Neutral Citation Number: [2024] EAT 200

Case No: EA-2023-000764-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 December 2024

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

MR JAMES MAIN

Appellant

- and –

SPADENTAL LTD

Respondent

- and -

TIMOTHY ALEXANDER CLOSE
(IN HIS CAPACITY AS TRUSTEE IN BANKRUPTCY OF MR MAIN)

Interested Party

- -

JAMES WILLIAMS (Direct Public Access) for the **Appellant**
BARNABY LARGE (instructed by RBS & NatWest Mentor) for the **Respondent**
JAMIE COCKFIELD (instructed by Trowers & Hamlins LLP) for the **Interested Party**

Hearing date: 26 November 2024

- -

JUDGMENT

SUMMARY

RIGHTS ON INSOLVENCY, PRACTICE & PROCEDURE, UNLAWFUL DEDUCTIONS FROM WAGES, WORKING TIME REGULATIONS

The Employment Tribunal:

1. was right to rule that the Claimant's claim for a failure to provide him with paid leave was a proprietary claim which vested in his trustee in bankruptcy, but
2. erred in its refusal to award any interest-like compensation to reflect the diminution in the value of money between the dates when it should have been paid and the date of judgment.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This appeal raises two issues arising from a decision of EJ Gibb ("the EJ"), sitting in the Bristol Employment Tribunal, relating to remedy. In her decision which was sent to the parties on 10 May 2023 the EJ found that the claimant, who is the appellant before me, was owed holiday pay of £83,573.78 by the respondent ("the company"), but that (1) the whole of his award should be paid to his trustee in bankruptcy, who is the interested party ("the trustee") and (2) he was not entitled to interest. The claimant challenges the bankruptcy point by ground 1, which is opposed by the trustee (in part), and the interest point by ground 2, which is opposed by the company.

2. The litigation has a long history. It arose because the claimant, who provided services as a dentist to the company for a number of years, claimed that he was owed unpaid holiday pay as a "worker" within the meaning of regulation 2 of the Working Time Regulations 1998 or section 230(3) of the Employment Rights Act 1996. Following a hearing in 2019 an ET decided that he was not a worker. On 9 September 2021 the EAT allowed an appeal from that decision and remitted the case. In a judgment dated 17 May 2022 EJ Gibb ruled that the claimant was a worker and gave directions for a remedy hearing. On 10 February 2023 the trustee applied to take part in that hearing as an interested party, and was permitted to do so.

3. The claimant worked for the company, pursuant to arrangements the details of which are no longer material, from 5 March 2013 until 28 February 2019. On 21 June 2017 he was made bankrupt on the petition of HMRC and he was discharged from bankruptcy on 21 June 2018.

4. The EJ decided several issues of law of which only the two mentioned above are still in dispute.

5. The relevant facts in this case occurred before the UK left the EU. It is common ground that the ET was required to apply EU law, where relevant, as it stood at the time.

Ground 1: whether the claim vests in the trustee in bankruptcy

Legal framework

6. The material parts of regulation 13 of the WTR (as applicable at the relevant time) provide:

> 13.— Entitlement to annual leave
>
> (1) … a worker is entitled to four weeks' annual leave in each leave year.
> …
> (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–
> (a) 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.

7. The material parts of reg 16 provided:

16.— Payment in respect of periods of leave

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

(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.

8. The material parts of reg 30 provided:

30.— Remedies

(1) A worker may present a complaint to an employment tribunal that his employer–
(a) has refused to permit him to exercise any right he has under–
(i) regulation … 13 … ;
…
or
(b) has failed to pay him the whole or any part of any amount due to him under regulation … 16(1).
…

(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.

9. Section 306 of the Insolvency Act 1986 ("the IA") provides:

306 - Vesting of bankrupt's estate in trustee.

(1) The bankrupt's estate shall vest in the trustee immediately on his appointment

taking effect or, in the case of the official receiver, on his becoming trustee.

(2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer.

10. The relevant parts of section 283(1) of the IA provide:

283 - Definition of bankrupt's estate.

(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises—
(a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and
(b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph.

[…]

(4) References in any of this Group of Parts to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property except in so far as the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's
estate and—
(a) is so exercisable at a time after either the official receiver has had his release in respect of that estate under section 299(2) in chapter III or [F5the trustee of that estate has vacated office under section 298(8)], or
(b) cannot be so exercised for the benefit of the bankrupt;
and a power exercisable over or in respect of property is deemed for the purposes of any of this Group of Parts to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person (whether or not it becomes so exercisable at that
time).

