAT 0140/06** and perhaps most importantly the Direction of the President of the Employment Tribunals in respect of claims in respect of the calculation of holiday pay Dated 27 March 2015. The fact that claimants could and did bring repeated applications to amend their claims strongly supports the position that it was neither impossible nor excessively difficult to do so.

162. I do not accept a point tacitly made by Mr Somerville that the uncertainty as to who was or was not entitled to holiday pay made it excessively difficult to start a claim. That is particularly true of the Claimant who is a qualified barrister. Whilst I accept that cases such as ***Autocleanze*** and ***Ube***r which Mr Somerville has referred to have given some welcome certainty any lack or certainty did not preclude an earlier claim. If the construction workers in ***Byrne Brothers (Formwork) Ltd v Baird and others***, ***Redrow Homes (Yorkshire) Ltd v Wright*** and ***Cotswold Development Construction Ltd v Williams*** were able to ascertain the possibility of claiming holiday pay in the early two thousands did not consider any legal uncertainty made claims within a short limitation period impossible or excessively difficult to being a claim for holiday pay then I cannot accept that it is any different for Mr Somerville. When Mr Somerville took up his position he knew he was not being given paid annual leave. He had knowledge of all material facts at all times.

163. I have regard to the fact that many domestic employment rights are subject to the same short limitation period (i.e. unfair dismissal). Time limits for bring appeals to the Employment Appeal Tribunal which are strictly enforced are even shorter.

164. The necessity for repeated claims (or amendment) where there is a consistent denial of rights is the strongest point that is made in support of an argument that a three month limitation period commencing on the day holiday pay was due makes enforcing those rights excessively difficult. Overall I am not persuaded that the need for repeated claims or amendments where makes enforcement of the rights afforded by Article 7(2) impossible or excessively difficult.

Regulation 16/30(1)(b) of the Working Time Regulations 1998 - effectiveness

165. In terms of effectiveness there is no material distinction to be made between a claim relying on regulation 14 and one relying on Regulation 16 brought through regulation 30(1)(b) or the WTR 1998. Mr Somerville knew when he took time off work, and he knew he was not getting paid annual leave. I repeat my reasoning above as to why I have concluded that the requirement to being successive claims did not make the enforcement of his rights impossible or excessively difficult.

Effectiveness in the light of Section 13 ERA 1996

166. For a claim that there has been a failure to pay sums due for holidays taken (Regulation 16) or accrued but untaken at the termination of the employment (Regulation 14) Section 13 ERA 1996 provides an alternative route for enforcing breaches of Article 7 WTD 2003. The two procedural rules restricting such claims are (1) that a claim must be brought within 3 months of the last of a series of seductions and (2) that recovery is limited to deductions made in the two years before a claim is presented.

167. Whilst the WTR 1998 are the primary vehicle for transposing the WTD 2003 into domestic law I consider that where domestic law provides more than one remedy for a breach of EU law the question of whether there is an effective remedy must take that fact into account. In ***FII Group Litigation v HMRC*** **Case C-362/12** the CJEU accepted that where domestic law provided two different causes of action in respect of the same loss a retrospective change to the limitation period in respect of one cause of action after the action had commenced breached the principle of effectiveness. It was not material that there was another route to the same remedy. I consider that that position can be distinguished in the present case. Here the cause of action is identical. The right to payment for holidays taken or accrued is provided by the WTR 1996 and not Section 13 of the ERA 1996. All Section 13 provides is a means of enforcement. In those circumstances I consider that the question of whether there is an effective remedy for a breach of Article 7 in a non-payment case needs to take account of the more favourable regime in Sections 13 and 23 of the ERA 1996.

168. It follows inevitably from my conclusions that a 3 month time limit for each infringement of the duty to pay for holidays taken or accrued does not make it impossible or excessively difficult to enforce a claim that I conclude that the more generous regime provided for in Sections 13 and 23 of the ERA 1996 do not do so either.

Retrospective removal of rights

169. I need to deal with an argument advanced by Mr Somerville that the introduction of the Section 23(4A) ERA 1996 is unlawful because it retrospectively removed an existing EU right. Mr Somerville's submissions prepared before the hearing suggested that having brought his claim Brexit Completion Day any rights he had under EU law were preserved. He says that as a consequence Section 23(4A) could not cut down those rights. He goes on to say that in the light of ***King*** and ***Smith*** his rights accumulated in any event. I consider that Mr Sommerville's submissions to be slightly confused. I have dealt with the effects of ***King*** and ***Smith*** above. I have accepted that where there is a refusal of an employer to afford access to paid annual leave then that right accrues before any national procedural rule results in the loss of that right. That does not deal with the question of, whether if the rights crystallised each time an assignment ended, Section 23(4A) provided a lawful backstop of 2 years. Mr Somerville appeared to say that such a result would be unlawful because he would lose rights which he could otherwise have enforced.

