Neutral Citation Number: [2022] EWCA Civ 70

Case No: A2/2021/1097

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL**
**Mr Justice Choudhury (President)**
**UKEAT/0211/19/DA**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 February 2022

**Before:**

**LADY JUSTICE KING**
**LADY JUSTICE SIMLER**
and
**LADY JUSTICE ELISABETH LAING**

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**Between:**

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| **GARY SMITH** | **Appellant/ Claimant** |
| **- and -** | |
| **PIMLICO PLUMBERS LIMITED** | **Respondent** |

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**Michael Ford QC, Caspar Glyn QC and David Stephenson** (instructed by **TMP Solicitors LLP**) for the **Appellant**
**Christopher Jeans QC and Andrew Smith** (instructed by **Mishcon De Reya LLP**) for the **Respondent**

Hearing dates: 7 and 8 December 2021

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# Approved Judgment

*This judgment was handed down remotely at 10.30am on Tuesday 1 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives*

**Lady Justice Simler:**

## Introduction

1. This case concerns the enforcement by a "worker" of the right to paid annual leave guaranteed by articles 7 of the EU Working Time Directive 2003/88/EC of 4 November 2003 ("the WTD") and 31 of the Charter of Fundamental Rights of the European Union ("the Charter"). Pimlico Plumbers Limited, the respondent, disputed the appellant's entitlement to paid leave, and did not pay him for it. The appellant nevertheless took unpaid leave for which he ought to have been paid. He took no steps to invoke the right to payment until after his contract was terminated by the respondent. The respondent now accepts that the appellant was entitled to paid annual leave but argues that the appellant acted too late to enforce his rights. That argument succeeded in the employment tribunal and in the Employment Appeal Tribunal.

2. The appellant is Gary Smith. He worked for the respondent, Pimlico Plumbers Limited, from 25 August 2005 until May 2011. At the beginning of the engagement there was an agreement between the parties, described as a contract of employment, which described Mr Smith as an employee. Later, and for the rest of the engagement, the respondent maintained, instead, that Mr Smith was a self-employed independent contractor who had no entitlement to paid annual leave. Mr Smith nevertheless took periods of leave from time to time, but these were always unpaid. On 3 May 2011, the respondent suspended Mr Smith and required him to return equipment and a van. Mr Smith regarded this as a fundamental breach of his contract. He brought proceedings in the employment tribunal on 1 August 2011, alleging, among other things, that he was, at least, a worker who was entitled to paid annual leave throughout the engagement, and seeking to recover compensation for unpaid leave.

3. The question of his status was addressed as a preliminary issue by the tribunal and finally resolved in *Pimlico Plumbers Limited and another v Smith* [2018] UKSC 29, [2018] ICR 1511. The Supreme Court held that Mr Smith undertook to "perform [his services] personally". Accordingly he was a "worker" within the meaning of section 230(3) of the Employment Rights Act 1996 ("the ERA") and regulation 2(1) of the Working Time Regulations 1998 ("the WTR"). That meant he was entitled in principle (subject to the issues considered below) to 5.6 weeks' paid annual leave. This appeal only concerns his entitlement to four weeks' paid leave each year under regulation 13 (deriving from the WTD) and not the additional domestic leave entitlement provided for in regulation 13A of the WTR.

4. His case returned to the employment tribunal. After a hearing on 18 and 19 March 2019, the holiday pay claim was rejected by Employment Judge Morton on jurisdictional grounds, in a judgment with reasons sent to the parties on 1 July 2019. In short, the tribunal found that the only pleaded holiday pay claim advanced by Mr Smith was for non-payment of wages for leave actually taken in each year of the engagement. The tribunal rejected Mr Smith's arguments that he had also pleaded claims for pay for holiday accrued but not taken in the final leave year to 3 May 2011, and for holiday accrued but not taken over the whole of the engagement, from August 2005.

5. The tribunal held that the pleaded claim was presented out of time because Mr Smith's last period of (unpaid) leave ended on 4 January 2011; the respondent ought

to have paid him for that period of leave on 5 February 2011 when Mr Smith received his payslip for that month; and he was therefore obliged to present a claim by 4 May 2011 at the latest, but did not present his claim until 1 August 2011, nearly three months after the expiry of the relevant deadline. The tribunal held that it was reasonably practicable for the claim to have been presented in time (this decision is not now challenged) and in any event, the claim was not presented within a reasonable period following the expiry of the primary time limit. The tribunal rejected Mr Smith's argument that the decision in *King v Sash Window Workshop* (C-214/16) [2018] 2 CMLR 10, [2018] ICR 693 ("*King"*) entitled him to bring, on the termination of his engagement, a claim in respect of all unpaid annual leave accrued throughout his engagement with the respondent, both taken and untaken. In a further judgment sent to the parties on 19 December 2019, Employment Judge Morton refused an application for reconsideration.

6. Mr Smith appealed both judgments (and another judgment dismissing his unlawful disability discrimination claim) to the Employment Appeal Tribunal (Choudhury J, President) ("the EAT") contending (among other things) that the employment tribunal had erred in its identification of the claims he was pursuing, erred in its interpretation of *King* and erred in concluding that his pleaded claim was out of time. By a judgment dated 17 March 2021 the appeal was dismissed: [2021] UKEAT 0211-19-1703, [2021] ICR 1194. In short, the EAT held that the tribunal made no error of law in relation to *King*. *King* was not concerned with leave that was taken but unpaid. It concerned the right to carry over, until termination, annual leave that is not taken because of an employer's failure to remunerate such leave. It did not suggest that there is a right to carry over leave that was in fact taken, in spite of the employer's failure to remunerate such leave. Nor did the employment tribunal err in its analysis that the pleaded case was limited to a claim for pay for annual leave that was taken, or in deciding that the pleaded claim was presented outside the relevant time limits.

7. This appeal is a further challenge to those conclusions. There are four grounds of appeal:

   i) The employment tribunal misconstrued the CJEU's judgment in *King* and/or misdirected itself in law in finding that the appellant was not denied his right to annual leave under regulation 13 WTR with the result that any claim he made under regulation 30(1)(a) WTR failed (Ground A).

   ii) The employment tribunal erred in law in finding that the appellant had not brought a pleaded claim for the accrued entitlement to paid or unpaid annual leave on termination which was due under regulation 14 WTR, or in respect of any entitlement to paid or unpaid leave which carried over in accordance with *King* and/or failed to give effect to the principle of effectiveness (Ground B).

   iii) The employment tribunal erred in holding that, on the facts, the appellant had made no claim for untaken leave and was only claiming payment for leave he had taken. Further, the employment tribunal erred in holding that it was necessary for the appellant to show that he was in fact dissuaded from taking leave (Ground C).

   iv) The employment tribunal erred in holding that a claim in respect of a "series of deductions" brought under section 23(3) ERA was broken by a gap of more

than three months between underpayments or deductions. It should have preferred the judgment of the Northern Ireland Court of Appeal ("NICA") in *Chief Constable of Police v Agnew* [2019] NICA 32 [2019] IRLR 792 ("*Agnew"*) to the EAT's judgment in *Bear Scotland Ltd v Fulton* [2015] ICR 221 ("*Bear Scotland*") (Ground D).

8. Mr Smith was represented by Mr Michael Ford QC, Mr Caspar Glyn QC and Mr David Stephenson, and the respondent by Mr Christopher Jeans QC and Mr Andrew Smith. Both junior counsel appeared in the employment tribunal below but their leaders did not. I am grateful to all counsel for the helpful way in which the appeal was prepared and presented on both sides.