11. Section 436(1) of the IA states that for these purposes:

" 'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

12. However, the benefit of some legal claims fall outside that definition of property, where they are "personal" rather than "proprietary". The distinction was made by Hoffmann LJ in *Heath v Tang* [1993] 1 WLR 1421:

"As will appear later from the cases that have been decided over many years, actions which relate to a bankrupt's personal reputation or body have not been considered to be property and therefore they do not vest in anybody other than the bankrupt. They relate solely to his body, mind and character and any damages recovered are compensation for damage to his body, mind and character as opposed to other causes of action which have been considered to be a right of property."

The EJ's decision

13. The EJ referred to sections 283, 306 and 436 and to *Gwinnutt v George* [2019] EWCA Civ 656, [2019] Ch 471 where Newey LJ emphasized the width of the relevant definition of property. She also referred to the exception made for personal claims, by reference to *Heath v Tang*, and reminded herself that claims for unfair dismissal, injury to feelings in discrimination claims and the right to a declaration in a discrimination claim are all personal in nature. She also referred to a third category of "hybrid" claims which are part personal and part proprietary, such as a personal injury claim for damages both for bodily and mental injury and for loss of earnings. In *Ord v Upton* [2000] Ch 352 CA, Aldous LJ held that such a claim is based on a single cause of action and vests in the trustee in bankruptcy, and that to be excluded, a claim must relate only to a cause of action of the personal kind, although the trustee would hold the personal part of the claim (such as a claim for damages for pain and suffering) on constructive trust for the benefit of the bankrupt.

14. Turning her attention to the nature of claims under the WTR, the EJ referred to *Santos Gomes v Higher Level Care Ltd* [2018] EWCA Civ 418, [2018] ICR 1571 where the Court of Appeal ruled that the remedy for a failure to give a paid break during the day is a payment of compensation for the relevant segment of time, based on the employee's rate of pay, and that there can be no award for injury to feelings. In such a case, "the mischief is that an employee is in effect required to work for no pay for the period of time which she does not have a paid break".

15. Later in her judgment the EJ stated her conclusion on the issue:

> "35. The Claimant's claim is brought pursuant to Regulation 16(1) of the WTR and Regulation 30 provides him with the route to his remedy. The wrong committed is the failure by the Respondent to provide paid holiday. As a result, the Claimant took unpaid holiday and the compensation for that wrong is to make payment of recompense for the unpaid holiday taken based upon the Claimant's rate of pay. There is no element of compensation which falls within the categories set out in *Heath v Tang* (supra), which are by reference to pain felt by the bankrupt in relation to 'body, mind or character'. Damages awarded under the WTR are different to those awarded for slander, for example. In *Santos Gomes v Higher Level Care Ltd* (supra) the Court of Appeal concluded that a complaint under Regulation 30(4) was akin to a breach of contract claim and I have come to same conclusion in this instance.
>
> 36. As is made clear in the case law, the definition of 'property' in section 436 of the IA 86 is drafted widely. In my view, based upon my analysis of the Claimant's claim as being akin to a contractual claim, this is to be treated as being proprietary in nature and therefore automatically vests in the Trustee."

The claimant's submissions

16. On behalf of the claimant, James Williams of counsel contended that his ET claim did not fall within his estate under section 283(1)(a) because, first, it was not "belonging to or vested in the bankrupt at the commencement of the bankruptcy" (he referred to this as the temporal criterion) and, second, it was a personal rather than a proprietary claim (he referred to this as the qualitative criterion).

17. In argument, Mr Williams addressed the qualitative criterion first. He began with the premise that the right to paid annual leave is not primarily an economic right but a health and safety right with social consequences. Thus the recitals to the Working Time Directive (2003/88/EC) refer to the laying down of minimum health and safety requirements and the goal of improving health and safety at work. Indeed, requiring workers to take paid leave may reduce their income, for example by depriving them of possibilities of overtime.

18. Mr Williams contended that the claimant's claim was therefore for the loss of a health and safety benefit rather than money. That, he said, was not changed by the fact that the remedy awarded by the tribunal was money. In *Smith v Pimlico Plumbers Ltd* [2022] ICR 818, the Court of Appeal described the right to leave and the right to payment for it as two aspects of a single composite right. So at [81] Simler LJ said:

> "In any event, viewed through the prism of a fundamentally important social (health and safety) right, a claim based on a failure to remunerate annual leave taken is not simply a claim for non-payment. Nor is the right only infringed when no payment is made, as [counsel for the employer] sought to argue. The failure to remunerate leave when the leave is taken (a fact that will inevitably be known in a case where the right is disputed by the employer who refuses to remunerate leave), means that there is a failure by the employer to ensure the necessary rest and relaxation that goes with paid annual leave."