170. I consider it clear that it is open to a member state to introduce a new limitation period. That can include bringing in a backstop where none previously existed. The limitations on a state's ability to do so are those set out above in the CJEU decision in ***FII Group Litigation v HMRC*** **Case C-362/12**. Mr Somerville's point that the effect of the introduction of Section 23(4A) of the ERA 1996 deprives him of rights he could otherwise have enforced is dealt with at paragraph 36 which I have quoted above. Such a change is lawful providing that the new limitation period is fixed in advance of the claims brought, reasonable in length, certain and does not breach the legitimate expectations of those holding the relevant rights. There will be a breach of legitimate expectations unless there is a reasonable transitional arrangement.

171. The Deduction from Wages (Limitation) Regulations 2014 were made on 17 December 2014, laid before Parliament on 18 December 2014 and came into force on 8 January 2015. They include a transitional provision at Regulation 4 which provides that:

'The amendment made by regulation 2 only applies in relation to complaints presented to an employment tribunal on or after 1st July 2015.'

172. It follows that employees who wished to rely on a series of deductions from wages had a 6 month transition period to present any claim to the employment tribunal.

173. I conclude that the introduction of a new limitation period did not breach any of the principles that were discussed in ***FII Group*** above. The UK was entitled to introduce a new limitation period even where it would prevent a worker from enforcing rights that had she/he held and could have enforced under the existing legislation provided that the new limitation period was reasonable and that there was a reasonable transition period.

174. I do not consider that it is open to me to say a two year backstop on claims can be said to be unreasonable when introduced in 2015. The Government made no secret of the reasons for introducing the backstop. It was a response to the decision of the Employment Appeal Tribunal in ***Bear Scotland Ltd v Fulton*** **[2015] IRLR 15** which as at the time the latest in a line of cases that had held that a worker's holiday pay must include her/his normal remuneration. The explanatory note to the regulations makes it clear that the Government intend an 'adjustment' to the national rules for the enforcement of rights deriving from the WTD 2003. The impact assessment

produced at the time makes it plain that a significant concern was that businesses were being faced with latent claims unlimited in their historic extent.

175. It is not for me as a judge to adjudicate on the balance struck by Government between the rights of workers and their employers. What I must do is ask whether the balance that was decided upon meant that there is now no effective remedy for a breach of EU law through Section 13. I am unable to say that.

176. The changes were introduced with a formal transition period of 6 months. Workers with accrued rights could present their claims within that window and recover the full extent of their rights. The changes to the law were clear and transparent. Any worker could have learned of the changes without difficulty. I consider a transition period of 6 months was a sufficient period to deal with any legitimate expectation by a worker that they would be able to bring historic claims.

177. For these reasons I find that the changes to the limitation period were in accordance with the lawful approach delineated by the decision of the CJEU in ***FII Group***. The changes were introduced after a reasonable transition period and well before Mr Somerville presented his claim. That transition period allowed an adequate period to deal with historic claims. The changes introduce a limitation period which is reasonable as it permits aggrieved workers to bring any successive claims at two year intervals.

178. In conclusion I do not consider that it was impossible or excessively difficult for Mr Sommerville to have brought claims that would have encompassed the entirety of his service for the Respondent. He did not do so before 1 July 2015 and accordingly if his rights had not accrued as I have found they did he would have lost the right to any period prior to 2 years before the claim was presented.

Equivalence

179. The principle of equivalence is tied up with but is distinct from the principle of effectiveness. A right may be effective but if it is not equivalent to a similar domestic right then it will not be in accordance with EU law.

180. Given my conclusion that the Claimant has not brought a refusal claim and my conclusions about whether there is in domestic law an effective remedy for such a claim I shall not reach a firm conclusion about the issue of equivalence in respect of such a claim. An appellate court is as well placed as I am to identify a similar claim in domestic law. I should say that I consider that such a claim is very different from a claim for liquidated damages. I note that the first remedy identified in Regulation 30(3)(a) is a declaration. This is a mandatory remedy where there is any breach. That in my view reflects the purpose of the claim. It is to seek to compel the employer to comply with the requirement to grant periods of rest from work. I consider that a very different claim to one seeking financial compensation. Were I to undertake the exercise I would certainly consider whether the rights provided by Section 57A (time off for care for dependants) which does not derive from EU law but provides declaratory relief and just and equitable compensation is an appropriate similar right. That right is subject to a strict 3 month time limit no different to regulation 30. It seems to me that the substance of the right is time off for the (indirect) wellbeing of the worker. No doubt there are other candidates.

