Neutral Citation Number: [2024] EAT 109

Case No: EA-2022-000092-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 June 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR B KNIGHT **Appellant**

- and -

OFF BROADWAY LIMITED **Respondent**

- -
- -

Dr Elizabeth Grace (instructed by **Kilgannon & Partners LLP**) for the **Appellant**
Mr Rupert Selby (**as a Director**) for the **Respondent**

Hearing date: 18 June 2024

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JUDGMENT

SUMMARY

Working Time – Holidays

Specific amendments to the **Working Time Regulations 1998**, that applied from the onset of the pandemic in March 2020 (and have since been repealed), meant that, in certain Covid-related circumstances, unused holiday entitlement, up to the four weeks derived from the parent Directive, could be carried forward at the end of the holiday year. The tribunal did not err in concluding that, on the facts of this case, those provisions did not apply so as to entitle the claimant to carry over any unused entitlement from 2019/2020, to the next holiday year.

The tribunal did err in failing to consider whether the respondent had done sufficient to inform the claimant, in particular, that any unused holiday at the end of the holiday year could not be carried over. Determination of that question, and, as necessary, of what unused holiday he in fact had at the end of that year, was remitted. **Max-Planck-Gesellschaft zur Főrderung der Wissenschaffen e.V. v Shimizu** C-684/16, [2019] 1 CMLR 35 considered.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal brought claims of unfair dismissal, wrongful dismissal and for holiday pay. There was a hearing at the East London Hearing Centre, by video, before Employment Judge Moore. The unfair dismissal claim succeeded. The wrongful dismissal claim failed. The tribunal made an award of three days' holiday pay in lieu of accrued but unused holiday entitlement in the final holiday year of employment. However, a further claim, premised on the claimant also being entitled to carry over accrued but unused holiday entitlement from the previous holiday year, was dismissed. The claimant's appeal was initially wide-ranging but, following the paper sift and then a rule 3(10) hearing, the sole challenge which has proceeded to this full appeal hearing today relates to holiday pay.

2. Ms Grace of counsel, who appeared in the tribunal, appears again for the claimant. In the tribunal the respondent was represented by counsel, but at today's hearing, its owner and director, Mr Selby, has appeared in person.

3. At the start of the hearing, Ms Grace confirmed in discussion that it is accepted that the live challenge before me relates only to the decision to dismiss the particular holiday-pay claim, premised on carry-over of unused holiday from the penultimate holiday year, which failed in the tribunal. She did not seek to pursue a challenge to the amount awarded in respect of the holiday-pay claim for the holiday year in which the employment ended.

4. The relevant factual background, which I take from the tribunal's decision, is as follows.

5. At all relevant time, the claimant was employed by the respondent company as the manager of the Off Broadway Bar. Mr Selby is the director and owner of the respondent. The tribunal found that the claimant became an employee of the respondent, as manager of the bar, from October 2018, although, at the time, neither the claimant nor Mr Selby considered that he was an employee or a worker of the respondent.

6. At paras.16 to 20 of its reasons, the tribunal found as follows:

> **"16. As manager of the bar, the Claimant was master of his own time. He rostered himself to work 'behind the bar' as bar tender 3 days a week but he also came and went at other times in his managerial/supervisory capacity. Crucially he could decide what days off to take and he could decide when to take holidays. He says he did not take any holidays but this does not prevent my finding that holidays were within his own gift as the person who organised the roster and managed the bar. He was not under Mr Selby's direction about holidays. The Claimant was not paid hourly; he was salaried. His time was his to organise as he saw best.**
>
> **17. It is agreed the holiday year ran from 1 October to 30 September.**
>
> ***Coronavirus Rules***
>
> **18. The law requires that in premises selling alcohol there is a designated premises supervisor ('DPS'). They are responsible for licensed premises when they are present. When they are not there, they must delegate that function to another. At all material times the Claimant was the DPS.**
>
> **19. During the coronavirus pandemic bars were placed under different restrictions at different times. From 26 March 2020 to 3 July 2020 they were closed altogether. In this period the bar traded as a takeaway through its window. All of the staff except the Claimant were furloughed. The Claimant ran this business and made it a success. There was nothing to stop him taking on temporary staff to work the takeaway on the occasions he decided not to work.**
>
> **20. Then there was a period of trading under different rules: relating to the numbers allowed and whether food was required. The bar reopened and traded with staff, not just the Claimant. Again, there was nothing to stop him taking appropriate time off for rest and holiday in this period."**

7. In October 2020, in all Tier 2 areas, including London, a curfew was in place, which meant that all customers had to leave the bar by 10.00 p.m. The start of a second national lockdown required all bars to close their doors from 5 November 2020.

