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EMPLOYMENT TRIBUNALS

Claimant: **Mr. A. Battan and others**

Respondents: **(1) Lloyds Bank plc**
(2) IBM United Kingdom Limited
(3) TSB Bank plc

Heard at: **London Central** **On:** **19, 20 November 2018**
Before: **Employment Judge Goodman**

Representation

Claimants: **Mr D. Barnett, counsel**

Respondents: **(1) Mr J. Cavanagh QC**
(2) Mr T. Richards, counsel
(3) Ms E. Misra, counsel

PRELIMINARY HEARING

JUDGMENT

1. The interruption of three months or more in a series of unlawful deductions is not unlawful as interpreted by the CJEU in **King v Sash Windows.**

2. In respect of UK law on interruption of a series, the Tribunal is bound by the Employment Tribunal decision in **Bear Scotland**.

3. The two year limitation on arrears of unlawful deduction claims introduced by the Limitation Regulations 2014 does not breach the EU principle of equivalence.

REASONS

1. This hearing was to decide test issues on how far back claims for underpaid holiday can go.

The Facts

2. The parties had agreed a statement of facts. The claimants were all originally employed by Lloyds Bank, the first respondent. In 2014 TSB was split from Lloyds to promote competition in retail banking, and those staff are now employed by TSB, the third respondent. In 2017 other Lloyds staff transferred under TUPE to IBM, the second respondent. There are 374 claims against Lloyds, 15 against IBM and 85 against TSB.

3. The underpayments arise because additions to basic pay for overtime, critical, standby and call-out rates, were not counted for holiday pay. When it was established in **British Gas Trading v Lock (2017) ICR 1,** following earlier decisions of the European Court of Justice**,** that normal remuneration for holiday pay should include additional payments, Lloyds negotiated a settlement with the two trade unions it recognised for collective bargaining, effective 1 November 2017, by which it agreed to enhance holiday pay going forward by 8.3% to cover the additional payments. Lloyds also agreed to pay one year's arrears.

4. These remaining claims are by members of a third trade union Affinity, which until 2015 was recognised by Lloyds, but no longer. Their holiday pay has been increased to include additional payments, effective from 1 September 2017 (IBM) and 1 November 2017 (Lloyds and TSB), but there is a dispute about payment for earlier years.

The Issues for this Hearing

5. Proceedings in most of the claims were stayed by Presidential order of 15 March 2018, leaving seven test cases. Mr. Damaa and Mr. McSporran claim against the first respondent, Mr. Travis and Mr. Battan against the second respondent, and Ms Knox, Mr Jackson and Mr Constable against the third respondent.

6. The issues for this hearing were identified at a case management hearing on 16 April 2018. They are:

> (1) whether, in the light of **King v The Sash Window Workshop Ltd (2018) IRLR 142 (C-214/16)**, the ruling **in Bear Scotland v Fulton (2015) ICR 221 (EAT),** to the effect that a gap in underpaid holiday of more than 3 months interrupts the series of deductions, is still good law;
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> (2) whether the ruling in **Bear Scotland** as set out above is correct, having regard to section 23 Employment Rights Act 1996. The claimants concede that the Employment Tribunal is bound by the statutory construction in **Bear Scotland,** but will wish to raise this issue on any subsequent appeal;
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> (3) whether, in the light of **King**, the two-year backstop contained in subsection 23(4A) Employment Rights Act, introduced by the Deductions from Wages (Limitation) Regulations 2014, is still good law, in so far as it applies to holiday pay claims like the present;
>
> (4) the answer to (3) is "no", whether the claims can go back to November 1996, October 1998, 6 years from the date of presentation of the respective claims, or some other date.

7. On question (4), the parties are now agreed, in the light of **Coletta v Bath Hill Court (Bournemouth) Property Management Ltd UKEAT/0200/17**, that because section 9 of the Limitation Act, setting a six year time limit for claims in contract, does not apply if there is another statutory limitation period, if the

claimants succeed on the other questions, the claims can go back to October 1998, the date the Working Time Regulations 1998 came into force. If the Limitation Regulations providing a two year backstop are set aside in this judgment, the respondents reserve the right to argue at a further hearing that section 9 (6 years) does then apply.

8. As to question (2), the decision of the EAT in **Bear Scotland** is binding on this Tribunal as a matter of UK law, and so is left to any appeal. That leaves (1) and (3) for this hearing.

9. These are questions of law. There are no admissions as to whether any particular claim is in time, or whether and when underpayments occurred.

10. The claims concern only the 20 days holiday required by the EU Working Time Directive, not the extra 8 days allowed in the UK Regulations.

Holiday Pay Claims - the Statutory Framework

11. Article 7 of the Working Time Directive 2003/88/EC provides:

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.

12. This was transposed into UK law by the Working Time Regulations 1998. The relevant regulations are 13 (entitlement), 16 (payment) and 30 (remedies) :

13. Entitlement to Annual Leave

(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is—

….(c)in any leave year beginning after 23rd November 1999, four weeks.
…..

(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.

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").
(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.

For completeness, the Deduction from Wages (Limitation) Regulations 2014 added to regulation 16 (4) the words:

"and paragraph (1) does not confer a right under that contract".

This has the effect of barring the worker's alternative remedy of bringing a holiday pay claim in contract in the court, where the limitation period is 6 years.

30.Remedies

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

..

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

(2) 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 …beginning with the date on which it is alleged that the exercise of the right should have been permitted … 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 …months.

…

(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 … 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.

13. Unpaid - or underpaid - holiday may also be claimed as an unlawful deduction from wages under the scheme set out in sections 13 - 27 of the Employment Rights Act 1996. Section 23 deals with complaints of deductions. It was amended by the Deduction from Wages (Limitation) Regulations 2014, which added subsections 4A and 4B, so it now reads:

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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

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

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

(a)a series of deductions or payments, or

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

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

(4) Where the employment tribunal 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.

Additions were made to this section by the Deduction of Wages(limitation) Regulations 2014. They are:

(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).

This is the two year "backstop", by which claims that could previously go back six years, or on some views, longer, are now limited to 2 years arrears.

14. Section 27 of the 1996 Act defines wages in section 27:

Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

These are limited by s.27(4A) to two years, whereas by s.27(4B) the following are not:

(b) statutory sick pay under Part XI of the M1Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

(ca) statutory paternity pay under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,

(cc) statutory shared parental pay under Part 12ZC of that Act,
(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the

> M2Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),
>
> (f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,
>
> (fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act.
>
> (g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,
>
> (h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and
>
> (j) remuneration under a protective award under section 189 of that Act,
>
> but excluding any payments within subsection (2).