19. That ruling in *Smith* was consistent, he submitted, with the decision of the CJEU in *King v Sash Window Workshop* [2018] ICR 693. There, as here, a worker was engaged on a self-employed basis and was not given any paid leave. On termination he claimed under regs 13 and 16 for payment for all periods of leave, whether actually taken or not, for the entire period of his work. The CJEU ruled that such a claim could be made whether or not the leave had been taken, and that where the employer had not allowed the right to be exercised, the right for particular periods could not be lost and therefore the claim could be made for the entire period. The court ruled that the Directive treated the right to the leave and the right to the payment as two aspects of a single right, and that the purpose of the right was to enable rest, relaxation and leisure. There would be no effective remedy if the leave had to be taken before the worker could claim the right. Allowing parts of the right to be extinguished would unjustly enrich the employer.

20. Mr Williams contrasted this case with *Ord v Upton* [2000] Ch 352, where the issue was whether a personal injury negligence claim, seeking damages both for pain and suffering and for loss of earnings, vested in the claimant's trustee in bankruptcy. The Court of Appeal held that the claim in negligence was a single cause of action, giving rise to a single thing in action. It could not fall within the *Heath* exception unless it related only to a cause of action of the "personal" kind. Although the claim included heads of damage which were personal, it was a "hybrid" claim. It therefore vested in the trustee, although the trustee would hold the right to recover damages for personal loss such as pain and suffering on constructive trust for the claimant. In the present case, he submitted, the relevant loss – deprivation of the right to paid leave – was entirely of the personal kind.

21. At the ET hearing, Mr Williams relied on two Court of Appeal cases, neither of which was mentioned in the EJ's judgment.

22. The first is *Grady v Prison Service* [2003] EWCA Civ 527, [2003] ICR 753. There the claimant brought money claims for wrongful dismissal and disability discrimination, both of which it was agreed vested in her trustee in bankruptcy, but also a claim for unfair dismissal. In relation to the latter claim, Sedley LJ explained that the statutory remedies for unfair dismissal are reinstatement, re-engagement and compensation. By section 112(4), if no order is made for reinstatement or re-engagement, a tribunal will award compensation consisting of a "basic award" which (per Sedley LJ at [8]) represents "not consequential loss but the years of the employee's life invested in the lost job" and "a compensatory award representing an equivalent of common law damages". Sedley LJ concluded at [22]:

> "In our judgment the essential nature of a claim for unfair dismissal is personal, not proprietary. Unlike a claim for wrongful dismissal, which (except in the rare case where specific performance can be granted) is an action for damages for breach of a contract, a claim for unfair dismissal only begins with the employer's fundamental breach. It proceeds through the issues described … above [of reinstatement, re-engagement and compensation]. The purpose and effect of the sequential provisions for judgment and redress can fairly be said to be the recognition of a vested interest in a job – something of a different order from the common law's view of a job as a simple contract which can be broken by a party willing to pay the appropriate price for breach."

23. The claim in *Grady*, said Sedley LJ at [24-25], was "primarily directed at the restoration of a contractual relationship in which the claimant's skill and labour are the essential commodity", and was "a claim of a unique kind which offers the restoration to the claimant of something which only the claimant can do". Thus "a claim for reinstatement or re-engagement consequent on an unfair dismissal, and indeed a significant element of the compensation which can be awarded in lieu of these, is not a thing in action of the kind which forms part of a bankrupt's estate, even though the eventual fund (if an award is made) may be".

24. *Grady* was followed in *Khan v Trident Safeguards Ltd* [2004] EWCA Civ 624, [2004] ICR 1591 where the same result was arrived at in respect of Mr Khan's unfair dismissal claim. He also brought claims for race discrimination and victimisation. These, it was held, would be personal if he only claimed declarations and compensation for injury to feelings but would become hybrid if he also claimed for loss of earnings. He was permitted to amend the claims to confine them to the personal elements, and they did not vest in the trustee. Having referred to *Heath* and *Ord*, Buxton LJ said at [100]:

> "This principle accordingly requires close attention to the nature of the relief claimed in any given case. Where there is a money claim, but in the form of relief that is merely the expression in money terms of an undoubted personal claim, such as pain and suffering in assault or general damage in defamation, then the action remains a personal one. However, if a claim is added for a distinct pecuniary loss, such as the loss of earnings in *Ord* … or special damage in defamation; then the whole chose becomes hybrid, and the whole of it passes under the control of the trustee."

25. By analogy, Mr Williams submitted, the present claim seeks the restoration of a leave right which, in the form of leave, could only be enjoyed by the claimant. Whilst the EJ's award converted that right into money, that did not occur until after the claimant's discharge from bankruptcy, and the trustee in the present case has conceded that sums earned after that time

are outside the bankruptcy. In any event, the money claim was "merely the expression in money terms of an undoubted personal claim".