8. On 8 November 2020 Mr Selby summarily dismissed all members of staff, including the claimant, because of the bar having been kept open beyond 10.00 p.m. in breach of the then applicable restrictions on two occasions.

9. I will set out the tribunal's self-direction on the law relating to holiday pay in full.

> **"93. Under Regulation 14 of the Working Time Regulations 1996 [*sic*], on termination, an employee should be paid for accrued but untaken holiday from the leave year.**

94. The calculation is set out in Regulation 14. I do not agree that it should be calculated as per Regulation 15A, which relates only to how leave accrues in the first year of employment.

95. Regulation 14 provides that the accrued but untaken leave is calculated as (A x B) – C. Where A is the period of leave to which the worker is entitled: here agreed as 5.6 weeks; B is the proportion of the leave year which has expired; and C is the amount of leave taken in the leave year.

96. A claim to carry over leave from a previous leave year is not normally allowed. But, under the Working Time (Coronavirus)(Amendment) Regulations 2020, in limited circumstances, up to 20 days of the previous leave year can be carried over. I must ask:

96.1. Whether it was not reasonably practicable to take such leave in the leave year?

96.2. And, if so, whether that was as a result of coronavirus (including the effect of it on the worker/employer or wider economy/society)?

97. The leave carried over derives from the EU Working Time Directive. The Claimant relies on *Max Planck Gesellschaft v Shimizu* in ECJ C-6845/16 which holds, at paragraph 46: 'should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right of such leave at the end of the authorised reference or carry over period, and, in the event of termination …, the corresponding absence of a payment of an allowance in lieu constitutes a failure.' The Respondent does not suggest I should have no regard to it, despite Withdrawal, but seeks to argue, on the facts, that the Claimant did have an opportunity to take leave and that it was reasonably practical to do so in the prior leave year."

10. I will also set out the tribunal's conclusions in relation to the two holiday pay claims in full.

"131. I have not heard sufficient evidence of the existence of a rolled-up holiday pay arrangement. In any event, it is doubtful that such an arrangement would be legal.

132. I have found that the Claimant worked flexibly as bar manager. In my judgment he had the opportunity to take holidays from work when he wished to do so.

133. I agree with Respondent's submissions as to the proper calculation for holiday under the formula at Regulation 14 set out above. I do not agree with the Claimant's submission about Regulation 15 for the reasons I set out in the legal principles section. The Claimant is therefore due a payment for 3 days' holiday accrued but untaken in the relevant leave year.

134. I do not award pay in respect of the argument about carry over from the year 2019/20 for the following reasons:

134.1. It is clear to me that the Claimant was master of his own timetable: he was free to organise his own working time as manager. He organised the roster and rostered himself on 3 days per week as bar tender. But it was within his own gift to take days off as holiday and he knew he would be paid because he received an annual salary rather than being hourly paid.

> **134.2. From 1 October 2019 to late March 2020 the Claimant had the opportunity to take holiday.**
>
> **134.3. While there will have been some weeks thereafter where it would not have been reasonably practicable to take holiday, for example, while setting up the takeaway service. In the other weeks, it was reasonably practicable to find staff to run it on a temporary basis. In any event, lockdown lifted in early July 2021 and there was trading for the rest of the holiday year. In this period the Claimant had every opportunity to take holiday when he wished. There is simply not enough evidence that coronavirus interfered with the ability to take holiday for the Amendment Regulations to apply and I find that it did not do so. I do not make any award."**

11. As I have noted, the challenge before me relates to the tribunal's conclusion that the claimant was not entitled to carry over any accrued but unused holiday entitlement from the holiday year 2019/2020. In summary, it is said that the tribunal erred in its application of the law in relation to the amendments made to the **Working Time Regulations 1998** by the **Working Time (Coronavirus) (Amendment) Regulations 2020** (SI 2020/365) and/or by failing to place the burden of proof in respect of this particular complaint on the respondent in accordance with the decision of the CJEU in **Max-Planck-Gesellschaft zur Főrderung der Wissenschaffen e.V. v Shimizu** C-684/16; [2019] 1 CMLR 35. It is also contended that the decision on this aspect was not *Meek*-compliant.