## The parties' respective cases and the issues to be addressed

9. On behalf of Gary Smith, Mr Glyn QC made submissions about the scope and effect of the decision in *King* (and subsequent CJEU authorities), while Mr Ford QC made the running in relation to the remaining grounds. In summary they contended:

   i) Both tribunals below misdirected themselves in law and misconstrued the decision in *King* in concluding that the appellant was not denied his right to "paid annual leave" under regulation 13 WTR. *King* is not limited to circumstances where the employee has not taken annual leave, but applies equally where annual leave has been taken but is unpaid because the employer refused to remunerate it: see the language of article 7(1), article 31 of the Charter, and *King*, where the single right protected is the right to "paid annual leave". That right is protected because anything less is liable to deter workers from taking annual leave and benefitting from the rest and relaxation required. The worker need not demonstrate that he was in fact dissuaded from taking annual leave. Member states may provide for the loss of the right at the end of each leave year. But to lose that right the worker must "actually have had the opportunity to exercise the right conferred on him by the Directive": see *Stringer v Revenue and Customs Commissioners and Schultz-Hoff v Deutsche Rentenversicherung Bund (Joined Cases C-520/06 and C-350/06) [2009] ICR 932; [2009] ECR I-179 ("Stringer")* at [44] and *Kreuziger v Land Berlin* (Case C-619/16) [2019] 1 CMLR 34 ("*Kreuziger*") at [28] to [32] (discussed further below). *King* and the subsequent cases make clear that when the employer disputes the right and refuses payment, a worker only loses the right to take leave at the end of the leave year if the employer can meet the burden of showing that it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until the termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.

   ii) This was Mr Smith's position. His circumstances were identical to Mr King's. He was unable to exercise his right to paid annual leave because the respondent never granted him any paid leave and leave without pay is not "leave" in the article 7 sense. It followed that his claim was in time because he had been denied the opportunity, throughout the engagement, to exercise the right to paid annual leave. The respondent could not meet the burden of

showing that it specifically and transparently gave him the opportunity to take paid annual leave. The right did not therefore lapse. It carried over and accumulated until termination of the contract, at which point Mr Smith was and remains entitled to a payment in respect of the unpaid leave.

iii) To the extent that the judgment in *King* depended on the lack of an effective remedy for Mr King in national law in respect of his untaken leave, Mr Smith was in the same position. The requirement to bring a claim within three months of every occasion on which he was not paid for leave is incompatible with the principle of effectiveness and/or with article 47 of the Charter.

iv) The tribunals below erred in deciding that Mr Smith did not bring claims for untaken or unpaid annual leave under regulation 14. The claim form included claims for unpaid leave for past leave years which carried over as a result of *King* and complained of a failure to remunerate for holiday taken throughout his employment. Further, they read the claim form too narrowly in holding that it did not make a regulation 14 claim.

v) The tribunals erred further in holding that a claim for untaken leave (both during earlier years and in the final leave year) was unsustainable on the facts and that this was not a *King*-type case. This case fell squarely within *King*, even on a narrow reading. Mr Smith's uncontested evidence was that he never received holiday pay and he never took his full entitlement to four weeks' leave. This put him in a similar position to the claimant in *King* who had also taken some of his leave each year. The employment tribunal was wrong to distinguish the present case from *King* on the grounds that Mr Smith was not dissuaded from taking annual leave and could not prove he had been refused permission to take annual leave.

vi) Finally, the tribunals below erred in holding that a claim under section 23(3) ERA based on a "series of deductions" was broken by a gap of more than three months between deductions. There was no dispute that Mr Smith was never paid when he took leave; his salary payments reflected the underpayment of salary, in other words the deductions. This was a "series" within section 23(3) ERA, and the gap of more than three months was wrongly held to break the series for limitation purposes following *Bear Scotland Ltd v Fulton* [2015] ICR 221 which was itself wrongly decided.

10. For the respondent, in summary, Mr Jeans QC sought to uphold the findings of the employment tribunal and the conclusions of the EAT. He submitted that four questions are relevant to the resolution of this appeal. First, what claim did the appellant bring? Secondly, what time limits applied to that claim? Thirdly, was the tribunal entitled to conclude that the pleaded claim was brought outside the domestic time limit? Finally, does the ordinary domestic time limit breach the principle of effectiveness?

11. In answering those questions, and again, in summary, Mr Jeans made five principal points.

i) Mr Smith did not plead a claim under regulation 14 for a payment on termination in lieu of leave not taken. The claim form referred throughout to

annual leave taken but not paid. The employment tribunal was obliged to, and did, determine the substantive holiday pay claim as it had been pleaded and presented by Mr Smith and his legal representatives below. Having lost on that basis, it is not open to him on appeal to seek to reformulate and argue his claim afresh. Mr Smith was legally represented and had numerous opportunities to amend the claim form, but did not do so, even after *King* was decided.

ii) Mr Smith had a remedy for the unpaid leave he took regularly throughout his employment: the right to bring a claim for non-payment of annual leave against the respondent under regulation 30(1)(b) (relying on a failure to pay under regulation 16(1)). This was an effective remedy capable of being enforced by him.

iii) The tribunals below were right in their conclusions about what *King* decided, about its effect on domestic holiday pay claims, and that *King* does not apply to this case. The decision in *King* was not concerned with leave that was taken by a worker but unpaid. It has no bearing on a case where leave was taken but not paid, and the CJEU did not decide or suggest that unpaid leave is not properly to be regarded as leave at all. The effect of *King* is that workers are permitted to carry over, without temporal limitation, any article 7 leave which they do not take during a particular year because of the employer's refusal to pay for such leave; and to the extent that such leave remains untaken at the point of termination of their employment, to make a claim for payment in lieu of that untaken leave. It does not confer a broader legal entitlement and does not create a new right to payment on termination for carried-over rights in respect of annual leave which goes beyond that sanctioned by article 7(2) WTD. It does not have the effect of nullifying the remedial regime provided for in the WTR, in particular as regards the distinction drawn between the different types of claim that can be made (namely a claim based on a refusal to allow a worker to take holiday, a failure to pay for holiday taken and a payment in lieu of holiday entitlement that has accrued but not in fact been taken at the point of termination). This case fell outside the scope of *King* because an effective remedy was available to Mr Smith: he could bring a claim for unpaid annual leave, whereas Mr King had no such option.

iv) The last period of (unpaid) leave taken by Mr Smith was in January 2011 and any pay for that leave should have been reflected in his 5 February 2011 payslip. He was therefore obliged to present his claim by 4 May 2011 but failed to do so, when it was reasonably practicable for him to have done so. There was no error in the conclusion that the claim was brought out of time and the challenge to that conclusion is no longer pursued.

v) If relevant, the decision in *Bear Scotland* should be followed. It remedied the oddity that a claim for unlawful deduction of wages can be out of time and then revived by later events. The decision promotes the principles of legal certainty.

12. It seems to me, in light of the four grounds of appeal and the arguments advanced by the parties, there are three central issues to be addressed by the court:

i) did the tribunals below err in law in holding that Mr Smith's only pleaded claim was for pay for the holiday leave he actually took (without pay) during his engagement with the respondent?

ii) What is the scope of *King* and do the principles it establishes mean that Mr Smith, whose employer denied his worker status, disputed the right to paid leave and refused to remunerate leave in breach of the WTR and WTD, was entitled to carry over and accumulate his entitlement to paid annual leave until his engagement with the respondent was terminated?

iii) Is a "series of deductions" within the meaning of section 23(3)(a) ERA broken by a gap of three months or more?

## The legal framework

13. First, I record the position relating to the European Union (Withdrawal) Act 2018 (as to which there is no dispute). This provides that although the principle of the supremacy of EU law no longer applies to any enactment or rule of law passed or made on or after "IP completion day" (31 December 2020), nor is the Charter part of domestic law on or after IP completion day (section 5(4)), the supremacy principle continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day: see section 5(2). Section 5(4) does not apply where proceedings are begun but not finally decided before IP completion day: see paragraph 39, schedule 8 to the 2018 Act. Further, the provisions of the Charter recognise established fundamental principles of EU law. The Charter is no longer part of domestic law, but "fundamental rights or principles" that exist irrespective of the Charter are retained in domestic law after IP completion day (section 5(5)). The provisions of the Charter, to the extent that they embody those "fundamental rights and principles", continue to apply. The tribunals below accordingly proceeded on the basis that the European Union (Withdrawal) Act 2018 has no substantive effect on the issues in this appeal, as do I.