26. Turning to the temporal criterion, Mr Williams relied on Article 7(2) of the Working Time Directive 2003/88/EC which provides that:

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

27. In domestic law that is reflected by reg 13(9)(b) of the WTR, quoted above. The effect, Mr Williams submitted, is that the claimant's claim for a payment in lieu of annual leave arose only on termination of the worker relationship in 2019, and did not exist during the bankruptcy which commenced on 21 June 2017.

28. At that earlier date, he submitted, all that the claimant had was a right to paid leave, which was not "property". He might from time to time have had a right to bring an in-time claim for a failure to provide annual leave in any given leave year, but until termination he did not have the right to bring the global claim which he was able to bring upon termination, and that is the chose (or thing) in action with which the present debate is concerned.

29. Mr Williams sought to distinguish that situation from the pension cases on which the trustee relies, to which I come below, where members of pension schemes were held to own valuable assets, for which they had paid or contracted, at the time of their bankruptcy, even though they could not access them at that time because they had not reached retirement age. Those benefits, he submitted, were different from the non-financial paid leave rights which the claimant had at the time of his bankruptcy.

The trustee's submissions

30. For the trustee in bankruptcy, Jamie Cockfield of counsel contended that the EJ's decision was correct though he acknowledged "the absence of an explanation of reasoning in the Judgment".

31. In respect of the temporal criterion, Mr Cockfield argued that a number of cases are applicable by analogy and support the EJ's decision. Essentially:

    a. The definition of property in bankruptcy is deliberately very wide, encompassing "the entire property of the bankrupt, of whatever kind or nature it be …": *Hollinshead v Hazleton* [1916] A.C. 428 HL per Lord Atkinson at 436.

    b. In *Patel v Jones* [2001] EWCA Civ 779, pension benefits received by a bankrupt after his discharge from bankruptcy were found to vest in his trustee in bankruptcy because, at the date of the bankruptcy order, he had "a present legal right to compel the payment of scheme benefits in the future and on certain contingencies", even where that right may have had "no immediate value" (per Mummery LJ at [36]). Mr Cockfield compared the situation of the claimant, who had a legal right to paid holiday during his employment which crystallised on termination after discharge of the bankruptcy.

c. Similarly in *Re Landau (A Bankrupt)* [1998] Ch. 223, the court held that the bankrupt's pension policy vested in the trustee in bankruptcy, who was therefore entitled to receive all sums payable under it, even where they only became payable after his discharge.

d. A similar approach was taken to compensation for mis-sold payment protection insurance in *Ward v Official Receiver* [2012] B.P.I.R. 1073, even though the bankrupt did not know of his entitlement or make the claim until after his discharge from bankruptcy. Either the right to complain and receive compensation arose from, and was part of, the policy itself, which pre-existed the bankruptcy and was a species of property within the IA, or the right to claim for misrepresentation was a chose in action which existed when the misrepresentation was made, i.e. before the bankruptcy. The court considered the situation to be comparable with that of an employee who is exposed to noise or hazardous materials before a bankruptcy and, after discharge from bankruptcy, discovers for the first time that the exposure gave him a right to sue his employer for lost earnings.

e. *Gwinnutt v George* [2019] EWCA Civ 656 concerned fees owed to a barrister at the time of his bankruptcy. The fees, arising before changes to the law in 2013, had arisen under honoraria rather than contracts and so, as was the invariable position at that time, the barrister could not sue for them. The question was whether his "expectation" of the fees vested in his trustee in bankruptcy. Having reviewed cases which established that a mere "hope" of acquiring property, as for example in the case of a beneficiary under a discretionary trust (even though that beneficiary could be said to have "an interest of sorts"), was not property which could vest, the Court of Appeal nevertheless applied *Ex parte Huggins* (1882) 21 Ch D 85 for the proposition that "the mere fact that you cannot sue for the thing does not make it not 'property'" (per Jessel MR at 90-91). An example given there was a bond given by a foreign government which could not be enforced by action. In the case of barristers' fees, the court noted that notwithstanding the lack of enforceability, non-payment by a solicitor could amount to professional misconduct or could lead to consequences under the Bar Council's withdrawal of credit scheme. It ruled that the unpaid fees were property because they were "capable of realisation" (citing *Hollinshead v Hazleton* [1915] AC 428).

32. Mr Cockfield contended that the present case is similar to those, because the claim "existed at the point at which R failed to provide paid holiday to C, notwithstanding that the claim for unpaid holiday pay could only be brought on termination".

