



EMPLOYMENT TRIBUNALS

Claimant: Mr. Iosifescu

Respondent: River Island Clothing Co. Limited

HELD AT: Leeds Employment Tribunal (by CVP) **ON:** 1 July 2021

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: In person

Respondent: Mr. Barker (Solicitor)

RESERVED JUDGMENT

1. The claim under the Working Time Regulations 1998 is **dismissed**.
2. The claim for unlawful deductions (unpaid holiday) is **dismissed**.

REASONS

1. The claims originally brought by the claimant in the ET1 were twofold. Firstly he claimed that any holiday that he took during furlough should have been paid at 100% of his usual rate rather than at the level of his furlough pay (i.e. 80%). The respondent has since proceedings were issued made a 'top up' payment to all employees to reflect the missing 20%. This part of the claim is therefore no longer pursued.

2. The second aspect of his claim is that “my employer has deducted (without paying) equivalent off the accrued holiday for the period that I have been furloughed...they never provide me any evidence that I ever been paid for the deducted holiday”.
3. This could be construed as either a claim under regulation 30(1)(a) or 30(1)(b) of the Working Time Regulations 1998. I have considered the claim under both headings.
4. The issues which I have to determine are as follows:

Time limits

- 4.1 Was the claim under the Working Time Regulations (WTR) presented before the end of the period of three months plus any early conciliation extension 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?
- 4.2 Was the claim for unlawful deductions (unpaid holiday) presented before the end of the period of three months plus any early conciliation extension beginning with the date of payment of the wages from which the deduction was made?
- 4.3 If not, was it not reasonably practicable for the claim(s) to be submitted before the end of that period and was it presented within such further period as the tribunal considers reasonable?

Working Time Regulations

- 4.4 Did the respondent give notice to the claimant in accordance with regulation 15(3) to take leave to which the claimant was entitled under regulation 13 or 13A?
- 4.5 Was any obligation under regulation 15(3) varied or excluded by a relevant agreement?
- 4.6 Has the respondent refused to permit the claimant to exercise any right under regulation 30(1)(a)?
- 4.7 Has the respondent failed to pay the claimant an amount due to him under regulation 16(1)?

Unlawful deductions

- 4.8 Was the amount paid to the claimant on any occasion less than that properly payable?

Witnesses

5. I heard evidence from the claimant and Ms Iosifescu. On behalf of the respondent I heard evidence from Ms Gonsalves, director of HR.

Findings of fact

6. I have limited the findings of fact to those necessary to determine the issues that I needed to determine. For example, I did not need to determine whether it was not reasonably practicable to submit the claim in time and therefore I have made no findings on this issue.

7. The claimant's contract contains the following provision on holiday entitlement:

The statutory holiday entitlement is 28 days pro rata including Bank and Public Holidays, to be taken in line with Company regulations. Our holiday year runs from 1st April to 31st March, you will be required to save three days of your entitlement to cover the Christmas and New Year period. If you fail to keep these days and the Distribution Centre is closed you will not be paid for these days. ***Please note we operate a holiday restriction period from 1st week in November to the 1st week in January.***

Holiday entitlement may not be carried over to the next year; any holidays not taken within the holiday year will be lost.

8. In March 2020 the respondent put the claimant and other employees on furlough. Up until 9 May 2020 all employees were paid at 100%.

9. On 29 April 2020 the respondent wrote to all its employees by email headed 'Please read: Pay update – Response required'. The email stated that the respondent would continue to pay all its employees 100% of their contract salary until to cover the pay period 12 April – 9 May. It continued:

...we... have concluded that we must now take the move to a temporary reduction of pay to 80%, as so many other businesses have already done.

What this means for your pay

Firstly, as mentioned, we can confirm that as well as the two full pay periods already received at 100% of salary for March and April, you will receive a further full payment of 100% of salary, up to and including 9th May 2020 (to be paid 15th May pay-date).

Then, from the May/June Payroll (payable 12th June 2020) onwards, pay will be temporarily reduced by 20% for all individuals both furloughed and working and paid at 80% of your pay.

...

The recent Government positioning on extended social distancing measures indicates that this could be for three pay periods but, as we have throughout, we will review this on a monthly basis and return to full-pay as soon as we feel we are able to do so.

What this means for annual leave

Annual leave for both colleagues who are being requested to work or placed on furlough will continue to accrue as normal, however, there are differences in how holiday must be taken:

Furloughed Colleagues

To ensure that we have resources available when we are able to fully re-establish trading, we are asking that holidays accrued during furlough leave are taken fully prior to the end of the furlough period. Accrued holiday hours will be deducted from your overall annual leave balance on Oracle after you return to the business.