### EU law provisions

14. Article 1 of the WTD provides that the purpose of the WTD is to lay down "minimum safety and health requirements for the organisation of working time", including as to annual leave.

15. Article 7 WTD sets out the bare minimum requirements in relation to annual leave, with detailed implementation left to member states. It 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."

16. The underlying philosophy of the WTD, that it is necessary for the health and safety of workers that they should have a minimum entitlement actually to take paid leave, is reflected in the prohibition in article 7(2) on replacing paid annual leave with an allowance in lieu, save where the employment relationship comes to an end. However, by exception in article 7(2), where the employment relationship terminates at a stage when the worker has not taken the minimum leave to which he or she is entitled, there is a right to an allowance in lieu. This reflects the fact that after termination of the employment relationship, it is no longer possible for workers to take the paid annual leave to which they are entitled.

17. The importance of the right to paid annual leave is also underlined by article 17 which provides that member states may not derogate from article 7.

18. Article 31 of the Charter (Fair and just working conditions) also provides for the right to annual leave:

> "(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 limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

19. Article 47 of the Charter (Right to an effective remedy and to a fair trial) provides:

> "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…"

**Domestic law provisions**

20. The WTR were made under section 2(2) of the European Communities Act 1972 in order to implement the WTD in domestic law. Article 7(1) was transposed in regulations 13 and 16 WTR; while article 7(2) was transposed in regulations 13(9)(b) and 14 WTR.

21. Regulation 13(1) WTR provides for a right to four weeks' annual leave in each leave year. In accordance with article 7(2) WTD, this can only be taken in the leave year in which it is due, and cannot be replaced by a payment in lieu unless the worker's employment is terminated (regulation 13(9)) (or by recent amendment, where taking leave is not reasonably practicable because of the coronavirus pandemic, see regulation 13(10)).

22. So far as relevant, at the material time regulation 13 WTR provided:

> "13 **Entitlement to annual leave**

> (1) Subject to paragraph (5), a worker is entitled to four weeks annual leave in each leave year.
>
> …
>
> (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –
>
> (a) it may only be taken in the leave year in respect of which it is due, and
>
> (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated…"

Regulation 13 did not allow for leave not taken to be carried forward until its recent amendment to cater expressly for the coronavirus pandemic (regulation 13(10) and (11)).

23. Regulation 14 provides for compensation in relation to leave entitlement in the year of termination:

> "14 **Compensation related to entitlement to leave**
>
> (1) This regulation applies 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).
>
> …"

24. Regulation 16(1) WTR confers entitlement to payment in respect of periods of holiday leave to which the worker is entitled under regulation 13. It provides as follows:

> "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 the leave."

Entitlement to payment depends on an entitlement to leave. On the face of the WTR, if a worker's entitlement to leave is lost because he cannot carry it forward, then ordinarily any entitlement to pay will also be lost – the "use it or lose it" rule.

25. The WTR distinguishes between claims

i) that an employer has refused to allow a worker to take holiday to which he or she is entitled under regulations 13 WTR (a refusal claim);

ii) for payment in respect of holiday which has been taken by a worker, but in respect of which they have not been paid in accordance with regulation 16 WTR (a non-payment claim); and

iii) for a payment in lieu of holiday entitlement which, at the point of termination, has accrued but has not in fact been taken by a worker, pursuant to regulation 14 WTR (a termination claim).

26. Consistently with this distinction, regulation 30 WTR provides for two different remedies, depending on the nature of the complaint. The first, in regulation 30(1)(a), is for a complaint by a worker that his employer "*has refused to permit him to exercise any right he has under – (i) regulation…13*" (a refusal claim). The second, in regulation 30(1)(b), is for a complaint by a worker that his employer "*has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1)*" (this remedy applies both to a non-payment claim and to a termination claim).

27. Regulation 30 provides:

> "30 **Remedies**
>
> (1) A worker may present a complaint to an employment tribunal that his employer –
>
> (a) has refused to permit him to exercise any right he has under–
>
> (i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A; ……
>
> (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.
>
> (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."

28. Claims under regulation 16 and under regulation 14 WTR have been held to be "wages" claims within the meaning of section 23 ERA: see *HM Revenue & Customs Commissioners v Stringer* [2009] UKHL 31, [2009] ICR 985 (HL). That means a worker can rely on the right not to suffer unauthorised deductions from wages in section 13 ERA, and in turn on the rights in section 23 ERA to make a claim to the employment tribunal about an unlawful deduction from wages, including in particular, by relying on the "series of deductions" provision in section 23(3). Section 23 ERA (as amended to introduce subsections 4A and 4B) provides:

> "23 **Complaints to employment tribunals**
>
> (1) A worker may present a complaint to an employment tribunal
>
> (a) that his employer has made a deduction from his wages in contravention of section 13…

> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,
>
> or …
>
> (3) Where a complaint is brought under the section in respect of-
>
> (a) a series of deductions or payments, or
>
> (b) …
>
> the references in subsection (2) to the deduction … are to the last deduction ... in the series …
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
>
> (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to 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)."

**The relevant CJEU case-law**

29. The approach to interpreting and applying the WTR is not in dispute. The relevant provisions must be interpreted, as far as possible, in the light of the wording and purpose of the WTD in order to achieve the result pursued by the WTD: see *Marleasing SA v Commercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135. This includes, as the CJEU made clear in *Max-Planck-Gesellschaft Zur Förderung Der Wissenschaften EV v Shimizu (Case C-684/16)* [2018] EUECJ C-684/16, [2019] 1 CMLR 35 ("*Shimizu*") at [60], "the obligation for national courts to change established case law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive."

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

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

32. The importance of the EU right to paid annual leave has been emphasised repeatedly in a number of CJEU judgments, including *King* itself. It is sufficient simply to cite *NHS Leeds v Larner* [2012] EWCA Civ 1034, [2012] ICR 1389 where Mummery LJ summarised the principles to be derived from the preliminary rulings made by the CJEU in *Stringer* as follows:

> "37 The preliminary rulings of the Court of Justice supported the workers' claims. I have extracted from the judgment of the court those general points that are potentially relevant to this case.
>
> Purpose of annual paid leave
>
> (1) The purpose of paid annual leave guaranteed by EU law is different from the purpose of entitlement to sick leave, which is not governed by EU law. The purpose of the former is to enable a worker to enjoy rest, relaxation and leisure: it is for the protection of health and safety. The purpose of the latter is to enable a worker to recover from illness: [2009] ICR 932, paras 23–27.
>
> No derogation from principle of paid annual leave
>
> (2) Paid annual leave "is a particularly important principle of Community social law from which there can be no derogations". That is borne out by the terms of article 7(2), which only permit payment in lieu on termination of the employment relationship: paras 22–23. The right is "granted to every worker, whatever his state of health": para 54.
>
> The "opportunity principle" and its limits
>
> (3) While it is for the member states to lay down conditions for the exercise and implementation of the right, they must do so "without making the very existence of that right … subject to any preconditions whatsoever": paras 28, 46.

> (4) As a general rule, national legislation and practices may provide that a worker on sick leave is not entitled to take paid annual leave during sick leave, "provided, however, that the worker in question has the opportunity to exercise the right conferred by that Directive during another period": para 29. Equally, national legislation or practices may also allow a worker to take paid annual leave during sick leave: para 31.
>
> (5) National legislation may also provide for the loss of the right to paid annual leave at the end of a leave year or of a carry forward period, "provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the Directive": para 43. The "opportunity principle" is relied on by NHS Leeds in its submissions discussed later.
>
> Right of sick workers to carry forward paid annual leave
>
> (6) "It must therefore be held that a worker, who … is on sick leave for the whole leave year and beyond the carry-over period laid down by national law, is denied any period giving the opportunity to benefit from his paid annual leave": para 44. National legislation providing for the loss or extinction of the right in such circumstances at the end of the leave year and/or the carry forward period laid down by national law would undermine the social right directly conferred by article 7(1): para 46. That would be the case " even where the worker has been on sick leave for the whole leave year and where his incapacity for work persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave": paras 49, 52, 55.
>
> Payment on termination in lieu of taking paid leave
>
> (7) After termination of the employment relationship, it is, of course, no longer possible for a worker to take paid annual leave for which that employer is liable: he has ceased to work for that employer. Provision is made in article 7(2) for entitlement to an allowance in lieu, but the article does not expressly lay down the way in which the allowance must be calculated: paras 56–57.
>
> (8) "[W]ith regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship": para 61, ie the worker's normal remuneration."