181. It seems to me that given my conclusions above I should ask whether the procedural limit in respect of claims founded on Regulation 14 and 16 of the WTR 1998 brought through Section 13 ERA the 3 month limitation period together with the 2 year backstop claim satisfy the principle of equivalence.

182. The first step is to identify a similar claim in domestic law. In doing so I must apply the principles above.

183. In ***Stringer*** the similar claim that was identified in domestic law to a claim for accrued holiday pay was a claim for breach of contract at common law arising from a failure to make payments for holiday entitlement. At the time such claims could be brought through Section 13 of the ERA without any backstop.

184. The Deduction from Wages (Limitation) Regulations 2014 amended regulation 16 of the Working Time Regulations to make it clear (if it had not been already) that regulation 16(1) – the right to payment – did not confer any contractual rights.

185. The effect of the introduction of Section 23(4A) of the ERA 1996 is that a claim for contractual holiday pay is subject to the same rules on time limits as a claim that derives from the rights conferred by the WRD/WTR 1998. They are both limited to a series of deductions in the 2 years before the claim is presented.

186. Section 23(4A) only applies to claims that fall within the definition of wages contained in Section 27(1)(a) namely *'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise'*. The other definitions of wages are excluded from the additional limitation of a 2 year backstop.

187. In order that a claim might be made for wages through Section 13 there must be some legal right to the payment – see ***New Century Cleaning Co Ltd v Church*** **2000 IRLR 27, CA**. The effect of the legislation as it stands is that whilst wages that fall within the definition of wages set out at Section 27(1)(a) will all be subject to the two year backstop the only claim that could not be presented in the civil courts is holiday pay derived from the WTD 1998. If the worker is an employee all claims for breach of contract (which is likely to be the entirety of the other wages claims) might be brought in the employment tribunal after termination of the employment contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The right with 'nowhere else to go' is the WTD 1998 holiday pay claim.

188. As I am reminded by the authorities I have cited above I need to '*take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts' –* ***Levez****.* Special care needs to be taken in comparing a claim brought in the Employment Tribunal to a potential remedy from the civil courts - see ***Preston*** when the case returned from the CJEU **[2001] 2 AC 455**.

189. I accept that it remains the case that a claim for contractual holiday pay remains the most obvious claim of a similar nature to a claim derived from the WTD 2003. If a claim for contractual pay was brought by a worker, as opposed to an employee, then if the claim was brought through Section 13 then it would be subject to the same backstop. It could not be brought under the Extension of Jurisdiction Order. There would be the option of a county court claim with the downsides of a more formal procedure, court fees and depending on the allocation of the claim the risk of costs.

Also, with the greatest respect for the judges of the county court, employment judges are specialists in their field.

190. Taking these matters in the round I do not think that the fact that there is a possibility of bringing a county court claim in respect of arrears of pay exceeding the two year backstop in the County Court means that the right afforded through Section 13 of the ERA to bring a claim for holiday pay is less favourable to the rights afforded in breach of contract claims for a worker. The route through the County Court is significantly more arduous than a claim brought under Regulation 13/23 of the ERA 1996. The necessity to bring such a claim could have been avoided by issuing a claim during the transition period or subsequently by bringing claims at 2 year intervals.

191. I do not think that the position is any different because an employee can bring a claim under the Extension of Jurisdiction Order. The right to bring such a claim is limited to employees and to claims outstanding or arising upon termination of the contract. There is no right to bring a claim in the currency of employment. A feature of a claim under the Extension of Jurisdiction Order is that it opens the door to counterclaims by the employer.

192. I have therefore concluded that whilst a breach of contract claim for holiday is a similar claim for the purposes of the comparison whilst there are differences between the available routes to enforcing such claims the regime available to the enforcement of the EU derived WTD 2003 claims is no less favourable than the domestic claims. The fact that it used to be treated more favourably through the unamended Section 23 ERA 1996 is neither here nor there. Both EU and Domestic rights have for been eroded through those changes. The overall picture is not one of less favourable treatment for the EU derived claim.