15. To summarise the UK framework for holiday pay claims, a claim can be made under the Working Time Regulations, with a strict 3 month time limit, but a money claim can only be made on termination of the employment (regulation 14). In the alternative, a worker can bring a claim for unpaid or underpaid holiday pay as an unlawful deduction from wages at any time while employed, provided he does so within three months of the deduction (whether underpayment or failure to pay at all), or if there is a series of deductions, within three months of the last deduction, unless the worker could show that it was not reasonably practicable to have claimed in time. It was held by the EAT in **Bear Scotland** that an interruption to the series of deductions of more than three months broke the series, and a worker could not go back further if it was broken. Finally, if there is an unbroken series of deductions of payments of a kind falling into section 27(1) (a), the addition of subsections 4A and 4B means that the series is limited to two years – the "backstop".

The CJEU decision in King and the European Framework

16. The stimulus for these claims is the CJEU decision in **The Sash Window Workshop Ltd v King (2018) IRLR 142**, on a reference from the Court of Appeal. In that case the claimant had worked for 13 years on a self-employed commission-only contract. He was not paid if he was not at work, with the result that any holiday he took was unpaid, and so sometimes he did not take holiday at all. After he left the job, an employment tribunal determined that he was not self-employed but a worker, and so entitled to paid holiday. Three issues were then identified: holiday pay 1, about payment for holiday in the final year, holiday pay 2, about failure to pay him when he took holiday, and holiday pay 3, on whether he was entitled to payment if he did not take holiday at all.

17. Holiday pay 1 and holiday 2 were awarded without difficulty, but in respect of holiday pay 2 it should be noted that this was decided before **Bear Scotland** and the 2014 Limitation Regulations, which otherwise would have limited his unlawful deductions claim, as he would have had to

establish a series of non- payments with gaps of less than three months between them, and even then be limited to the last two years of the thirteen.

18. Holiday pay 3 however appeared to fall foul of the "use it or lose it" rule in regulation 13(9), that states that if not taken in the year it is due it cannot be carried forward, and there cannot be a payment in lieu. So the issues referred to the European Court were:

    (1) having regard to Article 7 of the Directive and the right to an effective remedy in Article 47 of the EU Charter, whether an employee had to take holiday before he could claim payment for it, and

    (2) whether Article 7 precluded restrictions on carrying over untaken leave from year to year.

19. The CJEU decisions on these were:

    (1) "in the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave in accordance with (Article 7), they preclude the worker having to take his leave first before establishing what he has the right to be paid in respect of that leave",

    (2) "Article 7 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".

    In other words, section 13(9) did not apply where a worker was deterred or prevented from taking leave because it was unpaid – the right to leave could be carried over.

20. It is important that the claimants argue that this applies not just where leave is unpaid (as with Mr. King) but also where it is underpaid, as they were. A series of cases on what is "normal remuneration for holiday pay" have established that the reason for requiring normal remuneration is so that workers are not deterred from taking holiday by reduced income when away from work – **Williams v British Airways plc (2012)ICR 847**, **Lock v British Gas Trading (2014) ICR 813,** and **(2017) ICR 1,** and **Dudley MBC v Willetts (2018) IRLR 1152.**

21. The right to paid annual leave contained in the Working Time Directive comes from article 31 (2) of the EU Charter of Fundamental Rights which is directly binding on the UK as if a treaty (article 6 (1) of the Lisbon Treaty) and says:

    1. every worker has the right to working conditions which respect his or her health, safety and dignity.
    2. every worker has the right to …. an annual period of paid leave.

22. It has been stated in **BECTU (2001) ICR 1152** and **Dudley Metropolitan Borough Council v Willetts (2017) IRLR 1152** that this right is a particularly important principle of EU social law from which there can be no derogation.

23. Counsel for the second respondent helpfully listed 5 well-established principles of EU law applicable to the issues for determination.

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

2.Effectiveness. Article 47 of the EU Charter of Fundamental Rights provides the right to an effective remedy and to a fair trial:

> "everyone whose rights and freedoms guaranteed by the law of the union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article".

Under this, member states should ensure that the exercise of EU rights by citizens in the national court is neither "*virtually impossible*" nor "*excessively difficult*".

3.**Equivalence**. National procedural rules for EU law should be "*not less favourable than those governing similar domestic actions*". What is a "similar domestic action", was considered by the UK Supreme Court in **Totel Limited v HMRC (2018) 1 WLR 4053**. The question whether any proposed domestic claim is a true comparator with an EU law claim is context specific. The domestic court must focus on the purpose and essential characteristics of allegedly similar claims. The question should not be addressed at a very high level of generality; CJEU case law shows that alternative types of claim for exactly the same loss are common examples of true comparators. The principles are also set out in **Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc and others (2018) EWHC 2839**, reviewing the authorities, including:

> "the principle of equivalence requires that the limitation rule at issue be applied without distinction, whether the infringement alleged is of community law or national law, where the purpose and cause of action are similar".

In addition,

> "the principle is not to be interpreted as requiring member states to extend the most favourable to all actions brought in the relevant area of law" –

where there is a range of limitation rules, the EU right need not be equivalent to the most favourable; it need only be within the range.

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

5.**Legal Certainty**, which recognises that national limitation periods are necessary and desirable, provided that the principles of equivalence, effectiveness and legitimate expectation are not infringed – **Test Claimants in the FII Group Litigation v HMRC (2012) UKSC 19.** It is also permissible to shorten time limits, provided there is a reasonable transition period, compatible with legitimate expectation.

24. The parties agree that if the 2014 Limitation Regulations are held to infringe effectiveness or equivalence, the tribunal can strike them down, having regard to **Levez v Jennings (1999) ICR 521,** and more recent CJEU decisions on direct effect.

Claimant's Submissions

25. For the claimants, it is submitted that there is no challenge to the three month time limit on presenting claims, whether in the Working Time Regulations or the Employment Rights Act (subject to reserving for a higher court an argument on **Bear Scotland** about interruption of a series of deductions). They do challenge both the interruption of a series, and the two year backstop, on grounds of infringement of the EU right to an effective remedy.