33. In *King*, which lies at the heart of this appeal, the CJEU considered for the first time a situation where the worker had not received paid annual leave because his employer wrongly characterised him as self-employed, refusing to remunerate leave, and the worker took no steps to invoke the right to paid annual leave until after the end of the employment relationship. The effect of *King* is substantially disputed and must be addressed more fully in order to resolve this appeal. I shall do so below. At this stage,

I shall simply describe the facts briefly, and set out the five questions referred by this court and the answers given by the CJEU.

34. On the termination of his contract, Mr King brought claims for pay under the WTR for unpaid holiday. These were categorised by the tribunal as a claim for accrued but untaken leave in the final (incomplete) leave year ("Holiday Pay 1"); a claim for payment for leave actually taken over the 13 years ("Holiday Pay 2"); and a claim for payment for leave to which he was entitled during the whole period of his employment but did not in fact take ("Holiday Pay 3"). The employment tribunal held that Mr King was a "worker" and he succeeded in relation to all three heads of claim. The tribunal held that all untaken leave carried forward because the employer was never prepared to pay for it, so that the right to payment in lieu was triggered at dismissal, and the claim was in time because it was brought within three months of the date of termination.

35. The EAT (Simler J, President) allowed the employer's appeal against the Holiday Pay 3 decision, remitting it to the tribunal. Mr King appealed. In this court, it was common ground that Mr King was a worker entitled to sums due as Holiday Pay 1 and 2, and the only issue was Holiday Pay 3. The court stayed the appeal and referred five questions to the CJEU.

36. The CJEU summarised the parties' positions in relation to the claim for Holiday Pay 3 as follows:

> "20. Regarding holiday pay type 3, Sash WW claims that, under regulation 13(9)(a) of the 1998 Regulations, Mr King was not entitled to carry over periods of untaken annual leave into a new holiday year. By failing to bring an action pursuant to regulation 30(1)(a) of the Regulations, Mr King lost all entitlement in respect of annual leave, since a claim for payment in lieu of paid annual leave not taken in respect of the holiday years in question was time-barred.
>
> 21. By contrast, Mr King takes the view that his rights in respect of paid annual leave not taken because it would have been unpaid by the employer were carried over into the next holiday year, notwithstanding regulation 13(9)(a), and then from year to year until the date of termination of the employment relationship. Mr King claims, with reference to *Stringer v Revenue and Customs Comrs* (Joined Cases C-350/06 and C-520/06) [2009] ICR 932; [2009] ECR 1-179, that the right to payment in lieu of paid annual leave not taken did not arise until termination of the employment relationship and, accordingly, that his claim was brought in time.
>
> 22. The referring court, noting that United Kingdom law does not allow annual leave to be carried over beyond the leave year for which it is granted and does not necessarily ensure an effective remedy for breach of article 7 of the Directive 2003/88, expresses doubt as to the interpretation of the relevant

> EU law for the purpose of resolving the dispute pending before it."

37. At [24] the CJEU set out the five questions referred by this court:

> "24 In those circumstances, the Court of Appeal (Civil Division) decided to stay the proceedings and to refer the following questions to the court for a preliminary ruling:
>
> (1) If there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to article 7 of Directive 2003/88, it is compatible with EU law, and in particular the principle of effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid?
>
> (2) If the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it?
>
> (3) If the right carries over, does it do so indefinitely or is there a limited period for exercising the carried-over right by analogy with the limitations imposed where the worker is unable to exercise the right to leave in the relevant leave year because of sickness?
>
> (4) If there is no statutory or contractual provision specifying a carry-over period, is the court obliged to impose a limit to the carry-over period in order to ensure that the application of the national legislation on working time does not distort the purpose behind article 7?
>
> (5) If the answer to the preceding question is yes, is a period of 18 months following the end of the holiday year in which the leave accrued compatible with the right set out in article 7 [of Directive 2003/88]?"

38. At [47] the CJEU set out its conclusion in respect of the first question:

> "47. In the light of all of the foregoing considerations, the answer to the first question is that article 7 of Directive 2003/88 and the right to an effective remedy set out in article 47 of the Charter must be interpreted as meaning that, 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 of the Directive, they preclude the worker having to

> take his leave first before establishing whether he has the right to be paid in respect of that leave."

39. In relation to the second to fifth questions, the CJEU held as follows:

> "65. It follows from all the foregoing considerations that the answer to the second to fifth questions is that article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave".

40. After *King*, similar issues were addressed by the CJEU in three cases (all the judgments were issued on 6 November 2018): *Kreuziger* and *Shimizu* (both referred to above); and *Stadt Wuppertal v Bauer* (Case C-569/16) [2019] 1 CMLR 36 ("*Bauer*"). The factual context of each case was a worker who had not taken the leave to which he was entitled, either on termination of the employment, or as in *Bauer*, when the relationship ended because of the worker's death. One question is whether *King* and those cases were decisions on their facts or whether they establish any broader principles. I shall refer to these judgments as necessary below.

41. Against that background, I will address the issues raised by the grounds of appeal. I will summarise the relevant findings and conclusions of the employment tribunal in relation to issue (i) below. I will analyse the legal issues myself. It is not therefore necessary to summarise the legal reasoning of the tribunal on issues (ii) and (iii), or the legal reasoning of the EAT on any of the issues.

**Issue 1: Did the tribunals below err in law in holding that Mr Smith's only pleaded claim was for pay for the holiday leave he actually took (without pay) during his engagement with the respondent?**

42. As indicated above, Mr Smith's case is that, in addition to his claim in respect of the annual leave which he took during his engagement with the respondent and which was unpaid (which the employment tribunal upheld but said was out of time), he had three other valid claims, all of which crystallised on termination. They were: (i) a claim (pro-rated) in respect of leave which he had not taken on termination and which was due as a matter of domestic law under regulation 14 WTR in respect of his final leave year; (ii) as he never took his full entitlement to leave under article 7 in any leave year, and that entitlement carries over, a claim, on termination, in respect of that untaken leave, based on the narrowest reading of *King*; and (iii) a claim, on termination, in respect of the leave which he did take but for which he was not paid, because the CJEU principles (including those stemming from *King*) mean that unpaid holiday is not "leave" for the purpose of article 7, so that this entitlement also carried over until termination.

43. I will focus on the claims under heads (i) and (ii) at this stage, because claim (iii) depends on the scope and effect of *King*, which I will consider later.

44. Mr Smith's case is that the tribunal erred in deciding no claims under heads (i) and/or (ii) were brought and/or were sustainable on the facts. The termination of his engagement on 3 May 2011 triggered any regulation 14 obligation. So if there were such claims, his claim form presented on 1 August 2011 was in time for the purposes of regulation 30 WTR and section 23 ERA.

45. Mr Ford emphasised that the "grounds of claim" attached to the claim form dealt with holiday pay at paragraphs 5, 20, 21 and 37, alleging denial of the right to paid annual leave from the outset and throughout; and seeking compensation for *"unpaid holiday"* at paragraph 43. By regulation 13(3) of the WTR, Mr Smith's leave year began on 25 August each year (the anniversary of the commencement of his employment). The tribunal made no findings as to how much leave he took in his final leave year, from 25 August 2010 until termination of employment on 3 May 2011. Mr Ford submitted that even on assumptions most unfavourable to Mr Smith, he took less than his proportionate entitlement to EU leave due under the WTR in that year – his witness statement said he took three weeks' leave from April 2010 until termination. A number of tables/schedules of loss were also relied on. Mr Ford also maintained that, on the tribunal's findings, Mr Smith took no leave in the final period from April 2011 until termination, in particular on the bank holidays of 29 April and 2 May, as the Reconsideration Judgment made clear. That meant, at most, that he took three weeks in the period 25 August 2010 to 3 May 2011. Hence he was due a payment under regulation 14 in respect of the final leave year and had a potentially good claim under regulation 14 WTR, for a payment due on termination in respect of leave which he did not take, purely as a matter of domestic law.