33. In respect of the qualitative criterion, Mr Cockfield invited me to uphold the reasoning of the EJ. He reminded me that in *Khan* a claim for lost earnings would have vested in the trustee, and that Buxton LJ (in the passage quoted above) said that the addition of any claim for "distinct pecuniary loss" would cause that to happen.

34. The present case, he submitted, is essentially a money claim which is not merely the expression of a claim of a purely personal nature, and that the EJ was right to find support for that proposition in *Santos Gomes* (referred to above). In *Santos Gomes* the claimant had relied on the same Directive recitals as were cited by Mr Williams to show that the right to

paid leave is a matter of health and safety, but at [77] Singh LJ said that "that does not answer the question of what remedies may be required in order to give effect to the right to a paid break during the working day".

35. In reply to that last point, Mr Williams argued that the reasoning about the "natural remedy" for an omission to give a rest break should not be extended to an annual leave case and was inconsistent with CJEU cases such as *King*.

Discussion

36. It is clear from all of the cases on this subject that close attention must be paid to the type of claim which is brought and the remedy or remedies sought in it.

37. With that in mind, I will address the "temporal criterion" first.

38. At [11] above I set out IA section 436, which refers to "… every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property" (emphasis added).

39. Although neither the pensions cases relied on by Mr Cockfield nor *Gwinnutt v George* are on all fours with the present case, they show that a claim which is a chose in action can exist and vest in the trustee even at a time or in circumstances when the bankrupt cannot enforce the claim. Such claims are examples of "property" which is "future" or "contingent" within the meaning of section 436.

40. During the whole of the bankruptcy period from 21 June 2017 to 21 June 2018, the company was in breach of its obligations under regs 13 and 16 of the WTR to provide the claimant with leave and payment for it.

41. The claimant could, throughout that period, have made a claim under reg 30(1)(a) for a declaration and for discretionary compensation calculated on a "just and equitable" basis for the refusal (or omission) to permit him to exercise his right under reg 13. Whether or not he could at that time have made a claim under reg 30(1)(b) for the amounts due to him under reg 16, he could also have framed a claim under sections 13 and 23 of the Employment Rights Act 1996 for unlawful deductions from his wages, although section 23(4A) limits such a claim to a period of 2 years before the making of the claim.

42. In recent years, case law has resolved some uncertainties about particular aspects of such claims. For example, *Smith v Pimlico Plumbers* made clear that a worker can make the claim without having previously requested the paid leave or having taken unpaid leave, and that gaps of more than 3 months between failures to provide the pay for the leave do not prevent those failures from being a "series" for which a claim can be made under section 23 of the ERA.

43. At the time of the bankruptcy the claimant might reasonably have believed that parts of his claim would be time-barred. However, the subsequent cases which remove some of those doubts have clarified the law rather than changing it.

44. Because the claimant continued in work during the period of the bankruptcy, his potential claim continued to grow, but that did not prevent his right of action from vesting in the trustee. Counsel told me that the parties have agreed that the claimant will in fact receive the part of the money awarded by the ET which is referable to the period after his discharge, though that is not an issue in this appeal.

45. In my judgment, ground 1 turns on the qualitative criterion only. If and to the extent that the right to claim was in the nature of "property" rather than being "personal", any hindrances on the claim actually being brought at the time of the bankruptcy did not prevent it from vesting in the trustee. That is the effect of the broad definition in section 436, as applied in the cases cited by Mr Cockfield.

46. I therefore turn to the "qualitative criterion".

47. The case was pleaded in the grounds, drafted by solicitors, which are appended to the claimant's form ET1 in paragraph 15:

> "The Claimant contends that, although he was not deterred from taking annual leave, he was not paid for such leave that he did take. The Claimant therefore claims as follows: …"

and there followed a detailed calculation of a total sum claimed of £229,411.98.

48. The pleading ended in these terms:

> "**Claims**
>
> Unlawful Deduction of Wages/Holiday Pay
>
> 19 The Claimant claims holiday pay under the Employment Rights Act 1996 and a breach of Regulation 16(1) of The Working Time Regulations 1998.
>
> 20 The Claimant claims £229,411.98 as set out above."

49. It is noticeable that the claim is presented there as a claim for pay rather than a claim for compensation. That reflects the fact that, as is now well known, a claim for holiday pay can be made as a claim for unlawful deductions from wages under ERA section 23.

50. I accept, nevertheless, that a claim for holiday pay is not identical to any other claim for unpaid wages. As cases such as *King* show, the right in question is a composite right to the leave and to the pay for it. So it would be an over-simplification to say that this was simply a claim for wages.