26. Taken from the opinion of Advocate General Tanchev in **King**, (4) given the "considerable normative weight of the right to paid annual leave", it should not be for the employee to have to take steps (here, take unpaid leave and then claim pay for it) because it is for the employer to "create an adequate facility". Thus (5):

> "an allowance in lieu of paid annual leave is triggered upon termination of the whole relationship to cover the whole of the period in which no adequate facility was afforded by the employer for the right to paid annual leave, and ending only once that facility became available. It is only at this point that temporal and other restrictions on the right to annual paid leave apply.. . If an adequate facility for exercise of the right be paid annual leave was never provided, then an allowance is due under article 7 (2) of Directive 2003/88 to cover the full period of employment until termination of the employment relationship".

The Claimants argue that the right to an "adequate facility" survives the passage of time if not made available, as shown in King by the overruling of section 13 (9), whereby a worker must "use it or lose it". It is argued that this rule about taking it within the holiday year was a type of backstop, whether of one day or 364 days. They argue that time limits can only apply once an adequate facility for taking leave has been provided.

27. **King** was decided against a background of earlier cases. In **IRC v Ainsworth** and **Schultz-Hoff v Deutsche Rentungversicherung Bund (2009) IRLR 214 ECJ**, it was held that an employee off sick and so unable to take leave must have an opportunity to do so, and if not, could claim an allowance, and a carry-over period limited to 6 months (the German national restriction) was precluded; in **KHS AG v Schulte (2012) IRLR 156**, a worker who had been off sick and so unable to take holiday lost the right, however. In that case in German law the no carry-over period was 15 months, and that carry-over rule was permissible because if off sick for several years he might carry over leave without limit, which might lead to much organisational difficulty for the employer (34,39). Such a limit did not impede effectiveness.

28. In **King** itself the CJEU distinguished the position of those off sick from those able to work. Where the impediment to taking leave came not from sickness (where if he had been fit an adequate facility for paid leave was available) but from the employer refusing to remunerate leave, so that an adequate facility was not available, then if the right were extinguished by a carry-over restriction,

> "that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that directive, which is that there should be due regard for workers' health" (64).

No derogation was permissible. "An employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences".

29. In light of that the claimants submitted that the Limitation Regulations introducing the 2 year backstop were an impermissible restriction on the right to paid annual leave, as they deprive the worker of an effective remedy where there is no adequate facility for paid leave.

30. The claimants point to the explanatory note to the Regulations, and the impact statement published with them. While the 2 year backstop affects all claims for deductions from wages, not just holiday pay, the explanatory note says:

> "in particular these changes relate to complaints in respect of deductions from wages which arise as result of the employer failing to pay appropriate levels of holiday pay in accordance with the requirements of the Working Time Regulations 1998. The changes adjust our implementation (sic) the ongoing EU obligation to provide procedural rules governing claims in respect of rights under the directive".

The impact statement says that by limiting holiday pay claims: "there will be costs savings to businesses from not having to pay overtime to employees for more than 2 years going back", estimated at £300m for the private sector and £80m for the public sector. The claimants argue from this that the purpose and effect of introducing the backstop in section 23(4A) was to unjustly enrich the employer at the expense of the worker, by depriving workers of claims for underpayment for earlier years.

31. Next, it was argued for the claimants that there was no conceptual difference between underpaying, and not paying at all. Both failed to make a proper facility available for paid leave, which is a fundamental right, where a state could not impose conditions for entitlement and granting of annual leave. They are "two aspects of a single right" - CJEU in **Lock** (17), cited in **Bear Scotland** (29), and CJEU in **King** (35). In **King** the court immediately followed that with "it follows…that the worker must be able to benefit from the remuneration to which he is entitled".

32. To illustrate this the claimants point to two recent cases. In **Kreuziger v Land Berlin C-619/16, 6.11.18** a judge in training did not take leave in the 5 months of his engagement. The relevant German law did not permit payment of money in lieu on termination. It was held that if he had the opportunity to take leave and did not take it, he need not be provided with pay in lieu on termination, but if the employer had "any practice or omission .. that may potentially deter a worker from taking his annual leave", that was "equally incompatible with the purpose of the right to paid annual leave". It was "important to avoid a situation in which the burden of ensuring that the right to paid annual leave is exercised rests fully on the worker, while the employer may, as a result thereof, take free of the need to fulfil its own obligations by arguing that no application for paid annual leave was submitted by the worker". The employer must provide "sufficient information" about the right to leave. It was a positive obligation, and the burden was on him to show he had. Thus, it was argued, where there was a real risk that workers are being underpaid, there was an obligation on employers to tell them that. In the other recent case, **Max-Planck Institute v Shimuzu, C-684/16, 6.11.18**, the same point is made, that national legislation laying down conditions for the exercise of the right to paid annual leave (here, referring specifically to rights at the end of the leave year carry-over period) could only be permitted: "provided that the worker who has lost the right to paid annual leave has actually had the opportunity to exercise the right conferred on by the directive".

33. The claimants add that the remedies in regulation 30 of the WTR are the same, whether the complaint is that he has not been allowed to exercise a right, or that he has exercised it but has not been paid for it.

34. In **Stadt Wuppertal v Bauer; Volker Willmeroth v Brossman,C-569/16 and C-570/16**, 6.11.18, widows (one private sector, one public) could claim payment for accumulated holiday not taken by their husbands before death in service, on the basis that: "it is settled case law that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law, that right also including the entitlement to payment". This is relied on to illustrate that being able to take holiday means being able to take (properly) paid holiday.

35. As for whether the claimants had or had not been deterred from taking holiday, that was not required to show an infringement of the right, as in **Lock** and **Williams,** where workers had taken underpaid holiday. It was the *risk* of deterrence that was important. In **Willetts**, the President of the EAT said:

> "A deterrent effect is inferred from a reduction in remuneration rather than from actual evidence that a worker has not taken annual leave. The real question is whether normal remuneration is maintained in respect of annual leave guaranteed by article 7. If it is not, a deterrent effect is presumed irrespective of the opportunity the worker had to take annual leave at a different time or suffered a financial loss as a result of taking annual leave when he or she did".

The Claimants argue that the mere fact that there is underpayment breaches article 7 because of the deterrent effect.