193. Whilst Mr Somerville did not attempt to identify any other similar claims which might lead to a different conclusion I consider that I should ask myself whether any domestic claims excluded from the new limitation periods are sufficiently similar as to breach the principle of equivalence. The claims in Section 27(1)(b) - (j) are not affected by the new limitation period. Some of those claims derive from EU law in whole or in part. Those would not form the basis of a comparison because the comparison needs to be between an EU claim and a domestic claim. There are domestic claims for payment in respect of time off work in those sub-sections. That gives some superficial similarity to an EU holiday pay claim. However I am reminded that superficial similarity is not enough. I do not think it possible to equate annual leave with say time off for adoption or bereavement. Having raised the possibility of other claims for comparison purposes I have not identified any that are any more then superficially similar.

194. It follows that I have come to the conclusion that the procedural regime introduced by Section 23(4A) does not offend against the EU principle of equivalence. It follows that I do not need to consider whether I need to strike down that legislation.

195. I have reached this conclusion without mentioning the first instance decision of my colleague in the case of ***Battan v Lloyds Bank plc & Ors***. Having conducted my own analysis I have come to the same conclusion. It is not necessary that I review the reasoning in that case. As Mr Somerville urged upon me this is a first instance decision and the reasoning is not binding upon me.

Conclusions if I am wrong about the scope of Article 7(1)/King/Smith

196. If I have gone wrong when I concluded that the directly enforceable effect of Article 7(1) means that Mr Somerville was entitled to carry over the right to paid annual leave up to the point it was recognised, or the employment relationship ended then it follows that I would have found:

197. That any claim under regulation 16 and brought through Regulation 30(1)(b) of the WTR 1998 was limited to days of holiday taken in the months prior to the claim being brought (with any ACAS adjustment); and

198. That any claim brought under Sections 13/23 of the ERA 1996 was limited to any series of deductions in the two years preceding the presentation of the claim.

Other remedy matters

199. The Claimant had raised as an issue the question of whether the effect of the decision in ***Harpur Trust v Brazel*** **[2023] 1 CMLR 18** was that he was entitled to payment equivalent to 5.6 weeks holiday per year. His schedule of loss that accompanied his submissions suggested that he believed that the effect of that decision was that he was entitled to 5.6 x his daily rate x 5 working days per annum. This is despite the fact that on average he worked for a great deal less in each year of his claim.

200. I did not understand Mr Somerville to pursue this point in his oral submissions. Insofar as the point was not expressly abandoned it is sufficient for me to say that it is not a good point. Whilst not spelt out expressly the principle of pro rata temporis clearly applies to the calculation of any entitlement to leave. That is implicit in expressing the entitlement in weeks.

201. A further matter raised in the list of issues is the extent to which the decisions in **King** and ***Smith*** apply to the leave that should have been granted under Regulation 13A of the WTR 1998. Mr Somerville conceded at the hearing that those decisions do not apply to any claim to the 1.6 weeks annual leave afforded by Regulation 1.6.

202. It follows that the only claims that are in time in respect of the Regulation 13A claims are those brought within the time limits specified in Section 23(4A) of the ERA. It is for Mr Somerville to choose the most favourable remedy and he is entitled to advance those claims as they are clearly within the scope of his claim.

203. The parties suggested that subject to my findings on the points above any issues of mathematics might be resolved between them. If it is of assistance I would say that Assuming that the Respondent accepts that there was a stable working relationship throughout the period the entitlement to the sum due to the Claimant is 12.07% of his total remuneration from the Respondent.

204. In his submissions Mr Somerville has made an application for a preparation time order. I did not hear any submissions on that and have not decided it. However, if this is to be pursued Mr Somerville will have to bear in mind that the Respondent's position in respect of his employment status was considered to be properly arguable up to the Court of Appeal. His complaints about matters put to him in cross examination do not appear to form a very strong basis for a costs application. It is a matter for Mr Somerville whether he pursues this any further. He has also suggested that he should be awarded interest. He made no submissions on this point, and it is premature to decide this until Mr Somerville elects which statutory provisions he brings his claim under. I would point out that neither statutory provision refers to

interest per se. Mr Somerville might wish to have regard to Section 24(2) of the ERA 1996. At present he has not established that any delay in payment caused any consequential loss.

205. I ask that the parties write to me within 28 days setting out any remaining areas of dispute or hopefully agreeing the award that should be made to Mr Somerville.