12. The relevant legislative framework is this.

13. Immediately prior to the amendment of the **1998 Regulations** by the **2020 Regulations**, the broad regime of the **1998 Regulations** was as follows. Regulation 13(1) provided for a worker to be entitled to four weeks' leave in each leave year. Regulation 13(9) provided that leave may be taken in instalments, but only in the leave year in respect of which it is due, and that it may not be replaced by a payment in lieu except where the worker's employment is terminated. Regulation 13A provided for additional annual leave of 1.6 weeks per year. Regulation 14 provided for a worker to be entitled to a payment upon termination, in respect of accrued but unused leave in the final leave year, according to a formula set out there. Regulation 15 provided for the worker to be able to give notice of dates on which some or all of the regulation 13 or 13A leave is to be taken, but also for the employer to be able to give a notice or counternotice requiring the worker to take or not take leave on particular

dates, in each case subject to more detailed notice provisions set out there. Regulation 16 set out a formula for pay in respect of periods of leave to which a worker is entitled in respect of annual leave arising pursuant to Regulations 13 and 13A.

14. The **2020 Regulations** came into force immediately after they were made, at 9.00 p.m. on 26 March 2020. They amended regulation 13(9) of the **1998 Regulations** and added new Regulations 13(10), (11), (12) and (13), so that, as amended, Regulations 13(9) to (13) read as follows:

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

15. The **2020 Regulations** also introduced a new regulation 14(5) as follows.

> **"Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulations 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave."**

16. I turn to **Shimizu**. That was a decision upon a reference from the German Federal Labour Court in light of the provisions of the *Bundesurlaubsgesetz,* or federal law, relating to leave ("BUrlG"). The questions referred to the Court of Justice were the following:

"(1) Does Article 7(1) of Directive [2003/88] or Article 31(2) of the [Charter] preclude national legislation, such as Paragraph 7 of the [BUrlG], under which, as one of the methods of exercising the right to annual leave, an employee must apply for such leave with an indication of his preferred dates so that the leave entitlement does not lapse at the end of the relevant period without compensation and under which an employer is not required, unilaterally and with binding effect for the employee, to specify when that leave be taken by the employee within the relevant period?

(2) If the first question referred is answered in the affirmative:

Does this apply even where the employment relationship is between two private persons?"

17. At paras.45 to 47, the court said this.

"45. To that end, as the Advocate General also observed in points 41 to 43 of his Opinion, the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period.

46. In addition, the burden of proof in that respect is on the employer (see, by analogy, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 68). Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Directive 2003/88.

47. However, if the employer is able to discharge the burden of proof in that regard, as a result of which it appears that it was deliberately and in full knowledge of the ensuing consequences that the worker refrained from taking the paid annual leave to which he was entitled after having been given the opportunity to exercise his right thereto, Article 7(1) and (2) of Directive 2003/88 does not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of the paid annual leave not taken."

18. To complete the picture regarding the law, and although these changes came after the events with which this appeal from the decision of this tribunal is concerned, I note that the **Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023** (SI 2023/1426), which came into force on 1 January 2024, revoked the amendments to the **1998 Regulations** made

by the **2020 Regulations**. The **2023 Regulations** also introduced amendments to regulation 13 covering the same territory as the principles articulated in **Shimizu**, by introducing a right for a worker to carry forward unused leave in certain circumstances as set out there.

19. Ms Grace accepted that both the 2020 amendments to the **1998 Regulations** and what I will call the **Shimizu** principles only applied or apply to the four weeks' leave entitlement conferred by regulation 13. Neither applied, or applies, to the additional 1.6 weeks conferred by regulation 13A.

20. I will consider, first, the correct approach to the construction and application of the relevant provisions of the **1998 Regulations** as they stood while amended by the **2020 Regulations**. In doing so, when I refer hereafter to "the effects of coronavirus" for the purposes of regulation 13 (as amended), that is to be taken as shorthand for "the effects of coronavirus (including on the worker, the employer or the wider economy or society)".

21. The starting point is that the tribunal should consider the position that had been reached as at the end of the leave year in question and how it came about. Regulation 13(10), as it stood during the relevant period, required the tribunal, looking back from that vantage point, to consider whether it was not reasonably practicable for the worker to have taken some or all of the leave to which the worker was entitled, as a result of the effects of coronavirus. If so, then that part of the unused leave could be carried forward to the next two years.