36. It follows, it is argued, that underpayment of annual leave means that there has not been an adequate facility provided by the employer, and so the right must survive throughout the employment relationship, and not be cut back by national rules. Such rules, whether carryover, or a backstop, or a requirement that a series of deductions have intervals of no more than three months, deny the worker a remedy, and breach the principle of effectiveness.

37. With respect to **Bear Scotland** on breaking a series of deductions, the claimants argue that this denies workers an effective remedy if their holiday is underpaid. They rely in the Advocate-General in **King** stating that a requirement to bring proceedings each time there is a breach "would be insufficient to dissuade employers from breaching article 7… particularly in the light of the small sums involved when weighed against the cost of bringing legal proceedings". The claimants point out that as a matter of practice, within any12 month leave year there are often gaps of more than 3 months between the exercise of rights to take 20 days.

38. An argument that the employment tribunal fee regime had denied the claimants an effective remedy at earlier dates was withdrawn.

39. So far, the arguments have been about the provision of an effective remedy for an employer's failure to provide an adequate facility for paid annual leave. The claimants also argue that the 2 year backstop in the Limitation Regulations (but not the broken series interpretation of a series of deductions in **Bear Scotland**) breaches the principle of equivalence. The 2 year backstop applies to all unlawful deductions from wages clams, not just holiday pay claims, so arguably equivalence is not infringed. It also precludes holiday claims under the regulations from being claims in contract, so removing a claim in the civil courts with a six year limitation period from direct comparison. The claimants point however to **Santos-Gomez v Higher Level Care Ltd (2018) IRLR 440, CA**, where it was held that claims for breach of the WTR right to rest breaks did not attract an award for injury to feelings because they were "analogous to claims for breach of contract", or "akin to a breach of contract", where injury to feelings could not be awarded. A claim for payment under regulation 16 of the WTR was also therefore "analogous" to a claim in contract, and comparable to a contract claim, even though now stated in the Regulations not to be a contract claim. Not to benefit from the six year limitation period available in the civil courts denied the workers an equivalent domestic remedy, and is an "egregious breach of the principle of equivalence". Although the 2 year backstop applies to deductions other

than for holiday pay, the change in the law breached the principle of effectiveness, as made explicit in the explanatory note to the Regulations. The state, it was argued, cannot rely on a rule change that on the face of it applies to non-EU derived claims if the purpose of the rule change was to target an EU right.

40. As a secondary argument, the claimants point out that claims under section 27(1)(b) –(j) are not excluded from the backstop. All these are UK statute rights, save maternity allowance, which being limited to 14 weeks could never be caught by a 2 year backstop. Thus the Regulations discriminate adversely against an EU Directive right (not a term of the contract, like most other unlawful deductions claims) while not catching UK rights which are also not derived from contract.

Respondent's Submissions

41. The respondents' case is that **King** was not about time limits or procedural rules at all. EU law permits member states their own procedural rules and time limits, and so neither the rule about claiming within 3 months of a deduction in a series, nor the two year backstop, both rules about time limits, are inconsistent with EU law. Even very short limitation periods (one month in **Rewe**) are permissible if they do not infringe effectiveness and equivalence. The claimants' failure to challenge the 3 month time limit itself, while challenging the **Bear Scotland** interpretation of a series of deductions, and the backstop, lacks logic.

42. It would be astonishing if the CJEU in **King** could strike down well-established national rules about time limits without ever discussing them. The comments in both the Advocate General's opinion and the judgement itself were about preconditions to statutory rights, not about enforcing rights that existed; **Schulte** and **Stringer** were about rights lapsing if a worker was off sick, not about enforcing a right that had not lapsed. The three very recent ECJ cases were all about whether rights lapsed, not about whether there could be time limits on enforcement. If an employer was obliged to prompt a worker to take his leave or he would lose it, that did not make a 2 year backstop unlawful.

43. They point to **Barth v Bundesministerium fur Wissenschaft und Forschung (2010) CMLR 24**, a case on the Free Movement directive, where a professor at an Austrian university had a contractual right to length of service pay which did not count his prior service in Germany. The Austrian law was amended so he could claim back pay based on German service, but it was subject to a three year limitation from the date he had applied. It was held the rule did not breach the principle of equivalence because it applied to domestic claims as to EU rights claims. Nor did it breach the principle of effectiveness, because it did not make it "virtually impossible or excessively difficult" to exercise EU rights. Professors who claimed could get increments for earlier foreign service, though subject to limitation on backdating. This differed from **T H Jennings(Harlow Pools) v Levez (C-326/96),** where a two year limit on backdating was disallowed, as that was an equal pay case where the claimant had been misled as to the male comparator's salary, and so unable to claim in time; at the time there was no "not reasonably practicable" exception to the six month time limit for equal pay claims. In

the holiday claims, if there had been misrepresentation the "not reasonably practicable" exception would afford a remedy, but in any case there had been no misrepresentation to preclude a claim in time. In **Barth**, in particular, it was said in relation to deterrence:

> " it does not appear that applying a limitation period… constitutes, by itself, a restriction on the freedom of movement for workers within the meaning of article 39. When that limitation period is applied, the application has an impact on the possibility of obtaining the special length of service increment for a period entirely in the past. It follows that it is not such as to preclude or deter a worker such as the applicant in the main proceedings from exercising his rights to freedom of movement for workers, because the possibility of obtaining that increment in respect of the past is not dependent on the workers choosing to exercise those rights… Furthermore, there is no evidence that applying the limitation period in circumstances such as those of the main proceedings would have been such as to preclude or deter a worker such as the applicant in the main proceedings, at a given time in the past, from exercising his rights to freedom of movement for workers… It was the refusal itself to grant special length of service increment to the person concerned, where he was exercising those rights, which constituted a restriction of freedom of movement for workers".

44. The Respondents argue therefore that a 3 month time limit, with a "not reasonably practicable" extension, is consistent with the principle of effectiveness, even if there were no provision for an extension to cover a series of deductions. In **Iaia v Ministero della Instruzione (2011) 3 CMLR 18**, it was compatible with EU law to lay down reasonable periods within which proceedings must be brought "in the interests of legal certainty", and "such periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought". In other examples, the CJEU itself has a time limit of 2 months for references; in **Sita UK v Greater Manchester Waste (2011) 2 CMLR 32**, 3 months was held effective, as was 60 days in **Peterbroeck** (1996) 1CMLR793. The time limit in **Rewe** (a case concerning cross-border fuel duty) was one month, but was not held ineffective remedy.