51. However, that fact does not compel the conclusion that this claim falls within the *Heath v Tang* exception. It would equally be an over-simplification to say that the sum awarded was "merely the expression in money terms of an undoubted personal claim, such as pain and suffering in assault or general damage in defamation", as Buxton LJ put it in *Khan* (see [23] above). Instead, this claim falls somewhere in between a pure wages claim and an "undoubted personal claim".

52. Although *Santos Gomes* was concerned with the different question of whether a breach of the WTR can give rise to compensation for injury to feelings, the reasoning in that case gives some assistance. It shows that, when a tribunal assesses the nature of a claim under the WTR, the health and safety policy objectives of the Working Time Directive are a less powerful or decisive consideration than Mr Williams suggests. The point made by Singh LJ was that that consideration is separate from the question of what remedy is available. As can be seen from cases such as *Khan*, for present purposes the nature of the remedy sought is highly relevant.

53. Once it is appreciated that this case concerns a purely monetary remedy for a wrong which is at least partly monetary in nature, in my judgment the decisive consideration is the wide reach of section 436, as reflected in the case law on this subject. The statutory objective was identified by Mummery LJ in *Patel v Jones* [2001] EWCA Civ 779, [2001] Pens LR 217 at [39] as being that "subject to certain specific exceptions, all a debtor's property capable of realisation should be vested in the trustee for him to realise and distribute the proceeds among the creditors".

54. That being so, a right to make a claim where the cause of action at least includes a failure to pay wages and the remedy consists of an amount measured by reference solely to the worker's rate of pay cannot, in my judgment, be regarded as a "personal" claim of the kind identified in *Heath v Tang* where "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property".

55. I therefore conclude that the EJ made no error of law in this regard, and ground 1 must be dismissed.

Ground 2: the claim for interest

Legal framework

56. The ET has no express power to award interest accruing before judgment on compensation or other sums which it awards under the WTR or the ERA.

57. In 1993, Parliament introduced a power to award interest on awards for sex discrimination and equal pay, to give effect to the ECJ's decision in *Marshall v Southampton and SW Hampshire AHA (No. 2)* [1994] QB 126 ("*Marshall*").

58. That power, and similar powers introduced for race discrimination cases, were consolidated in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regs (SI 1996/2803) ("the 1996 Regulations"). The 1996 Regulations now have effect for claims under the Equality Act 2010 generally.

59. In *Marshall*, the claimant successfully challenged a requirement of her employer that female employees had to retire at a younger age than male employees. Although the Industrial Tribunal had no power to award interest under the Sex Discrimination Act 1975, it considered itself bound by EEC law to award adequate compensation including compensation for the diminution in value, over time, of the sums which the claimant would have earned had she not been forced to retire. On a reference from the House of Lords, the

ECJ ruled that the lack of power to award interest was contrary to Article 6 of the Equal Treatment Directive 76/207/EEC, and said:

> "31. With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.
>
> 32. Accordingly, the reply to be given to the first and second questions is that the interpretation of article 6 of the Directive must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid."

The EJ's decision

60. In the ET, Mr Williams contended that the wording of WTR regulation 30 is wide enough to permit an award of compensation which includes interest or, in the alternative, that the EU law principles of equivalence and effectiveness require the domestic legislation to be applied as if it conferred a power to award interest.

61. The EJ agreed that the wording of regulation 30 does not preclude an award of interest and therefore found it unnecessary to decide whether EU law provides an alternative basis for such an award.

62. Having had regard, by reference to regulation 30(4), to what was "just and equitable" and to the nature of the company's default and any loss sustained by the claimant, she nevertheless declined to make an award. At paragraph 32 she explained that she had relied on the following factors:

> "a. Throughout the relationship, both parties proceed on the basis that the Claimant was self-employed. This is not a case where the employer actively sought to prevent the worker exercising rights that the employer was aware of and the Claimant had not raised it as an issue. There was no suggested [sic] by the Claimant that the Respondent had acted in bad faith.
>
> b. The Claimant paid tax on the basis that he was a self-employed person. Any issue regarding his status as a worker arose after his employment had terminated.
>
> c. There was no evidence led as to any loss sustained by the Claimant over and above the loss of his paid leave.
>
> d. The Respondent's case is that there are sums outstanding due to it from the Claimant arising out of the application of the ADC."

63. "ADC" stands for Absent Dentist Charge, which in turn referred to a term in the agreement between the claimant and the company. The company had said that the claimant owed it some money by application of that term, though this could not be counterclaimed in the ET

proceedings (and was not the subject of any counterclaim). The claimant did not admit that such a sum was owed.