22. Pausing there, the tribunal should therefore start by determining whether, as at the end of the leave year in question, the worker had taken less than the four weeks' leave entitlement, and, if so, what period of leave was untaken at that point. The tribunal should then consider and decide whether it was not reasonably practicable for them to have taken some or all of that untaken leave by the end of that leave year, as a result of the effects of coronavirus. So if, for example, at the end of the leave year, the worker had taken one week's leave and had three weeks untaken, the tribunal would then

need to decide how much, if any, of the three weeks was not taken by the end of the year because it was not reasonably practicable to do so as a result of the effects of coronavirus.

23. Accordingly, if, as a result of the effects of coronavirus, there was a period during which it was not reasonably practicable to take leave – I will call that a "restricted period" – that would not necessarily, by itself, automatically mean that these provisions would bite. If, for example, the restricted period ended early on in the leave year, the tribunal might properly conclude that it was still reasonably practicable for the worker, after the restricted period ended, to take whatever unused part of their entitlement remained, during the course of the remainder of the leave year thereafter.

24. Nor do I think that how much leave the worker had in fact taken prior to the start of such a restricted period would *necessarily* always be irrelevant for these purposes. In order to ascertain the effects of coronavirus, the tribunal would need to consider, first, how much entitlement the worker had left to take at the start of the restricted period and whether, at *that* point, there would have been sufficient time left in the year for them to take some or all of it, if free to do so. It would then need to consider what the impact was, of the restricted period having cut down that remaining available time. If, for example, the worker had taken no leave at all in the first fifty-one weeks of the leave year, and the restricted period covered only the final week of the year, the inability to take the unused leave would not be a result of the effects of coronavirus, beyond what could otherwise have been taken in that one final week. Carry-forward would be correspondingly limited in that example.

25. I turn to the present tribunal's decision. I have set out already its self-direction in relation to the effect of the **2020 Regulations**. The ground of appeal postulates that this was in error, first, because, at para.96.1, the tribunal took an "all or nothing" approach. However, Ms Grace indicated in oral argument that she was not urging this particular point. It does appear to me that the tribunal plainly drew upon the wording of regulation 13(10) as it then stood in formulating that self-direction. Although it might be said to contain an element of ambiguity, the self-direction was not plainly and

obviously wrong. Whether the tribunal erred with respect to the application of these provisions to the facts of this case therefore turns upon whether it erred in its substantive findings of fact and the dispositive reasoning in the concluding paragraphs which drew upon them.

26. Turning to these, at para.16 the tribunal found that the claimant could decide when to take his holidays. In its conclusions, it found that he had the opportunity to take holidays when he wanted to do so (para.132) and, to similar effect, that it was within his own gift to take days off as holiday (para.134.1). Ms Grace made the point, however, that these findings did not address the question of whether, during any given period, it was not reasonably practicable for the claimant to take leave as a result of coronavirus. I agree, but these were general factual findings that the tribunal properly made, as such, and I do not read the tribunal as having relied upon them in relation to the **2020 Regulations** issue. I will return to what may or may not be the significance of these findings in relation to what I will call the **Shimizu** principles.

27. A different point is that the tribunal did not make any specific finding of fact, in these passages or indeed elsewhere, about whether the claimant did take any holiday during the course of the holiday year 2019/2020, nor, if so, how much he took and, hence, how much, if any, of the four weeks of regulation 13 entitlement remained unused at the end of the holiday year. As to that, I note that the tribunal said at para.16:

> **"He says he did not take any holidays but this does not prevent my finding that holidays were within his own gift as the person who organised the roster and managed the bar. He was not under Mr Selby's direction about holidays."**

28. The overall sense of these passages read together is that the tribunal did not consider it necessary to make any specific finding of fact about whether the claimant did take any holidays during 2019/2020, because it considered that its findings that when to take holiday was entirely within his own gift and control were sufficient for the purposes of what it had to decide in order to determine this particular claim, subject to its consideration of the potential impact of coronavirus.

29. That latter question was specifically considered by the tribunal at paras.134.2 and 134.3. In that passage the tribunal divided the holiday year 2019/2020, which, as it had found at para.17, ran from 1 October 2019 to 30 September 2020, into three periods.