45. In **Preston v Wolverhampton NHS Trust (2000) ICR 961 ECJ** a time limit for occupational pensions claims (denied to part-time workers, predominantly female) of 6 months after termination did not breach effectiveness. However the court did disallow a procedural rule that claimants could only count pensionable service going back two years before the claim, relying on **Magorrian,** on the basis that:

> "it must be borne in mind that the object of such a claim is not to obtain, with retroactive effect, arrears of benefit under the occupational pension scheme but is to secure recognition of the right to retroactive membership of that scheme for the purpose of evaluating the benefits to be paid in the future".

In **Preston** the successful claimants still had to pay contributions to the pension scheme for past years if they wanted to benefit from a pension in future. The restriction on contribution for past years, which was disallowed, was not a time limit on a claim for pension scheme membership.

46. These time limits, it is pointed out, were permitted even without any extension for a series of deductions. Even if there was no allowance for a series at all, a three month limit, plus a "not reasonably practicable" extension did not breach effectiveness. The **Bear Scotland** interpretation of a series did "not convert a limitation period that is permitted by EU law into one that is incompatible with EU law".

47. The respondents argue that the claimants are ambitious, overlooking that the cases relied on deal with rules on whether a right lapses if it is not taken, rather than procedural rules to enforce that right. Time limits have been permitted in all EU claims, including equal pay. It has never been suggested they were invalid. They are "well worn" (A-G in **Unibet**). If the argument was right, no time limit could apply to an otherwise good claim, and backstops were no different to other time limits.

48. Countering the claimant' s arguments on not cutting back non-derogable rights, in **Emmott** the CJEU had indicated that no time limit was appropriate while a state had not transposed the Directive into national law, but it had rowed back from that, and by **Iaia,** upheld as a general principle that time limits did not breach effectiveness, and were permissible even where the member state had not transposed the Directive. The decisions in **Johnson** and **Steenhorst-Neerings,** on social security**,** were not to do with whether there was permitted derogation from the right, as the Dutch government had not exercised a right of derogation, but were an attempt by the court to avoid its conclusion in **Emmott** without saying so, though it had later bitten the bullet and done so in **Iaia**. Outside social security, a backstop has been struck down on equivalence, but never on effectiveness; the real problem in **Levez** was that the employer had concealed essential information, at a time when the equal pay time limit did not happen "not reasonably practicable" extension, as the Working Time Regulations allow, but there is no denial of effectiveness with the extension.

49. The Claimants were in error when arguing that pay and the right to leave are two sides of the same coin, because while they might be two aspects of the same right, but in domestic law there were two mechanisms of enforcement - to seek a declaration under regulation 30 (3) if leave had not been taken, which was different to taking leave, but being underpaid when taking it. If a claimant never went on holiday, he could not bring a claim for unlawful deductions under the Employment Rights Act. These Claimants had taken leave, and nothing prevents member states from setting time running from the date of the underpayment.

50. Turning to equivalence, the respondents argue that, under **Totel**, the national court must identify a "true comparator" of a domestic nature, not by generality, but by reference to specific context. In **Totel** a taxpayer complained that having to pay the tax (VAT) before he could appeal whether he had to pay it breached equivalence, because VAT is an EU

tax, and there was no such requirement for national direct taxes. It was held this was not an appropriate comparison, because the reason for the "pay first, appeal later" rule was that he was collecting on behalf of the state tax owed by his customers to the state, not paying tax on his own behalf, and this requirement also occurred with some UK taxes. Further, the principle of equivalence required that: "the procedure should be broadly as favourable as that available for truly comparable domestic claims, rather than the very best available", and it was "correct to submit that it is to prevent member states from discriminating against claims based upon EU law by affording them inferior procedural treatment from that afforded to comparable domestic claims", though the Court of Appeal had been right to state that : "the jurisprudence of the CJEU shows that it is open to a member state to apply any available set of rules, which are already applied to similar claims, to an EU derived claim, provided that an EU derived claim is not selected for the worst treatment". The Supreme Court referring to this, added that equivalence did not mean choosing the most favourable set of rules, neither could it be established "by the choice of some exceptionally tough set of procedural rules already applied to some domestic claim for reasons particular to that type of claim. But such a claim would be most unlikely to be a true comparator in any event".

51. Turning to comparators in employment contract contexts, the House of Lords in **HMRC v Stringer (2009) ICR 985**, held that a claim for holiday under the Working Time Regulations could be brought as an unlawful deduction under the Employment Rights Act 1996, as a mattter of construction of the statute: "statutory annual leave falls to be regarded as coming within the normal meaning of the word wages in section 27". The words "or otherwise", in "whether payable under his contract or otherwise", were capable of meaning a payment under statute. Dealing specifically with the principle of equivalence, that was said to be an additional reason for so holding - they were sufficiently similar, taken in the round, and the Employment Rights Act regime was more favourable; the court must address "both the purpose and the essential characteristics of allegedly similar domestic actions", (from **Levez)**. It appears from the judgement that it made no difference to Mr. Ainsworth himself as he only complained of a single deduction, rather a series of deductions, but the House of Lords decided it was an important matter because it was represented the employment tribunal system was being cluttered up with "successive applications being made to employment tribunals to avoid the time limit in regulation 30, than in relation to a series of deductions of payments allegedly due under regulation 16"; it was more convenient for employees to make claims in the tribunals than in the courts, the alternative for a series of deductions, as argued by the employer suggesting that an unlawful deductions claim was not necessary because a claim could be made in the court. From this, the respondents argue that a claim for underpaid statutory holiday pay is a "similar action of a domestic nature" as a claim for an unlawful deduction other than holiday. As the **Bear** interpretation of a series of deductions applies to all kinds of unlawful deductions, not just statutory holiday pay, it does not breach the principle of equivalence. The respondents proposed that contractual holiday pay under section 23 is of a similar nature to sick pay,and is equally affected by the Bear Scotland rule on a broken series. A breach of contract in the county court is not a similar action, as in

Stringer it was held that a County Court claim was less favourable than an employment tribunal claim.

52. As for the argument about the claims in section 27 (1) (b) – (j), it was not the case that all alternatives must be subject to the same procedural rules; equivalence must just compare the closest claim, and contractual holiday pay claims were the closest.