Colleagues required to work

Holidays should be booked and taken in the normal manner, using the Oracle system. We would ask that where possible you take holidays in the normal pattern, to ensure readily available resource when we are back to trading fully.

Holidays will be paid for at the full day rate in line with the hours used at an amount reflecting the employee's agreed salary at the moment in time when the holiday was accrued.

For both parties, all other terms and conditions remain the same.

...we sincerely hope that you understand and agree to our request for this temporary reduction in your pay. We see this option as the best for protecting colleagues at this time and putting it in place now as a way of avoiding the redundancy discussions that no-one wants. We require all colleagues to confirm their agreement by clicking "accept" on the button included at the bottom of this letter by close of play on Friday 1 May.

Please click here for FAQ's

...

10. By 29 April 2020 some employees' furlough had already ended and they had returned to work. Ms Gonsalves stated in evidence that the holiday entitlement that they had accrued during furlough was deducted from their entitlement in accordance with the letter of 29 April.
11. Although I was provided with a version of FAQs, it was not the one that was available at the time of the letter, but a later version. Further the section of the FAQs which contains parts relating to holiday pay is marked 'Manager/People FAQs (not to be included in the FAQs but as part of the Manager brief)'. The parts of the 'Manager/People FAQs' related to holiday are:
 11. Will I still accrue annual leave whilst I am furloughed?

Yes, however any annual leave you accrue during the period you are furloughed, will be deducted from your overall annual leave balance on Oracle after you return to the business. We are effectively giving you notice now that we will require you to take the annual leave you accrue whilst on furlough, during the period that you are on furlough. This is to ensure readiness across the business to re-establish ourselves once again. Please note, you do not need to action anything on Oracle to reflect this, this will be managed by the People team after you return to the business.
 12. What if I have annual leave booked whilst I am furloughed?

Any annual leave currently in Oracle for the period you are furloughed will be cancelled and over-ridden by the above.
 3. How can we work out how holiday accrual works?

All holiday entitlement is accrued against a consistent formula. Individual entitlements will vary based on length of service & work group however if you need to calculate your personal holiday accrual, please use the below formula:
...
Please be aware we can't confirm the exact number of hours / days which will be deducted upon your return to work however this should give you an indication of a likely accrual.
 5. Will any holiday booked between May and June be cancelled in Oracle for all furloughed employees?

Yes, however we are asking that holiday entitlement is taken in the same timeframes so we can ensure we have the necessary resources available when we are able to fully re-establish trading. Please refer to the letter sent to you by email on Weds 29 April, for more details.

6. Can I book any annual leave through Oracle while I am furloughed?

No. As we do not know when the furlough period will end, please wait until you are unfurloughed before booking any annual leave.

7. I have annual leave booked later in the year, do I need to cancel it in Oracle.

No. As we do not know when the furlough period will end, please wait until you are unfurloughed before amending any annual leave.

8. Why am I being asked to take my holidays whilst I am furloughed?

Holidays are normally taken throughout the year. Furlough is in place because of exceptional circumstances and as a result of things over which we have no control. We will still need to operate the business when this is all over and so we are formally notifying colleagues to use their accrued holidays whilst on leave so that we are able to fully trade the business when we are called back to work.

Most colleagues over the time period should be able to take one week's holiday, the norm for this time of year.

12. The claimant states that he first looked at the FAQs when he returned to work after furlough. The claimant did not book or take any holiday on any specific days during furlough.
13. Ms Gonsalves gave evidence that the respondent's intention was to give notice to require the employees to take holiday, and that they were not attempting to contract out of the Working Time Regulations. They did not give notice to take holidays on particular days because they did not know how long furlough was going to last and therefore did not know how much holiday was going to accrue.
14. The respondent's 'oracle' system was unable to record two types of leave at once. That is why any leave already booked during the period of furlough was automatically cancelled. This meant that it was not possible for employees to attempt to book days of annual leave during furlough through Oracle.
15. At the end of the furlough period, the annual leave entitlement that the claimant had accrued during that period was deducted from his overall entitlement to annual leave. It was calculated by deducting a 365th of the claimant's overall hourly holiday entitlement for each day of furlough. The claimant was furloughed for 93 days and therefore the claimant deducted 25.48% of his full holiday entitlement of 211.25 hours i.e. 53.58 hours. This left him with a holiday entitlement of 157.67 hours.
16. On 14 April 2021 the respondent paid the claimant a sum of 20% of his pay for 54.7 hours of annual leave accrued during furlough. The respondent calculated and made the payment to all employees who had been furloughed on a broad brush basis for a period from 1 April because it made the calculations easier. That explains why the number of hours said to have

accrued in this calculation was slightly higher than the amount deducted from his holiday entitlement.