30. The first period was from 1 October 2019 to late March 2020. Though it would have been better for the tribunal to have stated it precisely, I think it is clear that it meant, specifically, the period up to the start of the first national lockdown on 26 March 2020, as referred to by it earlier at para.19.

31. The second period was the period of "some weeks thereafter", from 26 March 2020 until the first national lockdown lifted in "early July 2021". That was plainly a typo for "early July 2020" and was, more precisely, plainly a reference to 3 July 2020. As the tribunal had found at paras.19 and 20, that was the date from which the bar began trading as a bar again, though subject to ongoing local Tier 2 restrictions. The second period was, therefore, the period during which the bar was set up and operated as a takeaway and during which all of the staff, apart from the claimant, were furloughed. The third and final period was the period from 3 July 2020, when the bar began trading again as a bar, until the end of that holiday year on 30 September 2020.

32. With reference to the issue as to the effect of the **2020 Regulations**, Ms Grace submits that the tribunal erred by relying on its finding about the first period, as it carried the implication that the tribunal considered that the claimant could or should have taken some or all of his holiday entitlement during that period. But, she submits, the claimant could not have been expected to take leave during that period in anticipation of the pandemic and the restrictions which it later ushered in. Secondly, the tribunal erred, she submits, in relying on its finding that, once the takeaway service was set up in the second period, it was reasonably practicable to find staff to run it on a temporary basis. That, she submits, was an error, because that finding did not, without more, equate to a finding that it was reasonably practicable for the claimant, who was the manager, to take leave during that latter period.

33. Taking the second of those points first, while the reasoning is fairly shortly expressed, it seems to me, reading para.134.3 together with the earlier factual findings on which it drew, that the tribunal considered that the *only* period during which it was not reasonably practicable as a result of the effects of coronavirus for the claimant to take leave during that same period, was the first part of the second of the three periods into which it divided the overall leave year, during which the claimant's colleagues were furloughed and he was setting up the takeaway service. Once that service was set up, there was, the tribunal found, at para.20, "nothing to stop him taking on temporary staff to work the takeaway on the occasions he decided not to work". It is clear from this that the tribunal did not think that it was not reasonably practicable for him to take holiday during this latter part of the second period, whether as a result of the effects of coronavirus, or indeed for any other reason.

34. Ms Grace submitted that the burden of proof was on the respondent to show that it *was* reasonably practicable for the claimant to take leave during that period. She referred me to the explanatory memorandum accompanying the **2020 Regulations**, as well as to non-binding guidance issued by the Government at the time. The explanatory memorandum states at para.2.1:

> **"This instrument amends regulation 13 of the Working Time Regulations 1998 (WTR) to ensure that workers for whom it is not reasonably practicable to take holiday due to the coronavirus situation can carry their holiday into the following two leave years. This will protect workers by ensuring they do not risk losing their holiday entitlement, whilst ensuring that businesses have the flexibility and the staff needed to respond to the coronavirus situation."**

35. Ms Grace referred me to various other passages in these materials, the thrust of which, she submitted, is that it was the responsibility of the employer to consider whether the effects of the pandemic were such that it was not reasonably practicable for the worker to take leave during a given period. That approach, she said, was reinforced by the general approach of **Shimizu**, which places the onus generally on the employer to proactively take steps to ensure that workers can exercise their paid holiday rights. It would therefore, she submitted, be an error to put the burden on an employee

to show that it was *not* reasonably practicable to take their leave as the result of the effects of coronavirus, which error, she submitted, was committed by this tribunal.

36. As to that, the usual approach is that a party asserting something bears the burden of proof. In a case where a worker was complaining that they had wrongly been deprived of their leave in the current year, and the employer was relying in its defence on the 2020 amendments as being applicable, it would be for the employer to show that they applied. But if, as in this case, the worker is asserting that they had the right to carry over unused leave because the circumstances described in the 2020 amendments applied, then the onus is on the worker to make that good. I do not think that this is affected by **Shimizu**, which is directed at a different mischief.

37. Ms Grace also submitted that this tribunal had failed to consider the logistics of how, after the takeaway was set up, temporary staff might actually be recruited and trained, and that there was a contradiction between the conclusion on this aspect and the earlier findings about the claimant's responsibilities as DPS. However, these submissions go beyond the scope of the grounds of appeal. In any event, I do not think that these findings were perverse or insufficiently explained, bearing in mind – to repeat – that the burden was on the claimant to show that the conditions that he relied upon as having triggered the right to carry-over introduced by the **2020 Regulations** were met.