53. Turning to the 2 year backstop, it is argued that a two year limitation is consistent with the principle of effectiveness as much as a 3 month time limit. The respondents rely on the social security cases, **Steenhorst-Neerings (1994) IRLR 244** and **Johnson v Chief Adjudication Officer (1995) ICR 375**, which found one year backstops lawful. As for equivalence, the 2 year backstop applied to all claims for unlawful deductions, whether domestic rights or statutory annual leave.

54. An argument that the Working Time Directive did not have direct effect was abandoned in the light of the very recent decisions in **Stadt Wuppertal** and **Max Planck Institute.**

55. Responding to the claimants' arguments, the respondents argue that if the claimants' contentions are accepted, no limitation can be imposed on claims for annual leave or holiday pay under the regulations where an employer failed to make facilities available, they are in effect saying that limitation periods do not apply if the claimant has a good claim, when of course limitation rules can disapply otherwise good claims. By the same logic, the 3 month time limit is incompatible. However, they are both same type of rule, limiting enforcement. Further, a permissible 6 year backstop applies to equal pay claims and is imposed by statute, and the right not to suffer sex discrimination is one of the most fundamental in EU law. The claimant confuses the substance of the rights with the enforcement of them. The recent cases of **Stadt Wuppertal** and **Max Planck** are about whether a substantive right to annual leave or holiday pay lapses, such that there is nothing to enforce, rather than whether it is permitted to impose limitation rules on enforcement.

56. On equivalence, the purpose of the 2014 Limitation Regulations, as set out in the explanatory note, was not relevant. As a matter of statutory interpretation, it is the plain text that matters. The Privy Council in **Ferguson v A-G** (**2016) UKPC 2** had so held when examining a change to limitation rules on corruption claims following a change of government.

57. The Claimants replied on the two social security cases that the Equal Treatment Directive on Social Security benefits 79/7/EC, allowed derogation, unlike the Working Time Directive, so the only relevant question was whether the backstop was proportionate, and in those cases it was held that it was, because it facilitated proper checking of eligibility, and also funding for the relevant period. It was a proportionality defence.

58. On backstops being permissible in equal pay claims, it was pointed out that **Levez** was decided on the principle of equivalence, and there was no challenge on effectiveness, as the 6 years provided an effective remedy.

On backstops not being the issue, but the claimant's failure to issue claims in time (every 2 years, or every 3 months) that was shown to be wrong by **King, Kreuziger** and **Max Planck**, as it placed the burden on the claimant to enforce compliance with the right to paid annual leave. Limitation rules were for when the respondent made the facility available.

59. A number of additional points were made by the second and third respondents. Ms Misra, for the third respondent, TSB, submitted in relation to **King** that the grounds of claim in the claimants' cases made clear this was a claim for underpayment. The claim was about procedural rules to enforce a right, not a failure to exercise a substantive right. A time limit or backstop was not a precondition as the requirement to take holiday in the current year was. In **King** there was no analysis of case law on time limits as might be expected if these were in issue, and "facility", as in "no adequate facility", had no special meaning. "Preconditions" related to the exercise of the right, not its enforcement. If the claimants' argument about underpayment meaning there was no adequate facility provided was right, it would be necessary to examine all the facts in every claim to know if there was a right to be enforced, before knowing if the backstop would apply.

60. As for the claimants' arguments on equivalence, it appeared that it was argued **King** was a community rule displacing national rules on limitation periods, but if so, it could be expected to have said so in plain terms. On the time limit and backstop, it was not clear why a three month limitation for a single claim was unobjectionable – there being no challenge to regulation 30 - when a restriction on a series of deductions or a two year backstop was. As for equivalence, contractual and statutory holiday pay claims were all caught under section 27(1)(a), and **Totel** and **Ainsworth** are binding on the tribunal as regards equivalence of a county court claim. **Santos-Gomez** (compensation for rest breaks) did not engage equivalence. As for the payments in section 27(1)(b) to (j) excepted from the back stop, they were broad and general, and seldom involved an annual recurring payment. Contractual holiday pay and other deductions from wages of the like were the natural and obvious comparators.

61. Replying on this point, the claimants argue that **Stringer** was not about pay as it fell due, but about compensation for four days holiday to be taken when off sick. This was not a proper comparison, so not binding. The arguments on equivalence were obiter, as it was already decided that claims for statutory holiday pay were included within the section 27(1) definition of wages.

62. For the second respondent Mr. Richards, countering the claimants' point about the social security cases, added that limitation rules applied to fundamental unqualified rights as much as qualified ones – such as **Rewe –** and permitted national autonomy. **King** did not overturn that. The same arguments applied to backstops as to time limits. It is not explained why a single payment limit is not objectionable but the limit on a series is.

Discussion

63. The Tribunal does not hold that time limits are preconditions that preclude provision of an adequate facility.

64. At the core of the claimants' case is whether a three month time limit, or a series of deductions with gaps of more than three months, or a two year backstop, denies them an "adequate facility" to exercise the right to take annual leave and be paid for it. This rests on interpreting dicta in **King** on there being no preconditions to exercising the right as meaning that the restrictive interpretation of a series of deductions, or the limit of two years on back payment are preconditions restricting the right. Given the permission to member states to rely on national procedural rules for enforcing EU rights, in order to hold this it must be very clear the CJEU meant in **King** that procedural rules barring claims were impermissible infringements of the right. The absence of any discussion of time limits is unhelpful. The reason for that is of course was the issue in King was on facts where the claimant had not exercised a right to take holiday at all, even unpaid. Where he had taken it, there was no dispute; as at the time, there was no back stop limit to claims for a series of unlawful deductions and the section was interpreted without reference to the length of gaps in a series of deductions. Thus the factual scenario differed from these claims. The claimant relies on general statements applying to a different set of facts.

65. The Tribunal does not accept that limiting a series of deductions, or a 2 year backstop once a claim is brought, denies a worker an "adequate facility" to take leave. The worker can bring a claim, provided he does so in three months of the deduction (underpayment). The adequate facility argument rests on the risk a worker will be deterred from taking leave, and so lose it. Although in the 'normal remuneration' cases it was not necessary to show workers were deterred to reach a decision about the level of holiday pay to be awarded, in **Barth** it was relevant to the three year backstop being upheld that the claimant had not in fact been deterred from exercising a right to free movement by the rules on counting past service in another country. These claimants, unlike Mr King, had taken leave, and the issue is within what time they must claim for underpayment.