46. Furthermore, Mr Ford submitted that the tribunal adopted an unfair and unduly narrow reading of the claim form, inconsistent with the overriding objective and the requirement to avoid unnecessary formality. In the light of *King* it "shouted out" from the claim form and from his witness statement that Mr Smith was contending as a matter of fact that he had never taken all his entitlement to article 7 leave in any leave year, so that, at the very least, he had a good claim for untaken leave based on *King*: see *Mervyn v BW Controls Ltd* [2020] ICR 1364 at [42]. It was Mr Smith's uncontested evidence that he was told he was self-employed, never received holiday pay and never took his full entitlement to four weeks' leave. This put him in a similar position to the claimant in *King*. The burden was on the respondent to prove that Mr Smith took all of the leave to which he was entitled (*Kreuziger)* and that burden was not discharged. Accordingly, both tribunals below erred in deciding that Mr Smith had not brought a claim for untaken or unpaid annual leave due on termination under regulation 14.

47. I do not accept Mr Ford's submissions on the scope of the pleaded claim, and have concluded that the submissions made by Mr Jeans on this issue are to be preferred. My reasons follow.

48. The starting point must be the pleaded claim brought by Mr Smith in the employment tribunal since it is well established that, while pleadings in the employment tribunal are relatively informal, they are nonetheless intended to set out the essential case and establish the parameters of the dispute. As Langstaff J (President) emphasised in *Chandhok v Tirkey* [2015] ICR 527, "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is*

*saying, so they can properly meet it; … it should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."*

49. Mr Smith's claim form pleaded his case as follows. The holiday pay box was ticked, as were boxes claiming "arrears of pay" and "other payments". In the grounds of claim he said (referring to the respondent as "R1"):

(a) "5. I took annual leave but R1 did not pay holidays under WTR. …"

(b) (Under the heading "Worker"): "21. As a worker I was denied paid holidays from the outset or at a later stage in my contract."

(c) (Under the heading "Unlawful deduction of wages"): "37. As an employee or worker R1 failed to allow my entitlement to paid holidays from the outset of my employment or at a later stage. This was a continuous failing connected to each annual leave year up to the date of termination on 3 May 2011."

(d) (Under the heading "Remedy"): "43. I seek compensation for … unpaid holiday …"

50. Accordingly, having set out a claim for paid holidays under the WTR and unlawful deduction of wages under the ERA in general terms in the claim form, the grounds of claim began with a clear statement that Mr Smith took holiday but was not paid when he did so. His pleaded case thereafter is consistent with a claim for the failure to pay, and no express allegation was made that he was refused or otherwise did not take his full entitlement to four weeks' leave each year. Read fairly, the case as originally pleaded (before the CJEU judgment in *King*) did not encompass a claim for payment in lieu of leave not taken at the date of termination. The other documents relied on by Mr Ford are of limited assistance because they cannot be treated as amending or adding to the pleaded claim.

51. In any event, the document served by Mr Smith's solicitors on 4 October 2018, containing a holiday pay table claiming a total of £74,000 (odd) for gross holiday pay based on 5.6 weeks each year from 25 August 2005 to 3 May 2011 (pro-rated for incomplete years – the first and the last), made no distinction between unpaid taken holiday and untaken holiday: no dates on which holiday was (or was not) taken were identified (perhaps not unsurprisingly in circumstances where the understanding was he had no entitlement). Rather, the document and table asserted an entitlement to the full amount (pro-rated as appropriate) in each holiday year.

52. Clarification was sought by the respondent. In a document dated 10 January 2019, Mr Smith's solicitors said:

> "1. The purpose of providing the Particulars of Holiday Pay Claim is to give an overview of the Claimant's holiday pay claim. It is not to be read as a skeleton argument or a complete authoritative document on the law. For the avoidance of doubt these particulars do not replace, amend, or otherwise change what is pleaded in the grounds of claim. Specifically, it does

> not change or replace the Claimant's entitlement to **paid** annual leave under regulation 13 and 16 WTR.
>
> 2. The fact that the First Respondent may have purportedly "permitted" the Claimant to take annual leave is irrelevant for the purpose of this claim. It is clear and obvious that the First Respondent did not permit **paid leave** under the Regulations…" (emphasis original)

53. There was no reference at all in this document to regulation 14. Nor was there any express claim for pay in lieu of untaken holiday. As Mr Jeans submitted, paragraph 1, in particular, suggested that the case stood or fell on regulations 13 and 16. The document was expressed as not altering or replacing the pleaded case based on entitlement to paid leave.

54. The reliance placed by Mr Ford on Mr Smith's witness statement (including the table at paragraph 40) does not advance his case either. Although it is possible to infer from the table at paragraph 40 that the claim included a claim for untaken leave as well as unpaid leave taken over the years (including in the termination year), no clear statement to this effect was made anywhere in the witness statement. For example, Mr Smith's witness statement said at paragraph 17: "At all times from 2005 to 3 May 2011 I worked continuously for Pimlico Plumbers except for holidays and sickness absence. I did not get paid for holidays and sickness absence." Paragraph 18 said: "I took leave but I never received holiday pay". Further details were given at paragraphs 19, 20 and 23 and at paragraph 40 he repeated again: "I took annual leave each year but was not paid for such leave. …" No examples were given of occasions on which he was either prevented in some way from taking time off, or was unable to do so, or even simply took less leave than the full EU-based entitlement each year. The respondent contends moreover, that the table contradicted particulars provided by Mr Smith's own solicitors in a document dated 11 January 2019 and was never agreed as representing a reliable or accurate statement of his leave history. It is not the function of this court to engage in a factual inquiry into the leave history in this case. What is clear, in any event, is that, even if this were possible, these documents read fairly and as a whole, did not fill the gap in the pleaded case. The lack of any clear pleaded case for a payment in lieu of untaken leave remained. Accordingly, nowhere in the pleaded case was there any express reference to a claim for pay in lieu of untaken leave at the date of termination.

55. It is true that the claim for "paid annual leave" each year was pursued as a deduction from wages claim. That does not exclude a claim for pay in lieu of untaken leave, but if that is what was being claimed, the substance of that claim could and should have been pleaded. It was not necessary for Mr Smith to refer expressly to regulation 14 (although he was legally advised throughout, and repeated references to regulations 13 and 16 suggest that such a reference would have been made if it was relied on). However, it was incumbent on him to identify the substance of his claim. After all, he must have known whether or not he took the full leave entitlement each year, and could have been expected to plead the basis of a claim that some leave was not taken, even if he did not have the records to identify precisely when and in what amount.

56. In those circumstances, I agree with the tribunals below that the pleaded case was not clear enough and entitled them to conclude that, in substance a claim on termination,

pursuant to regulation 14, for pay in lieu of leave which had not been taken (whether throughout the engagement or its final year), was not pleaded. The position was compounded by two things: first, the response to the request for clarification which emphasised the regulation 13 and 16 claims without mentioning regulation 14; secondly, there was no application to amend, despite the facts that Mr Smith was professionally represented throughout and that, about a year after the CJEU's judgment in *King* was published, a detailed amendment application (relating exclusively to his disability discrimination claims) was pursued on Mr Smith's behalf, resulting in a contested preliminary hearing. His witness statement and schedules of loss (even taken at their highest) did not and could not fill the gap.

57. Thus I consider that the employment tribunal was entitled to decide, as it did, that Mr Smith's case was confined to a claim that he took annual leave each year but was not paid for it. The tribunal did not make the errors of law alleged in ground B and/or C, and subject to the further consideration below, the appeal therefore fails on these grounds.