17. There is no evidence that the claimant made a specific request to take any leave in excess of what he had been told was his remaining entitlement.

18. This is unsurprising. He had been told that he was not entitled to take a period of leave, and that it had been deducted from his annual leave entitlement. I note from para 39 of the CJEU's decision in **King** (see annex for citation) that any practice or omission of an employer that may potentially deter a worker from taking his annual leave is incompatible with the purpose of the right to paid annual leave. I find that the deterrent effect of being told that the accrued leave deducted from his entitlement is, on the balance of probabilities, the reason why he made no specific request to take that period of leave.

19. The claimant presented his claim on 2 November 2020.

The law

20. The Working Time Regulations 1998 contain the following relevant provisions:

13 Entitlement to annual leave

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

(2)

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

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

...

.....

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

(a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and

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

(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(13) For the purpose of this regulation “coronavirus” means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).

13A Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

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

...

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker’s leave year begins for the purposes of this regulation on the same date as the worker’s leave year begins for the purposes of regulation 13.

...

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker’s employment is terminated; or

...

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where—]

(a) a worker’s employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

...

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

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

15 Dates on which leave is taken

(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A; or

(b) not to take such leave (subject, where it applies, to the requirement in regulation 13(12)),

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

...

16 Payment in respect of periods of leave

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

...

(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.

30 Remedies

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

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

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

...

...or

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

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

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

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

(2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).

(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

21. There is a significant body of case law which I have placed in the annex, because it is of some, albeit limited, relevance to this case.

Application of the law to the facts

Did the respondent give notice to the claimant in accordance with regulation 15(3) to take leave to which the claimant was entitled under regulation 13 or 13A?

22. The leave which would be taken during furlough occurred at the beginning of the leave year, and therefore would have been regulation 13 leave. The notice under regulation 15(3) must specify the days on which leave is taken. The notice that the respondent purported to give did not specify the days and I find that the respondent did not give notice under regulation 15(3).

Was any obligation under regulation 15(3) varied or excluded by a relevant agreement?

23. I find that even if the claimant's continued employment after the letter dated 29 April amounted to an acceptance of the terms set out in that letter, such that they became part of the employment contract, that does not amount to a variation or exclusion of regulation 15(3). Nothing in that letter can be set out as a proposal to vary or exclude the notice requirements by, for example, setting out proposed alternative notice requirements, or asking the claimant to agree to an exclusion of the notice requirements. There was therefore no relevant agreement. This accords with the evidence of the respondent's witness who indicated that there was no intention to 'contract out' of the notice requirements in regulation 15(3).
24. The failure to give notice in accordance with regulation 15(3) means that the claimant was not obliged to take that leave. He did not take that leave. The leave accrued during furlough therefore should still have formed part of his holiday entitlement when he returned to work.

Has the respondent refused to permit the claimant to exercise any right under regulation 30(1)(a)?

25. There is no evidence that the respondent has refused to permit the claimant to exercise any right under regulation 13 or 13A. He has made no specific request to take leave in excess of the reduced entitlement. He therefore cannot bring a claim under regulation 30(1)(a). This claim must therefore fail and is dismissed.
26. Although I do not have to determine this point, in accordance with the case law set out above, I would if necessary have found that he would be entitled to carry over any of the wrongly deducted accrued leave that formed part of the regulation 13 leave to the next leave year, because he has been unable to take it for reasons outside his control. By deducting the entitlement accrued during furlough, the

respondent effectively informed the claimant that he was not entitled to take that leave. This, in my judgment, falls within the principles set out in **Max-Planck and King v Sash Windows** and if would be appropriate to read unto regulation 13(9) words to the effect that ‘it may only be taken in the leave year in respect of which it is due save where *the employer has failed to take steps to enable him to take his leave and as a consequence he did not exercise his right to leave.*’

27. This would mean that any wrongly deducted leave which formed part of regulation 13 leave still forms part of his holiday entitlement. Any regulation 13A leave would have been lost at the end of the holiday year.

Has the respondent failed to pay the claimant an amount due to him under regulation 16(1)?

28. The claimant is not entitled to be paid, because he has not taken the leave. He cannot be paid in lieu during his employment. This claim is therefore dismissed. The claim for unlawful deductions fails on the same grounds and is dismissed. Even if he remains entitled to any regulation 13 claim, a claim for payment in lieu will only arise on termination of employment.
29. Given my conclusions above, I do not need to consider the question of time limits.