The claimant's submissions

64. Mr Williams noted that the sums involved are significant. At 8% running from the mid-point of each leave year, interest would add £42,082 to the £83,573 awarded by the EJ.

65. He relied, first, on the principle of effectiveness in EU law. As it was expressed in *Marshall* at [17], the third paragraph of article 189 of the EEC Treaty requires each member state to which a Directive was addressed to adopt "all the measures necessary to ensure that its provisions are fully effective".

66. That, he submitted, was why the Court reached its conclusion quoted above. Applying the Equal Treatment Directive in that case, the Court said that an award of interest "must therefore be regarded as an essential component of compensation" (emphasis added). At [24] it had also said that implementing domestic measures must also have a "real deterrent effect on the employer".

67. The same, Mr Williams submitted, must logically apply to a claim based on the rights conferred by the Working Time Directive.

68. Mr Williams also relied on the decision of the House of Lords in *Sempra Metals Ltd v IRC* [2008] 1 AC 561 where a company was required to pay tax prematurely because it had a non-resident subsidiary. The tax in question would have fallen due later, but the requirement to pay it at an earlier date was held to be contrary to the freedom of establishment under EU law. The House considered whether interest should be simple or compound, rather than whether it was available at all. In the course of that discussion, Lord Mance referred to *Marshall* and referred at [202] to an award of interest as "an essential component of the 'effective' legal remedy which national courts are bound to award",

69. Lord Mance also said at [204] that "it is not permissible for English law to decline to give any interest at all or to treat an award of interest as a purely discretionary matter". As Mr Large pointed out, however, that was on the basis that loss of use of the prematurely paid money was "the 'very objective' or 'sole object' sought by Sempra", and *Sempra Metals* did not concern the availability of interest on damages or compensation.

70. In this context Mr Williams emphasized the importance of the right to paid leave. It is set out in Article 31(2) of the EU Charter of Fundamental Rights ("the Charter") which has the same legal value as the EU treaties, as the CJEU emphasized in *King* at [32-33]. He submitted that the ET was bound to award interest and could not treat it as a mere matter of discretion.

71. Although he primarily relied on the principle of effectiveness, Mr Williams relied on the alternative on the principle of equivalence, whereby domestic procedural rules governing actions to safeguard rights deriving from EU law must not be less favourable than those governing similar domestic actions. In this case he compared the claimant's claim with a contractual claim for holiday pay in the civil courts, a comparison recognised as valid by the House of Lords in *RCC v Stringer* [2009] ICR 985. However, in that regard Mr Williams

acknowledged that the relevant powers to award interest in the civil courts, under section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984, are framed in discretionary rather than mandatory terms.

72. As to the rate of interest, Mr Williams accepted that that is a matter for the national court. However, interest under the 1996 Regulations in discrimination cases in the ET is awarded at 8%, as is post-judgment interest, and he submitted that there is no reason to apply a different rate to an award vindicating the important right to annual leave. That liability is one of the "consequences" of non-compliance with the CJEU in *King* said that employers must bear (at [63]).

73. There is, Mr Williams submitted, no difficulty in interpreting WTR reg 30 as conferring a power to compensate the claimant for the effects of the effluxion of time on his award relating to annual leave, as indeed the EJ ruled.

74. The same result could, he submitted, be achieved by the route of the Charter having horizontal direct effect in accordance with the CJEU's decision in *Stadt Wuppertal v Bauer* [2019] IRLR 148. This would matter only if the EJ was wrong in her interpretation of regulation 30.

75. Mr Williams further submitted that there are very important policy reasons to award interest in a case such as this. Were it not so, employers would have a financial incentive for non-compliance with the WTR even if they might eventually be ordered to pay the holiday pay, and could gain a competitive advantage from non-compliance.

76. Finally Mr Williams submitted that even if, contrary to his primary case, the EJ had a discretion, she gave incorrect and insufficient reasons for refusing to make the award. The fact that the company did not know it was in breach was irrelevant, especially in the absence of evidence that it ever took any steps to inform itself. The fact that the claimant was self-employed for tax purposes was not, legally, a reason why the company could assume he was not a worker. There was no delay by the claimant, who could not bring his claim for a payment in lieu of paid leave until termination of his engagement. Although there was no evidence of loss, it was known or could be assumed that the value of money diminishes over time, and the EJ failed to deal with that point. As for the ADC issue, the existence of a disputed and unproven counterclaim which might be pursued in a different forum was logically irrelevant to the question of interest.

77. As to disposal, Mr Williams submitted that the EAT can and should decide the position itself rather than remitting the case. If the ET had no discretion as to the award or the rate of interest, that conclusion must follow. But even if there was a discretion, no factors were identified below which were relevant to the grant or refusal of an award, or the rate or relevant period, and therefore there is nothing to remit.