Answers to the matters included in the list of issues

206. Conscious that I have dealt with things in a different order to the agreed list of issues I provide the following summary:

206.1. Issue 1 – Decided by REJ Burgher – the Claimant had not brought a claim relying on Regulation 14 of the WTR 1998; and

206.2. Issue 2 – The Respondent conceded that the Claimant did not need to show that he had taken holiday on specific dates.

206.3. Issues 3-5 there is no claim relating to pension – conceded by the Claimant

206.4. Issue 6 – Decided by REJ Burgher – the Claimant was not permitted to amend his ET1 to bring claims arising after the presentation of the ET1

206.5. Issue 7 – does not require a determination – it is agreed that the Claimant's claims is brought as individual deductions from wages predate the backstop imposed by Section 23(4A) ERA 1996.

206.6. Issue 8 – See below:

206.6.1. I have held that the rights given by Article 7(1) of the WTD 2003 subsist throughout the employment relationship; and

206.6.2. I have held that applying the reasoning in ***King*** and ***Smith*** the right to payment for holiday taken but unpaid continued to accrue until recognised by the employer, termination of the employment relationship or determination by the Tribunal; and

206.6.3. As a consequence, the claim was brought within the time limit imposed by Regulation 30(3) WTR 1998.

206.6.4. Accordingly the Claimant is entitled to claim the entirety of the holiday pay that he ought to have received had the Respondent recognised his right to paid annual leave.

206.7. Issue 9 – see above.

206.8. Issue 10 – Yes the Tribunal can consider the complaint brought under Regulation 30 WTR 1998

206.9. Issue 11 – There was no Regulation 14 claim.

206.10. Issue 12, 13 & 14 what was the date of termination – I have held that the rights accrued until the end of the employment relationship. That is the date

upon which the agreement about the terms that would apply if work was done expired. In any event it was after the claim was presented.

206.11. Issue 15 – There was no Regulation 14 claim

206.12. Issue 16 – (1) the Claimant is entitled to 4 weeks holiday per annum pro-rated for the entirety of his service; and (2) He is entitled to a further 1.6 weeks holiday, pro-rated, for the two years preceding the presentation of his claim.

206.13. Issue 17 – The parties agreed that this is a matter they could resolve – I have made no determination how often the Claimant worked for the Respondent.

206.14. Issue 18 - Harpur Trust v Brazel has no bearing on the issues I needed to decide the principle of pro rata temporis applies to the accumulation of a right to annual leave.

206.15. Issue 19 – I have found that the Claimant had not brought a claim under Regulation 30(1)(a) and therefore he is not entitled to any remedy under Regulation 30(3) WTR 1998.

206.16. Issue 20 – The Claimant concedes that he brought no pension claim.

206.17. Issue 21 – No submissions were made on these points, and I have made no decision.

Parting remarks

207. I apologise for the delay in providing this decision. The parties provided me with a great deal of material and much food for thought. I have been engaged in several other cases in the meantime and have not had as much time as I might have liked to complete this task. That said I am very sorry it has taken so long.

208. The judgment is long and may have typing mistakes. If the parties would like these to be corrected please let the tribunal know and a certificate of correction can be completed. If I have failed to deal with any material part of the case then the parties should ask me to reconsider any decision.

209. I thank the parties for their assistance with this difficult case.

Employment Judge Crosfill
Dated: 9 April 2024

List of Issues

The issues the Employment Tribunal will be asked to decide at the final hearing are as follows.

Nature of Claims

1. The Claimant accepts that his pleaded claim was brought under 16 WTR and asserts his 16 WTR claim was the right claim at the time it was made in July 2018 and continued to be so through to 2020 when he received his last payment and/or when his umbrella contract terminated in April 2020. Can the Claimant now extend his claim to be considered in the alternative under Regulation 14 without seeking leave to amend his ET1/ Grounds of Complaint or being granted leave?

ET Decision: The Claimant cannot pursue a Reg 14 WTR and his application to amend to advance such a claim is refused.

2. In order for a claim under 16 WTR to succeed is the Claimant required to show that he actually took holiday and the dates on which he did so?

The Respondent concedes that the Claimant is not required to show that he actually took holiday and the dates of holiday to succeed for this issue.

Pension Claim

3. Does the ET have jurisdiction to consider the pension claim set out in the following paragraph, and if so pursuant to what statutory provision?

The Claimant concedes that the ET does not have jurisdiction to consider the pension claim.