ANNEX: LEGAL PRINCIPLES ON ANNUAL LEAVE

30. In accordance with **Marleasing SA v La Comercial Internacional de Alimentacion SA** C-106/89 1990 ECR I-4135, even post-Brexit, I am obliged to interpret the WTR so as to give effect so far as is reasonably possible to what it required by EU Law. This includes an obligation to change established case law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of the directive: *Max-Planck-Gesellschaft Zur Förderung Der Wissenschaften EV v Shimizu* [2019] 1 C.M.L.R. 35 at para 60.
31. The following paragraphs are mainly taken from Employment Judge Harding’s useful summary of the relevant case law set out in his decision in **Klicner v Guarding UK Ltd Case no 1302129.19**. I am not bound by Employment Tribunal decisions, but I agree with and adopt his analysis of the relevant principles. This case law primarily applies only to the portion of leave which is regulation 13 leave. There is no possibility of carrying over regulation 13A leave.
32. Much of the case law of the CJEU has focused on the issue of when unused leave can be carried over thus triggering an obligation to make a payment in lieu for that leave on termination of employment. This issue was considered in detail in **Stringer v HM Revenue and Customs C-520-06, [2009] IRLR 214**. It was held that when a worker cannot take leave during a particular leave year for reasons beyond his or her control, such as ill health, the leave must be carried forward and a payment in lieu must be made if the sick leave ends on termination of the employment. Over the years this principal has been developed and expanded both in the case law of the CJEU and domestically.
- 33.

34. In **NHS Leeds v Larner [2012] EWCA Civ 1034** it was said that if an employee is unable or unwilling to take paid annual leave because of sickness then such an employee is entitled to receive payment on termination of their employment for the leave which the employee had, for that reason, been prevented from taking. This is the case even if the leave accrued in a leave year prior to that in which the employee's employment terminated. This was a case brought under Article 7 of the WTD, as the respondent employer was an emanation of the state, but the Court of Appeal stated, obiter, that if necessary it would be possible to interpret the WTR compatibly with the WTD, and the rulings of the CJEU, by reading in words to regulations 13 and 14 to permit carry over and payment for carried over leave on termination of employment in these circumstances. Whilst these comments were obiter this approach has been followed by the national courts, see for example **Plumb v Duncan Print Group Ltd UKEAT/0071/15** and **The Sash Window Workshop Ltd v King UKEAT/0057/14**.
35. In **The Sash Window Workshop Ltd** the EAT gave guidance that sick leave may not be the only circumstance that would act as an impediment to taking annual leave. It was said that the tribunal in that case should have considered whether the claimant was unable or unwilling because of reasons beyond his control to take annual leave and as a consequence did not exercise his right to annual leave.
36. The EAT in **Shannon v Rampersad & Anor (t/a Clifton House Residential Home) UKEAT/0050/15** explained that the right to carry forward is not limited to cases where a worker is prevented from taking leave by ill-health. That is an example of where holiday pay may accrue. Paragraph 32:
37. The question for the tribunal was whether the claimant was unable or unwilling to take annual leave as it fell due for reasons beyond his control, for example due to sick leave or maternity or paternity leave or because the employer would not allow him to do so.
38. The principle first set out in *Stringer* was extended further by the CJEU in **King v The Sash Window Workshop Ltd C-214/16 [2018] ICR 693** to cover situations where leave was not taken because the employer refused to pay for the leave. In summary it was held in this case that a worker is entitled to be paid on termination of employment for any periods of annual leave that had accrued where he had not taken the leave because it would have been unpaid. Article 7 does not allow national legislation to prevent a worker from carrying over and accumulating until the termination of his employment annual leave where the employer has refused to pay him for that leave. It is irrelevant whether or not over the years the worker has made requests for paid annual leave.
39. The circumstances in which WTD leave may be carried forward and paid for on termination of employment was extended again by the CJEU in **Max-Planck_Gesellschaft zur Forderung der Wissenschaften e. V. v Shimizu C-684/16, [2019] CMLR 1233**. The facts of this case were that the worker was engaged under a series of fixed term contracts which came to an end on 31 December 2013. The worker had accrued 51 days paid annual leave for 2012 and 2013 which had not been taken. He had not requested to take this leave. The German legislation in question had been interpreted as having the effect that the fact that the worker had not requested any paid leave during the leave year *automatically* resulted in the worker losing his leave entitlement.