58. However, if as is submitted on behalf of Mr Smith, the employment tribunal erred in its approach to *King*, by misconstruing its scope and confining its application to cases of untaken holiday leave, and if *King* has the wider scope contended for by him, then it is arguable that his pleaded claim based on leave which he took but for which he was not paid should have been seen and read differently by the tribunals below. In particular, if *King* means that there is a single right to paid leave which was denied by the respondent because it refused to remunerate annual leave, then it may be that it was inherent in his claim form that he was advancing a claim for breach of this right, and was in time to do so. I therefore turn to consider issue the scope of *King* and its effect on Mr Smith's pleaded case.

**Issue (ii): the proper scope of *King* and its application to Mr Smith's case**

59. Both tribunals below held that the principle established in *King* did not apply to Mr Smith's case so as to permit him to carry over and accumulate, until termination, payment for leave which he took but for which he was not paid. The employment tribunal dealt with this claim at paragraphs 29 to 32, holding that there was a fundamental difference between Mr Smith's case and *King*. The tribunal accepted that:

> "29. … the CJEU decision did cast doubt on the compatibility with the EU law of the division in the WTR between the right to pay and the right to leave. But it did so in the context of a set of facts in which Mr King was deprived of a remedy because of this division. Because he had been deterred from taking leave, he could not bring a claim under Regulation 16 – a point identified by the EAT in the case and specifically noted by the CJEU in paragraph 43 of its judgment "*As regards the case in the main proceedings, it is clear from the order for reference that the Employment Appeal Tribunal's interpretation of those provisions was, in essence, that a worker (i) could claim breach of the right to annual leave provided for in regulation 13 of the 1998 Regulations only to the extent that his employer did not permit him to take any period of leave, whether paid or not; and, (ii) on the basis of regulation 16 of those regulations, could claim payment only for annual leave actually taken*." The Claimant is not in that situation – having taken leave he was entitled to bring a claim for payment in accordance

> with Regulation 16. He therefore was not deprived of an effective remedy. I do not think it is open to me on the facts before me to say that the division between pay and leave in the WTR brought about a situation that deprived the Claimant of his rights under the WTD and that on the facts of this case the WTR regime is therefore incompatible with the WTD. I can see that the second paragraph of the decision of the CJEU could be interpreted as meaning that Mr Stephenson is correct and that the consequence of the denial of one aspect of the right – namely pay – does in effect mean that the right to leave has not been exercised. But the underlying facts of Mr King's case have persuaded me that that is not the meaning of the decision and that to interpret it in the way suggested by Mr Stephenson is going too far."

60. The tribunal described the effect of *King* on "the applicable limitation rules" as follows:

> "30. … The CJEU's ruling means that in cases in which an individual worker has taken less than the leave to which they are entitled because the lack of pay has acted as a disincentive to the taking of leave can accumulate the untaken leave and seek payment in respect of the full accumulated amount regardless of Regulation 13(9) WTR which stipulates that leave must be taken in the year in which it accrues. In other words there is no "use it or lose it" rule where the employer fails to recognise the need for holiday pay (or refuses to pay for it) and the worker does not exercise the statutory right to leave as a result of that failure. As the principle will apply to leave accrued and untaken in the final year of employment as well as in earlier years, provided the worker brings the claim (or initiates early conciliation) within three months of the last payment made to the worker which does not include holiday pay to which the worker is entitled the entire claim will be in time. It will also not be subject to the limitation in s23(4A) ERA, or the decision in *Bear Scotland*, because the claim would be brought under the WTR, not under ERA section 13."

61. However, the tribunal held the structure of the WTR does not deprive a worker (like Mr Smith) who takes unpaid leave of a fundamental right, and that he was not deprived of a remedy in the same way as Mr King. There was therefore no basis in *King* for disapplying the provisions of the WTR (Regulation 13(9)) in this case.

62. The EAT did not find it easy to interpret *King*, but concluded, in agreement with the employment tribunal that the principles established in *King* were limited to cases of leave not taken; and that the situations considered by the CJEU to be incompatible with article 7 WTD (and articles 31(2) and 47 of the Charter) were all ones where the leave had not been taken.

63. I have summarised in outline the essential case advanced by each side on this issue. In addition, in submitting that the tribunals below were wrong to interpret *King* as they did, Mr Glyn emphasised the health and safety aspect of the legislation and as the prism through which it should be understood. Although the factual case addressed by the CJEU in *King* concerned a worker who did not take his leave entitlement because of the employer's refusal to pay, the case established broader principles that apply equally to Mr Smith's case, whose employer also disputed the right to paid leave and refused to pay him for such leave. *King* does not require workers to show that they were in fact deterred from taking leave. Rather, not granting paid annual leave is

"liable to dissuade the worker from taking annual leave", and any practice that may deter a worker from taking annual leave is incompatible with article 7. Here, there was never an opportunity to exercise the composite right to paid leave and the *Kreuziger* test was not met. Accordingly the right must carry over. Alternatively, the principle of effectiveness requires a remedy in this case because the system for enforcing a claim in these circumstances breaches the principle of effectiveness. A vulnerable low-paid worker is forced to run the risk of taking leave which will be unpaid, with the certain loss of wages which follows, and must then issue proceedings every three months to preserve the chance of getting paid. Those factors make it "excessively difficult" for the right to be enforced. Those are preconditions which are incompatible with the WTD and the Charter.

64. I have also summarised Mr Jeans' arguments above. In addition, he developed an argument that the right to paid leave comprises two legal entitlements (the right to take leave, and the right to receive payment for such leave). That argument accords with common sense, and legitimately recognises and reflects the structure of the WTR. Generally, workers will first exercise their right to take leave (having given the appropriate notice etc.) for which they will *subsequently* be paid by their employer. If they are denied the right to take leave in the first instance, they may challenge that refusal by bringing a refusal claim in accordance with regulation 30(3) and (4) WTR. If they are not paid for the leave which they have in fact taken (or are underpaid), they may bring a non-payment claim in accordance with regulation 30(5) WTR. These are conceptually and practically different remedies. The CJEU has not criticised the distinction drawn domestically in the WTR, and in *King*, did not state, or suggest, that leave "*taken and not paid*" was not to be regarded as the taking of leave *at all.* In short, nothing in the European case law obliges member states to adopt national procedural rules which ignore the distinction between these two rights.

65. He accepted that an employer with a practice of not paying workers for holiday, thereby creating uncertainty as to remuneration, might deter workers from taking leave, and such a practice is accordingly inconsistent with the health and safety objectives underpinning the WTD. However, that does not require employment tribunals to proceed on the imaginary basis that a worker who has in fact taken leave, even if he is not paid for it, or is underpaid, is to be treated as if they have never taken leave. From a health and safety perspective, a worker who does not take leave is not to be equated with a worker who does in fact regularly take leave (even if he is not paid for it, or is underpaid). It is wrong in principle to suggest that because lack of payment may affect the degree of relaxation enjoyed, unpaid leave cannot, as a matter of fact or law, be regarded as the taking of leave at all.

66. Here, having been permitted by the respondent to take leave (albeit unpaid), and having regularly done so throughout his employment, it was open to Mr Smith to take steps to enforce the second aspect of his legal entitlement – namely, his right to be paid in respect of such leave. Mr Smith had an effective remedy, namely the ability to bring a non-payment claim in accordance with the relevant domestic time limits. On the first occasion when he chose to take holiday but the respondent declined to pay him for that leave, Mr Smith was entitled and able to complain about that and seek a determination from the employment tribunal as to his entitlements. As EJ Morton found (and the EAT agreed), it was reasonably practicable for Mr Smith to have exercised his right to bring a non-payment claim in accordance with the applicable

domestic time limits. There is no appeal against this finding and it is not open to Mr Smith to seek to contest it, indirectly or otherwise. The tribunals below were correct to find that Mr Smith had in fact taken leave and therefore that the legal remedy available to him was payment for the leave taken. That effective remedy was available to him but not exercised, and the appeal on this ground should fail.

67. Forcefully as these submissions were advanced by the respondent, I do not accept them. I prefer the submissions made on behalf of Mr Smith. My reasons follow.