38. Turning to the first of the foregoing two points – about the first period – this has given me greater pause. In this case, the tribunal found that there was one restricted period during which the effects of coronavirus meant that the claimant could not take holiday during that period, beginning on or around 26 March 2020, when the takeaway had to be set up, and ending when it was up and running. That was some time earlier than 3 July 2020, which was when the bar returned to trading as a bar, under local restrictions. The tribunal would therefore have been entitled to consider what holiday remained unused as of 26 March 2020, and to what extent being unable to take any holiday

during the restricted period, which was from then until, at latest, 3 July, affected the claimant's ability to take that unused holiday in the time that thereafter remained after 3 July.

39. However, Ms Grace makes the point that the finding at para.134.2 was that the claimant had the opportunity to take holiday during the first period. The tribunal did not actually make a finding about how much, if any, holiday he did in fact take during that period. However, the latter part of para.134.3 begins with the words: "In any event". That tends to suggest that the tribunal considered that, whatever the position may have been in the period up to 3 July, *in any event* the claimant had sufficient time to take any unused leave between 3 July and the end of the holiday year on 30 September, during which period, as the tribunal found, the effects of coronavirus did not make it not reasonably practicable to do so. That reading is reinforced by the tribunal's conclusion that there was simply not enough evidence that coronavirus interfered with the claimant's ability to take holiday, and the statement by the tribunal, in terms: "I find that it did not do so".

40. Ms Grace submitted, however, that there are a number of difficulties with this reading. First, the tribunal had not made any finding about how much, if any, leave the claimant had already taken since the start of the holiday year, and, hence, how much he had left to take after 3 July. Secondly, it had, on her case, wrongly put the burden on the claimant to show that it was not reasonably practicable to take whatever leave remained, during the remainder of the holiday year after 3 July. It did not necessarily follow, she submitted, that the business would have been able to spare him, or spare him for enough time, during this summer period, when it was trading as a bar again after the first lockdown had lifted. The respondent had not shown that it *could* have spared him.

41. However, for reasons I have explained, I consider that the onus was on the claimant, who was seeking to rely on these provisions, in order to claim the right to carry over, to show that the effects of coronavirus made it not reasonably practicable for him to take some or all of his four weeks' leave entitlement from 3 July and by the end of the year. While the tribunal did not make a finding about

how much holiday, if any, he had already taken, it noted that his case was that he had taken none. The tribunal had also identified when the holiday year ended. Its finding that in "the rest of the holiday year", after 3 July, the claimant had "every opportunity to take holiday when he wished" indicates that, however much he had left to take, it was not persuaded that, as a result of Covid or the effects of it, it was not reasonably practicable for him to take it by the end of the year.

42. For all of these reasons I am not persuaded that the tribunal erred in concluding that the provisions introduced by the 2020 amendments were not satisfied in this case, and that the claimant could not rely on those provisions to make good his claim to carry over unused leave from that year. Nor do I consider that the tribunal's findings in this regard were not *Meek*-compliant.

43. I turn to the challenge by reference to **Shimizu**. The main thrust is that the tribunal erred by relying on its findings that the claimant was a master of his own time and could decide when to take his holidays and was not under Mr Selby's direction in that regard. Ms Grace submits that the tribunal failed to engage with the law being, as explained in **Shimizu**, that the respondent had the burden of showing that it had exercised all due diligence to enable the claimant actually to take the leave to which he was entitled, in particular by informing him in good time that any untaken leave would be lost at the end of the leave year. This was in line, she submitted, with the general approach to this part of the **1998 Regulations**, discussed in a number of authorities, such as, by way of illustration, **Smith v Pimlico Plumbers Limited** [2022] EWCA Civ 70; [2020] ICR 818.

44. As to this, I note that the tribunal did, in its self-direction as to the law, at para.97, cite from para.46 of **Shimizu**; but it did not cite from para.47, in which the Court of Justice set out what an employer needs to do in order to ensure that the right to take leave is effective. Further, the tribunal noted at the end of its self-direction, at para.97, that the respondent did *not* suggest that it should have no regard to these principles, but, rather, sought to argue that the claimant *did* have the opportunity to take leave and that it was practicable for him to do so. However, there was no finding by the

tribunal that the respondent had informed the claimant, in some way, that he had a right to take leave, and that, if he did not take his full entitlement during the year, he would not be able to carry it over.