40. The fundamental issue in this case was whether the worker was entitled to be paid for the accrued leave when his employment terminated, and the (relevant) question which was referred was whether Article 7 precluded legislation which provided that in the event that the worker did not request to take his leave the entitlement to leave, and thus to payment in lieu of it on termination of employment, was automatically lost.
41. The Court held that Article 7 does not require that irrespective of the circumstances leave should be carried over, nor does it preclude national legislation which, for instance, lays down that leave as a rule should be taken within the relevant leave year, paragraphs 35 – 36. However it also held that legislation which resulted in leave automatically being lost was not compatible with the Directive. Moreover, any practice on the part of an employer that might deter a worker from taking his annual leave is incompatible with the Directive.
42. It was said that an employer is required to ensure that the worker is actually in a position to take the paid annual leave to which he is entitled by encouraging him, formally if need be, to do so and by informing him accurately and in good time that if he does not take it it will be lost at the end of the reference period, paragraph 45. Paragraph 46; the burden of proof in that respect is on the employer. Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave it must be held that the loss of the right to such leave at the end of the reference or carryover period constitutes a failure and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard to Article 7.
43. In summary, therefore, the position under the case law of the CJEU is essentially that workers must have the opportunity to exercise the right to annual leave before the right to paid leave can be lost, and the employer must be able to show that is the case.
44. 12 Article 7 also does not preclude national legislation laying down conditions for the exercise of the right to paid annual leave - to the contrary Article 7 makes express provision for this; “1. Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice”.
45. We see the implementation of this in Regulation 15 of the WTR. Regulation 15 is therefore not on its face inconsistent or incompatible with the Directive, to the contrary it is consistent with it.
46. Regulation 15 sets out the notice that a worker must give to his employer to trigger the entitlement to take leave. In essence Regulation 15 requires that a worker who wishes to take leave gives notice to his employer of his request twice as many days in advance of the number of days holiday to which the notice relates. In **NHS Leeds**

v Larner the Court of Appeal stated that Regulation 15 has no application where a worker is on sick leave. If a worker has a right under Article 7 to take annual leave at another time outside sick leave, to require the worker to serve a notice or to make a request to take paid annual leave during sick leave would be fundamentally inconsistent with this right. If the worker has not recovered or returned from sick leave, and therefore had no opportunity to take that leave at another time, the service of a notice for a period which is not sick leave is not practically possible.

47. The claimant was therefore entitled in this case to carry forward her untaken paid annual leave to the next leave year without having made a prior request to do so. As her employment was terminated in that (following) year before she could take the carried forward leave, she was entitled to payment on termination for the paid annual leave she had been prevented from taking. The extent to which Regulation 15 notices are required where a worker is unable or unwilling to take leave for reasons beyond his control remains unresolved domestically in cases other than supervening sick leave, but this is an area that has been considered, albeit in the context of payments for holiday once employment has terminated, by the CJEU.
48. As I have already set out above, in **Max-Planck** the worker had not made any request to take leave and the CJEU held that accrued leave would carryover unless the employer could show it had exercised all due diligence in order to enable the worker to take the leave.
49. In **Kreuziger v Land Berlin ECJ C-619/16**, a case which was heard together with **Max-Planck**, Mr Krueziger likewise did not make any request to take annual leave during his employment. After his employment had ended he requested that he be paid a payment in lieu of the annual leave not taken. This was refused. He bought proceedings and the claim against the respondent was dismissed. It was dismissed on the basis that German law places an obligation on the worker to take his leave and that entails the person concerned being required to apply for leave. Since he had voluntarily failed to submit such an application his entitlement to paid leave expired when his employment relationship came to an end.
50. The Higher Administrative Court made a reference to the ECJ. The ECJ noted that, as with **Max-Planck**, it was apparent from the order for reference that the national legislation in question was interpreted as meaning that the fact that the worker did not request to take the paid annual leave before the employment relationship ended automatically meant that when the relationship was terminated the worker lost his entitlement to that leave and accordingly to an allowance in lieu of that leave. The ECJ stated that such an automatic loss of entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise the right to take leave, fails to have regard to the limits placed on member states when specifying the conditions for the exercise of the right.
51. It held that, in circumstances where a worker has not asked to exercise his right to paid annual leave, Article 7(2) precludes national legislation which excludes, automatically and without prior verification of whether the employer had enabled the worker to take the leave, an entitlement to an allowance in lieu of holiday on termination of employment where the worker did not apply for the leave.

Employment Judge Buckley

Date: 9 July 2021