68. Although the worker in *King* claimed compensation for leave which he did not take, the answers given by the CJEU to the questions referred by this court rest on principles which are not confined to those facts. The first question referred in *King* (see paragraph 37, above) asked whether it is compatible with EU law, and in particular, with the principle of an effective remedy, for the worker to have to take leave first before establishing whether he is entitled to be paid. That question includes the situation of a worker who has taken leave for which he has not been paid as well as that of one who has not taken the leave at all. As the EAT recognised, both workers claim payment when there is a dispute as to the entitlement to "paid annual leave", and the fact that the former has taken the leave, and so performed the condition the compatibility of which is in issue, does not necessarily exclude his case from the scope of that question.

69. Moreover, in answering the first question, the CJEU made a number of important observations which suggest that a broader approach was applied.

70. First, it emphasised the particular importance of the right to "paid annual leave" in article 7, a provision from which no derogation is permitted; and that the right to "paid annual leave" is also expressly set out in article 31(2) of the Charter: see [32] and [33]. Secondly, although the conditions for the exercise and implementation of the right to paid annual leave were recognised as being for member states to lay down, the CJEU stated that member states "*must not make the very existence of that right … subject to any preconditions whatsoever*: *Stringer …*": see [33]. In other words, there can be no precondition that the worker must request annual leave and be refused it; or take unpaid leave. Nor, I infer, could there be any precondition that the worker must first ask the employer to recognise the right to paid annual leave, and be refused it.

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

72. It followed from all of these considerations (see [36]) that, "*<u>when</u> taking his annual leave, the worker must be able to benefit from the remuneration to which he is entitled under article 7(1)* …" (emphasis added), because as the CJEU had observed at [35], "*the very purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure …*". In other words, there is a right to be paid when the leave is taken as this enables the worker to have the necessary rest and relaxation which paid leave is intended to provide. A worker faced with uncertainty about whether he will be paid for leave when taking it was not regarded as being able fully to benefit from that leave as a period of relaxation and leisure in accordance with

article 7 WTD. Similarly, such uncertainty was liable to dissuade the worker from taking annual leave. No evidence of actual deterrence was required. The CJEU noted that any practice or omission of an employer that might *potentially deter* a worker from taking his annual leave was equally incompatible with the purpose of the right to paid annual leave: see [38] and [39]. The CJEU held that against that background, "*observance of the right to paid annual leave cannot depend on a factual assessment of the worker's financial situation when he takes leave*": see [40].

73. The CJEU considered whether the two remedies provided by regulation 30 WTR meant there was an effective remedy. It set out the interpretation of those provisions I had given in *King* in the EAT, as in essence that a worker could claim (i) breach of the right to annual leave provided for in regulation 13 only to the extent that his employer did not permit him to take any period of leave, whether paid or not; and (ii) on the basis of regulation 16, payment only for leave actually taken. The CJEU then held:

> "44. However, in a situation in which the employer grants only unpaid leave to the worker, such an interpretation of the relevant national remedies would result in the worker not being able to rely, before the courts, on the right to take paid leave per se. To do so he would be forced to take leave without pay in the first place and then to bring an action to claim payment for it.
>
> 45. Such a result is incompatible with article 7 of Directive 2003/88 for the reasons set out in paras 36–40 above.
>
> 46. A fortiori, in the case of a worker in a situation such as that of Mr King, if the national remedies are interpreted as indicated in para 43 above, it is impossible for that worker to invoke, after termination of the employment relationship, a breach of article 7 of Directive 2003/88 in respect of paid leave due but not taken, in order to receive the allowance referred to in article 7(2). A worker such as Mr King would thus be deprived of an effective remedy.
>
> 47. In the light of all the foregoing considerations, the answer to the first question is that article 7 of Directive 2003/88 and the right to an effective remedy set out in article 47 of the Charter must be interpreted as meaning that, 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 of the Directive, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave."

74. The conclusion that it would be incompatible with article 7 for a worker to be forced to take leave without pay and then have to bring an action to claim payment for it was reached for the reasons given earlier at paragraphs 36 to 40, which emphasised the importance of remuneration at the time leave was taken and said that any practice of an employer that might potentially deter a worker from taking his annual leave was

incompatible with the purpose of the right to paid annual leave. At [44], the CJEU described the right to "paid leave" as a right per se. It described the position as stronger in the case of a worker in the position of Mr King, who would be deprived of an effective remedy, but the incompatibility arose from the denial of the "right to take paid leave per se".

75. The CJEU then addressed the second to fifth questions (see paragraph 37, above) which in essence concerned the validity of national provisions or practices preventing the carry over and accumulation until termination of "*paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave*". It is plain from this reference to "paid annual leave rights" that the CJEU was not confining its analysis to untaken leave. To have treated the taking of unpaid leave as the exercise of "paid annual leave rights" would, in any event, have been inconsistent with what the CJEU said earlier about the importance of the right to paid leave; it being a single right; and the requirement that, *when* taking annual leave, the worker benefits from the remuneration to which he or she is entitled.

76. In the lead up to answering those questions, at [49] to [52], the CJEU referred repeatedly to "the right to paid annual leave" and said that it was important that workers should not be prevented from exercising that right:

> "49. In that regard, in order to respond to those questions, it must be noted that the court has previously been called upon, inter alia, in *Stringer v Revenue and Customs Comrs* [2009] ICR 932, to rule on questions concerning a worker's right to paid annual leave which he was unable to exercise until termination of his employment relationship due to reasons beyond his control, specifically because of illness.
>
> 50. In the present case, it was indeed for reasons beyond his control that Mr King did not exercise his right to paid annual leave before his retirement. The court points out, in this respect, that even if Mr King could, at some point during his contractual relationship with his employer, have accepted a different contract providing for the right to paid annual leave, that is irrelevant in answering the present questions referred for a preliminary ruling. The court must take into consideration, in that regard, the employment relationship as it existed and persisted, for whatever reason, until Mr King retired, without him having been able to exercise his right to paid annual leave.
>
> 51. Thus, it must be noted, in the first place, that Directive 2003/88 does not allow member states either to exclude the existence of the right to paid annual leave or to provide for the right to paid annual leave of a worker, who was prevented from exercising that right, to be lost at the end of the reference period and/or of a carry-over period fixed by national law: *Stringer*, paras 47 and 48 and the case law cited.
>
> 52. Moreover, it is clear from the court's case law that a worker who has not been able, for reasons beyond his control, to

> exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu under article 7(2) of Directive 2003/88. The amount of that payment must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship: *Stringer*, para 61."

Unsurprisingly, there is nothing in these paragraphs to suggest that the CJEU was distinguishing between cases in which the worker did not take leave at all and cases in which the worker took leave but was not paid for it.

77. The well-established principle relied on by the CJEU was that the right to paid annual leave cannot be lost unless the worker has had the opportunity to exercise that right before the termination of the employment relationship. It seems to me that there is a clear analogy between workers who do not take leave, and those who take unpaid leave, where in both cases, their contracts do not recognise the right to paid leave and their employers refuse to remunerate leave. In both cases, like the worker who is prevented by illness from taking annual leave, they are prevented by reasons beyond their control from exercising the single, composite right. The worker who takes leave in these circumstances, knowing it is unpaid leave, will not derive the necessary rest and relaxation from it, because it is unpaid. Although the CJEU did not expressly address this case, there is nothing to suggest that the CJEU regarded the taking of unpaid leave as the exercise of the composite right to paid annual leave. On the contrary, the strong inference from the passages I have cited is that a worker whose employer disputes the right and refuses to remunerate annual leave would, even if he or she takes unpaid leave, also be seen as having been prevented, by reasons beyond his or her control, from exercising the composite right.