66. It is right that the reasoning for the normal remuneration cases about the correct level of holiday pay included that claimants need not show they were deterred from taking leave. The risk that workers might not take leave if paid less was a general one, and justified payment of "normal remuneration" in all cases, deterred or undeterred. In those cases - **Williams, Lock, Willetts -** the claims were decided after leave was taken. They are like **Barth**.

67. It is not accepted that the either the three month time limit (interpreting the series of deductions, or the backstop, is a precondition to taking leave. The claimants argued that the requirement to take leave in any given year, as overruled in King, is itself a kind of time limit, and amounted to a "community rule" about time limits. The CJEU included the no carry over rule in "preconditions" to exercising the right, and held that it was wrong to place the burden on the claimant to ask for leave and take it, but in the view of the Tribunal that does not help these claimants, where the difference is between claiming for a right not exercised and claiming for a right exercised but underpaid. If there were a "community rule" displacing national procedural rules, the court did not say so, as the question of a claim for back pay of underpaid leave had already been agreed.

68. Nor are preconditions of themselves ruled out, as in **Kreuziger,** where it was envisaged that if a worker, once fully informed of his rights, still did not take his leave before termination he would lose the right to be paid for it. The precondition was permissible if there was an adequate facility. Here the Tribunal prefers the respondent's argument: there is a distinction between exercising a right and enforcing it. These claimants did exercise the right, their claims are about enforcement of that right.

69. The claimants point to the section 30 remedies of the WTR (a declaration, or a claim for payment) being the same, but the time limits would still have applied to any enforcement of a declaration by seeking a payment.

70. If **King** had been about claiming pay for leave he had taken but without pay (holiday pay 2), what might have been decided? There is no reason to think that a time limit on bringing a claim after he had taken leave would have been displaced. Time limits on important rights were allowed in **Levez** and **Preston (**equal pay for women, and equal access to pensions for largely female part-time workers, though in **Levez** not applicable because of concealment by the employer); and in **Barth** (national discrimination in conditions for long service pay increments), where the discussion in the judgment makes clear that the deterrence factor was considered but discounted as the employee had in fact exercised his right to work in another country, and the claim concerned how this had affected his right to present pay, and past pay subject to the national backstop. **Rewe** (complaints about national discrimination in payments of duty) is not in the employment field, but on cross border trade, fundamental to the operation of a common market. Even if the member state had failed to implement a directive in national law it could still rely on a national time limit to bar a claim (**Iaia**).

71. The tribunal does not accept the argument that failing to pay normal remuneration meant there had not been an adequate facility to exercise the right, or that if it did, it displaced a time limit. For similar reasons a backstop on past underpayments is not displaced by the argument that underpayment meant there had not been an adequate facility.

72. The Tribunal does not accept that having a time limit or a backstop is of itself contrary to the principles set out by the CJEU in **King**. Do the time limits and backstop that are now in place infringe the principles of effectiveness or equivalence?

73. On effectiveness, it is argued that it is unreasonable to expect workers to make claims to an employment tribunal each time they exercise holiday. If workers took one or two days holiday a month, there would be a long and unbroken series, but in fact most people prefer to take leave in whole weeks, often two at a time, and many employers actively discourage the taking of leave in single days, so in practice there will often, even usually, be broken series, and an underpaid worker might well have to make more than one claim a year. In order to claim, a worker must fill in an online form (or make a telephone call) for ACAS, then wait for an early conciliation certificate, then complete form ET1 online to start the tribunal claim. That the requirement for early conciliation makes this a two stage process may be discouraging, but is not dissimilar to most other legal

procedures which require some form of letter before action and then issue of process. The analysis in **Stringer/Ainsworth** shows the advantage of using a series of unlawful deductions rather than making single claims under the WTR, and of making claims in the tribunal rather than the court, but did not conclude that single claims approached anything that could be described as "virtually impossible" or "excessively difficult". There are currently no fees for claims; this may change, but against the principles set out in UNISON in the Supreme Court it seems unlikely that any fee later introduced will make claims ineffective, unless delays in bringing holiday pay claims to hearing mean that recurrent claims must be started for subsequent holiday until a decision is obtained. As most money claims are processed relatively quickly, this is unusual.

74. As for the backstop of two years, it is hard to see how this means there is no effective enforcement of a claim. There is no objection to a backstop in principle. The two year limit on past years in **Preston** was disallowed not because it was about any past entitlement, but about calculating future entitlement when it arose, and to be so entitled employees must pay their pension contributions for their retrospective years. Where a time limit is changed (as it was by virtue of the 2014 regulations introducing the backstop), there must be a transition period because of the principle of legitimate expectation, but this did not feature in the claimants' argument on effectiveness.

75. The Tribunal concludes that neither the interpretation of a series of deductions in **Bear Scotland**, nor the two year limit on back claims in the 2014 Limitation Regulations, infringes effectiveness.

76. The claimants' other argument on the introduction of the two year backstop is that it breaches equivalence. Contract claims generally are subject to a six year limitation period, so a backstop provides a lesser remedy where a period of underpayment goes back more than two years. Unlawful deduction claims, if brought in time and part of a series, could, until the 2014 regulations, go back many years (**Coletta**). On the face of it, a statutory holiday pay claim is equivalent, in purpose and essential characteristics, to a contractual holiday pay claim, and in **Santos-Gomez** was held to be "analogous" to a contract claim. The 2014 regulations deal with this by applying to any unlawful deductions claim for wages under section 27(1)(a), statutory or contractual, and at the same time providing that the right to holiday under the Working Time Regulations is not a right under the contract. (It is not for discussion here whether the addition of regulation 16(4) to the WTR now opens up whether awards for injury to feelings should be made to workers denied rest breaks).This change limits the pool of potential comparators to other unlawful deductions claims. As all section 27(1)(a) claims – under the contract or otherwise - are subjected to the same backstop, many of the equivalent alternatives are in the same range. On the principles discussed in **Levez** and **Totel**, the claimants cannot choose the best in range if some equivalent comparators are subject to the same restrictions, though **Levez** succeeded as so many of the comparator claims had less restricted time limits. **Stringer/Ainsworth** held that statutory holiday pay fell within the definition of wages, so what was said about equivalence was obiter. Thus it is unsurprising that the claimant complains that the *purpose* of the 2014 regulations was to disadvantage EU claims, even if the result was also,

and probably advisedly, equally to disadvantage many non-EU claims for deductions from wages.