45. Mr Selby argued that it was unrealistic and unfair to place such a burden on a small employer such as his company, and that the reality was that the claimant, who himself had had responsibilities for managing employees, was well acquainted with the fact that he had the right to take paid holidays. He stressed that the tribunal had also found that he had had sufficient opportunity to do so.

46. **Shimizu** is, however, a reflection of the approach of the Court of Justice in a line of authorities, to the importance to be attached, as a matter of health and safety, to the rights of workers to enjoy the paid annual leave provided for by the underlying Directive. It is also a reflection of the Court's approach being, as a general principle, that the right may not be effective, if the worker has not been sufficiently supported by the employer, including by informing them as to the implications of not taking the leave in full during the current leave year.

47. In principle, this approach is the same for all employers, big or small, though what may or may not factually satisfy the tribunal that the obligation falling on the employer has been discharged in the given case will be a fact-sensitive matter. I note in this regard that the court in **Shimizu** referred to the employer being required to ensure that the worker is actually in a position to take the paid annual leave to which he is entitled by encouraging him "formally if need be" to do so, while "informing" him in good time that leave not taken during the holiday year will be lost. What would be sufficient in the given case to satisfy that obligation will be a fact-sensitive matter for the tribunal.

48. In this case, however, the tribunal relied on the fact that the claimant was free to organise his own holidays and had the opportunity to do so. It seems to me that, notwithstanding its citation of **Shimizu** at para.97, it did not engage with, and make a finding about, whether what I may call for shorthand the **Shimizu** duty lying on the respondent was fulfilled on the facts of this case.

49. I therefore conclude that the tribunal did err by failing specifically to apply the guidance in **Shimizu** to the facts of this case, and that is something that must now be done. I allow the appeal to that extent. Given that conclusion, the further *Meek* challenge adds nothing. I note also that if the answer proves to be that the duty was not fulfilled, then a finding of fact will also now need to be made as to what, if any, leave the claimant had in fact taken by the end of the 2019/2020 year.

50. Finally, I observe that my conclusions have been based on a consideration of the Court of Justice's decision in **Shimizu**, as the **1998 Regulations** had not been further amended in this regard at the relevant time, those amendments having only been made by the **2023 Regulations**, with effect in 2024. I have not needed, for this purpose of this appeal, to consider the construction or implications of the specific framing of the 2023 amendments; and I express no view about them.

51. Following my giving my substantive decision on this appeal I have now heard argument as to further and consequential directions. There are, potentially, two matters that now need to be decided. The first is whether the respondent in fact did sufficient to comply with **Shimizu**. If not, the second is what holiday did the claimant in fact take during the course of 2019/2020. Hence, what holiday, if any, was he, on that scenario, entitled to carry over, and in respect of which he would now be entitled to be compensated.

52. Ms Grace submitted that I do not need to remit the first of these questions to the tribunal because there is only one possible answer, applying the law to the facts found, being that the respondent did not comply with the duty. She accepted that the second question does need to be remitted to the tribunal. Mr Selby contended that both questions need to be remitted.

53. I appreciate Ms Grace's submission that, on the facts so far found, it would look like a tall order to persuade the tribunal that the **Shimizu** duty was complied with, given that, in particular, at time, neither the respondent nor the claimant considered him to be a worker. However, the tribunal has not made the necessary factual findings about that matter and I do not think I can say that it is impossible

that the tribunal might conclude that, in some way, the **Shimizu** duty was, in substance, met. I consider that I must, therefore, remit that question, along with the second issue as to what, if any, holiday the claimant, in principle, carried over and should now be compensated in respect of, if the tribunal decides the first question in his favour. Both parties agree, as do I, that it is desirable for these questions to be remitted to be decided by the same judge if available, and I will so direct.

54. Lastly, I heard argument as to what further case-management direction I should give, if any, in particular on the question of whether any new evidence should be admitted by the tribunal which was not before it last time. Having heard argument on this, I have concluded that I should leave it to the tribunal. I am not apprised of all the circumstances regarding what evidence precisely was before the tribunal last time, nor the relevant history of the litigation. Accordingly, if either party, having reviewed what evidence was available to the tribunal at the last hearing, considers that there is other evidence that is relevant and that they wish to be permitted to introduce for the purposes of the further decision-making that is to come, any issue about that will be for the tribunal to decide.