4. Was the Respondent required to:

i. enroll the Claimant into a pension scheme and/or

ii. provide the Claimant with certain required information about the scheme

iii. and/or make contributions into a pensions scheme for the benefit of the Claimant?

5. Have such claims been pleaded and if not, should the Claimant be granted permission to amend his claim to include them?

The Claimant concedes that pension claims have not been pleaded and no application for amendment to add a claim has been made.

Events After ET1 Presented

6. Does the Employment Tribunal have jurisdiction to consider any claims the Claimant is now making (by way of his Schedule of Loss) for holiday pay in respect of the period after the Claimant presented his ET1 (i.e. the period after 20 July 2018).

ET Decision: The Tribunal's jurisdiction is limited to claims brought by the Claimant in respect of matters that arose on or before the presentation of his ET1 on 20 July 2018.

Unlawful Deduction of Wages Claim

7. The Claimant is also pursuing his claims for statutory holiday pay pursuant to s.23 of the Employment Rights Act 1996. It is agreed that the Claimant's claim in part relates to deductions where the dates of payment of the wages from which deductions were made were before the period of two years ending with the date of presentation of the complaint. (Two years ending on 20 July 2018).

8. Is the ET prevented from considering that part of the Claimant's complaint under s.23(4A) ERA 1996?

(1) In particular, what is the impact of the CJEU's judgment in Sash Windows and/or Smith v Pimlico Plumbers [2022] EWCA Civ 70 and/or the WTD 2003 on the two year backstop contained at s.23(4A) ERA 1996?

9. In relation to any remaining claims for statutory holiday pay that the ET has jurisdiction to consider:

(1) Is the claim for statutory holiday pay a valid one?

(2) If so, was the Claimant required to present it before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made (in circumstances in which the Respondent did not admit

that he was a worker)?

(3) If so, was it 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?

(a) The Claimant says that the last of a series of deductions occurred on 10 January 2020.

(4) Or, is the Claimant's complaint a complaint in respect of a series of deductions or payments within s.23(3) ERA 1996?

(5) If so, was the Claimant's complaint presented before the end of the period of three months beginning with the last deduction or payment in the series?

Time Limits and Jurisdiction

10. Pursuant to Regulation 30(2) of the WTR 1998, can the ET consider the Claimant's WTR 1998 complaint?

11. Was the Claimant required to present any claim under Regulation 14 before the end of the period of three months, beginning with the date of termination.

12. When was the date of termination?

13. The Respondent's position is that it was the last day that the Claimant sat on the FtP Committee prior to presenting his claim.

14. The Claimant's position is that termination occurred on or after 10 January 2020 when he received his last payment or when the overarching contract between the parties came to an end in April 2020.

15. Following on from issues 10 to 13 above, did the Claimant present his claim within the period of three months from the date of termination and if not, should he be granted permission to amend his existing claim to include a claim under 14 WTR?

QUANTUM

16. Is the Claimant entitled to claim for:

(1) The pro-rated equivalent of 20 days statutory holiday? Or

(2) The pro-rated equivalent of 28 days statutory holiday?

17. In what way, if at all, is the attached Schedule 1 of the Claimant's sittings, disclosed by the Respondent, inaccurate? In what way, if at all, is the attached Schedule 2 of the Claimant's sittings comprising of those in Schedule 1 and subsequent sitting days inaccurate?

18. What was the Claimant's pro-rated entitlement to holiday for each leave year and what effect does:

(1) the case of Harpur Trust v Brazel; and

(2) the judgment that the Claimant is only a worker for the periods when he is actually sitting under an individual contract, have on the amount of holiday to which the Claimant is entitled and the way that his holiday pay should be calculated? Subject to issue 1 above, how much statutory holiday pay is due to the Claimant under Regulations 14 or 16 and 30(1)(b) WTR 1998? What declaration should the ET make in relation to Regulation 13 WTR?

19. Should the ET make an award of compensation to be paid by the Respondent to the Claimant under Regulation 30(3)(b) WTR 1998 as well as, or instead of any other award? If so, what should that award be?

20. Subject to issues 2, 3 and 4 above what compensation is the Claimant entitled to in respect of the Respondent's failure to:

i. provide the Claimant with the required pensions information?
ii. make contributions into a pension scheme for the Claimant's benefit?
iii. provide the Claimant with the ability to make his own pension contributions?

21. What award if any should be made to the Claimant in respect of:

i. interest relating to any substantive award made; and/or
ii. witness expenses; and/or
iii. preparation expenses.