77. Whether the purpose can be distinguished from the effect deserves closer consideration therefore. **Totel** discusses the application of the principle of equivalence, by which remedies must be broadly equivalent for EU and national claims. A member state may apply: "any available set of rules, which are already applied to similar claims, to an EU-derived claim, provided that an EU-derived claim is not selected for the worst treatment". Procedures should be "broadly as favourable" as those for "truly comparable domestic claims". The purpose of the principle was "to prevent member states from discriminating against claims based upon EU law, by affording them inferior procedural treatment from that afforded to comparable domestic claims". This was all subject to the "any available set of rules" not being "some exceptionally tough set of procedural rules already applied to some domestic claim for reasons particular to that type of claim".

78. None of the cases considered in that discussion included rules being introduced to restrict an EU right, and the relevance of this if it also restricted UK rights. They involved existing rules, "already applied". Further, while superficially the restriction on holiday pay is "exceptionally tough", in that the new backstop operates to cut a six year claim back by two-thirds, possibly far more if back to 1998, the mention there of particular circumstances for the rule shows that the reason to exclude those from the range of comparators was that they were not truly equivalent.

79. What is different here is that the two year back stop was not "already applied to similar claims", but was introduced, for both EU and non-EU claims, with claims for EU underpayment of holiday pay claims as the intended target. That is clear from the explanatory note. Even being careful about the silence of the explanatory note on the effect on other unlawful deductions claims, there is certainly no reason to think the two year limitation was introduced because of the particular circumstances of any UK based claims.

80. The respondents rely on the Privy Council decision in **A-G v Ferguson**, where it was sought to set aside a statute that had eliminated a ten year limitation if in force would have prevented some prominent prosecutions for corruption, on the ground that it interfered with the judicial process of particular individuals and so was contrary to a constitutional separation of powers. Discussing whether that was its purpose, it was said (paragraph 27): "how is the court to ascertain a more specific purpose behind an Act of Parliament than its general terms would suggest? Although this question commonly rises in politically controversial cases, in the Board's opinion the answer does not depend on an analysis of its political motivation. The test is objective. It depends on the effect of the statute as a matter of construction, and an examination of the categories of case to which, viewed at the time passed, it could be expected to apply". Although the statute had been passed following public outcry that individuals would escape prosecution, it did not follow that was its purpose, as "sometimes the facts of a particular case simply exemplified the need for a general law". Further, even if the limitation period no longer

obtained, the accused could still have fair trial. The whole discussion is however framed by the question whether the statute was an unconstitutional interference with the judicial process in particular cases, or itself an injustice. It is not directly helpful on whether it is permissible to examine the reasons for the Limitation Regulations and whether the reason for their introduction was to disadvantage a potentially very large set of EU claimants.

81. The 30 page Impact Assessment deals with the costs of overtime related statutory holiday claims and is explicit that the prompt for this is the ruling in **Bear Scotland**. It acknowledges that other unlawful deductions claims are affected - principally claims for underpayment of national minimum wage, though noting that there is another route to enforcement through HMRC - but undertakes no evaluation at all of the effect of introducing a 2 year cap on deductions claims other than for statutory holiday pay. Of what assistance is an explanatory note? They are not endorsed by Parliament, and the government's expectation of the meaning of a statute may not reflect the will of Parliament - Brooke LJ in **Flora v Wakom (Heathrow) Ltd (2006) EWCA Civ 1103.** They are admissible aids to construction as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed" - Lord Steyn in **R (Westminster City Council v NASS (2002) UKHL 38.** Impact statements have also been allowed as an indication of the mischief at which a statute is aimed.

82. The mischief aimed at seems clearly to have been the impact on business of holiday underpayments from all sectors of the economy going back years, arising from the new understanding of the EU right. The issue is whether the EU equivalence principle is infringed if limitation rules are changed to cut back enforcement of an EU right if UK rights are also caught. If there were in practice very few UK rights affected, it might be possible to say EU equivalence was infringed, but the effect on UK claims is unknown. Usually workers appreciate soon enough that they are underpaid and a two year limitation is unlikely to be a problem. Long standing underpayments have arisen where (for example) a collective agreement has been misunderstood or not applied, such that workers would not understand they had been paid less than a contractual entitlement. It is not difficult to imagine other sets of facts where workers might not know they were being paid less than they should be paid. The silence of the impact statement on this might mean the position had not been considered because there were so few such claims that might be affected, or it might have been considered, but it was politically not expedient to mention the impact the change would have on those groups. That leaves the Tribunal with the position that the EU permits national rules on time limits, and permits changes to those time limits subject to a transition period compatible with legitimate expectation, provided EU claims are not disadvantaged compared to claims based on national rights. The drafting of the Limitation regulations clearly cuts back non EU based unlawful deductions claims. It removes the possibility of claiming in contract. By **Ainsworth**, statutory holiday pay claims fit best into the section 23 definition of wages. There is no information showing that the two year limitation does not in practice catch national claims too, and is not equally harsh. Despite the explanatory note and impact statement

showing that the purpose of the rule change was to limit EU rights-based claims, the effect did not breach the equivalence principle.

83. The regulations do not apply to section 27(1) (b) to (j) claims. What these have in common is that they are all statutory payments, all independent of EU law except for maternity pay. Three relate to awards by employment tribunals, four to family responsibilities (other than maternity pay), two are about payment when unfit for work, one for time off for trade union duties. These claims fit into that group because they too are derived from statute rather than contract (whether of employment or otherwise), but otherwise differ in that holiday is a regular and recurring feature of employment, while other than trade union duties all the others arise from particular circumstances, many when someone is unable to work because of health or family, and do not recur without special circumstances. Contrasting this group with section 27(1) (a), which includes holiday pay "whether payable under his contract or otherwise", and in light of **Ainsworth,** these claims are a natural fit in that group. Claimants cannot choose the more favourable in a range of procedural rules, and so there is no reason to hold on this ground that the two year limit on back pay claims breaches equivalence.

Conclusion

84. For the reasons given, the answers to the questions to be answered as preliminary points are:

(1) Yes.
(2) Yes, because the tribunal is bound by the decision of the Employment Appeal Tribunal
(3) Yes.
(4) Not applicable.

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Employment Judge Goodman

Date 8 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 February 2019

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FOR THE TRIBUNAL OFFICE