The respondent's submissions

78. The company was represented by Barnaby Large of counsel.

79. As to the effect of *Marshall*, Mr Large conceded that the ET was bound to consider whether to make an award reflecting the effluxion of time. However, he submitted that the EJ did

precisely that, and that *Marshall* does not make it a fait accompli that there will be interest and that the rate will be 8 per cent. The existence of a discretion, he submitted, is recognised in the opinion of the Advocate General in *Marshall*, with which the Court did not disagree.

80. Mr Large also submitted that since the domestic provisions on interest in civil court cases are discretionary, the principle of equivalence adds nothing.

81. So far as the EJ's reasons are concerned, Mr Large submitted that the EJ was right to consider all of the factors identified in the different paragraphs of regulation 30, and she logically considered the parties' interactions. In this case there were experienced businesspeople on both sides. The EJ was entitled to have regard to the passage of years before the claim was made, notwithstanding the need to consider the diminution in value of the sum awarded.

82. In relation to the rate of interest, Mr Large made the further point that if the ET or EAT held that the rate was effectively fixed at 8%, that could offend against the principle of effectiveness by imposing a cap on recovery.

83. As to disposal, Mr Large submitted that if the appeal succeeds, the interest issue should be remitted so that the ET can exercise a discretion as to the award, period and rate.

Discussion

84. The EJ decided, and I agree, that regulation 30 is framed in terms which do not prevent the ET from awarding a sum to compensate a claimant for the financial effect of the delay in receiving what should have been paid. To avoid confusion, this could be expressed as "interest-like compensation".

85. I do not accept that the ET was bound by EU law to award a sum, calculated at a fixed percentage rate, for the whole of the period from loss to judgment. Instead, it seems to me that the ET was bound, by the principle stated in *Marshall* at [31], to deal fairly and logically with the claimant's claim for the financial effect of the delay in receiving what should have been paid.

86. The Court in *Marshall* explained that "full compensation" for "loss and damage" includes the factor of reduction in value by effluxion of time. So that factor must be brought into account. However, that does not prevent the ET from assessing the amount of that loss or considering the cause of it in more detail. That process must respect the principle of effectiveness but it is not correct to say that it can have only one outcome.

87. In my judgment the principle of equivalence does not add anything of significance to the present case. In a civil claim the court would have a discretion as to the award or refusal of interest, and as to the relevant rate and the period of any award. There is no reason to regard the proper consideration of interest-like compensation as a less favourable process, if it differs at all.

88. However, although the EJ correctly directed herself that she was empowered but not obliged to make the award sought, I am afraid that her decision cannot stand. I accept the submission

of Mr Williams that the reasons which she gave were not sufficient to justify her decision. Each can be dealt with briefly.

89. A lack of bad faith on the company's part, or of any active attempt to prevent the claimant from exercising his rights, was logically of little if any relevance. The fact was that he did not receive what he should have received over a very long period. The financial effect of that delay fell on him, whilst it could be assumed to have been of benefit to the company. Although neither party knew the true legal position at the time, it is the employer that has the legal responsibility to inform itself of the law and comply with it, as the CJEU said in *King* at [61].

90. The fact that the claimant was self-employed for tax purposes added nothing to the previous point.

91. There was no need for the claimant to adduce evidence that his award would be worth less when paid than it would have been if he had received it as holiday pay at the correct time (and the interest claim did not depend on proof of any other loss such as a need to borrow money). On the contrary, what was missing from this judgment was a recognition by the EJ of the loss which could be assumed to arise from delayed payment.

92. A disputed counterclaim which was not before the ET could not be a valid reason to withhold an award of interest.

93. Ground 2 will therefore be allowed.

94. In my judgment, the issue of interest-like compensation (with any consequence such as interest on any award) must be remitted to the ET. This ground of appeal was based on legal argument, and was not a perversity ground based on the absence of any evidence which could justify the EJ's decision. It will be for the ET to consider the question of loss caused by effluxion of time in light of any relevant evidence. Where such loss is found, the ET must award the necessary compensation. If that is in the form of a percentage rate of interest (as would be usual), the ET must make a reasoned decision as to the appropriate rate, which may or may not be the rate of 8 per cent, and the applicable period. These issues must be remitted because it cannot be said that there is only one possible outcome on any of them. Finally, on a question which was raised after the parties' representatives saw this judgment in draft, it seems to me that there is no reason not to remit the remaining issue to the same ET so that it can be re-decided in light of the matters set out above.

Conclusion

95. The appeal is allowed on ground 2. Ground 1 is dismissed.