78. That inference is supported by the way the CJEU expressed its conclusions on these questions at [58] onwards:

> "58. First, according to the court's settled case law, the right to paid annual leave cannot be interpreted restrictively: *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* (Case C-486/08) [2010] ECR I3527, para 29. Thus, any derogation from the European Union system for the organisation of working time put in place by Directive 2003/88 must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which that derogation protects: *Union Syndicale Solidaires Isère v Premier Ministre* (Case C-428/09) [2010] ECR I9961, para 40 and the case law cited.
>
> 59. In circumstances such as those at issue, protection of the employer's interests does not seem strictly necessary and, accordingly, does not seem to justify derogation from a worker's entitlement to paid annual leave.
>
> 60. It must be noted that the assessment of the right of a worker, such as Mr King, to paid annual leave is not connected to a situation in which his employer was faced with periods of his absence which, as with long-term sickness absence, would have led to difficulties in the organisation of work. On the contrary, the employer was able to benefit, until Mr King retired,

> from the fact that he did not interrupt his professional activity in its service in order to take paid annual leave.
>
> 61. Second, even if it were proved, the fact that Sash WW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is for the employer to seek all information regarding his obligations in that regard.
>
> 62. Against that background, as is clear from para 34 above, the very existence of the right to paid annual leave cannot be subject to any preconditions whatsoever, that right being conferred directly on the worker by Directive 2003/88. Thus, it is irrelevant whether or not, over the years, Mr King made requests for paid annual leave: *Bollacke v K + K Klaas & Kock BV & Co KG* (Case C-118/13) [2014] ICR 828, paras 27–28.
>
> 63. It follows from the above that, unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer who does not allow a worker to exercise his right to paid annual leave must bear the consequences.
>
> 64. Third, in such circumstances, in the absence of any national statutory or collective provision establishing a limit to the carry-over of leave in accordance with the requirements of EU law ( *KHS AG v Schulte* [2012] ICR D19 and *Neidel v Stadt Frankfurt am Main* (Case C-337/10) [2012] ICR 1201), the European Union system for the organisation of working time put in place by Directive 2003/88 may not be interpreted restrictively. Indeed, if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, 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.
>
> 65. It follows from all the foregoing considerations that the answer to the second to fifth questions is that article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave."

79. In other words, although the factual context was a worker who had not taken all the leave to which he was entitled, the answers given by the CJEU rest on principles with a broader reach and, in my judgment, are to be read as extending to cover workers who have taken leave but have not been paid for it in the circumstances described. As the CJEU held, the right in issue is the right to "paid annual leave". That right cannot be subject to any preconditions whatsoever (including taking unpaid leave and, no doubt, making requests for recognition of the right or payments that are refused). An employer who does not allow a worker to exercise the right to paid annual leave must bear the consequences. An arrangement or system where the worker's entitlement to paid annual leave could be extinguished in these circumstances would, in effect, validate conduct by the employer which unjustly enriched the employer at the expense

of the worker's health. The fundamental principle which followed from these considerations is that where paid annual leave rights are not exercised over a number of consecutive reference periods because the employer disputed the right and refused to remunerate leave, rules or practices preventing the worker from carrying over and accumulating the leave until termination are precluded by the WTD. These considerations and the principles they articulate apply equally to Mr Smith's case.

80. Further, although in Mr King's case the fact that he did not take his full leave entitlement meant that he had no effective remedy in domestic law because of the structure of the WTR and the domestic remedies available, that was not the underlying basis of the CJEU's conclusions in his case, as the reasons and considerations identified above make clear.

81. In any event, viewed through the prism of a fundamentally important social (health and safety) right, a claim based on a failure to remunerate annual leave taken is not simply a claim for non-payment. Nor is the right only infringed when no payment is made, as Mr Jeans sought to argue. The failure to remunerate leave when the leave is taken (a fact that will inevitably be known in a case where the right is disputed by the employer who refuses to remunerate leave), means that there is a failure by the employer to ensure the necessary rest and relaxation that goes with paid annual leave. As the CJEU made clear in *Shimizu* (and held to similar effect in *Kreuziger*):

> "45. … the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of art.7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period.
>
> 46. In addition, the burden of proof in that respect is on the employer... Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively to art.7(1) and art.7(2) of Directive 2003/88."

82. Thus, the employer is required to set up and maintain a facility to enable paid leave to be taken (which may include recognition and acceptance of worker status and worker rights in appropriate cases). The right to paid annual leave is infringed by an employer who disputes the worker's right to paid annual leave, refuses to remunerate the leave and so fails to set up and maintain such a facility.

83. Although in *Shimizu, Kreuziger,* and indeed, in *Bauer*, the worker did not take leave at all, rather than taking leave which was unpaid, the CJEU's reasoning and analysis (which is similar to that in *King*) establishes and applies broader principles which also apply in a case in which the worker takes leave but is not paid for it.

84. In *Kreuziger* (and in *Shimizu*), the CJEU repeated the points made in *King*. Further, it emphasised that since the worker is to be regarded as the weaker party in the employment relationship, that position of weakness might mean that he or she is dissuaded from explicitly claiming rights from the employer especially where that might expose him to detrimental treatment, so that any practice or omission which might potentially deter a worker from taking annual leave is equally incompatible with the purpose of the right to paid annual leave: see [48] and [49]. The CJEU expressly referred here to deterring a worker from taking annual leave, but I cannot see any principled basis in the reasoning for limiting that broader principle to the factual context of that case. The court went on to hold that in those circumstances it was, "*important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually 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*": [50]. The court therefore held that the burden was on the employer to show that it, "*exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled* ..." and that the "*loss of the right to such leave, and, in the event of the termination of the employment relationship, the corresponding absence of the payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to art.7(1) and art.7(2) of Directive 2003/ 88*": see [52] and [53]. Again, the CJEU expressly referred to "annual leave not taken". That was the factual context of this case and so is unsurprising. But, as I have explained, this is a single, composite right. Those considerations mean that, again, I cannot see any principled basis for limiting the broader principles to that factual context, or for holding that they do not apply equally in the case of a worker who does take annual leave, but whose employer disputes that right and refuses to pay him for that leave. Unless the employer can show that this worker was given the opportunity to take paid annual leave, the loss of the right to such leave, and, if the employment is terminated, the corresponding absence of a payment of an allowance in lieu of annual leave, is also a breach of article 7.

85. Moreover, I disagree with Mr Jeans and the EAT that article 7(2) cannot be invoked to confer an allowance in lieu of leave taken but unpaid in the circumstances described. Such an allowance is an allowance in lieu of paid annual leave. First, it reflects the fact that the worker took the leave but was not paid for it (and so suffered uncertainty which reduced the benefit of the rest which the leave should have brought). Secondly, it reflects the employer's failure to establish and maintain a system to ensure that the worker's right to paid leave is recognised and the worker is actually in a position to take the paid annual leave to which he is entitled and which gives him the required rest and relaxation.

86. Accordingly, I can see no principled basis in the CJEU's judgment in *King* (or the subsequent cases) for treating the worker who takes unpaid leave differently from the worker who takes less than the full leave to which he is entitled, in circumstances where both are unable to exercise the right to paid annual leave because of the employer's refusal to recognise the right and remunerate annual leave. It does not matter what means are adopted for transposing the right to paid annual leave or what the domestic system for remedies is. The single composite right in EU law is to take annual leave and to have the benefit of the remuneration that goes with it *when* the leave is taken. This is a particularly important health and safety right guaranteed by

the WTD and by the Charter. Failure to pay for annual leave or uncertainty about pay is liable to detract from the rest and relaxation that should be afforded by periods of paid leave and to deter workers from taking it. The employer must bear the consequences of the refusal to recognise and remunerate the right; is under a duty to establish the correct position; and cannot be allowed to benefit from not paying for annual leave to the detriment of the worker's health and of the purpose of the WTD. In these circumstances, it seems to me that properly understood, the CJEU's reasoning in *King* (confirmed in the subsequent cases) extends to cover the worker who takes unpaid leave because the employer refuses to recognise the worker's right to paid leave and remunerate the leave, and means that this worker too is prevented from exercising the single right to paid leave afforded by article 7(1) WTD.

87. Contrary to the reasons relied on by the EAT at [92], this interpretation does not make the time limits for claims under regulations 13 and 16 ineffective. Whatever the position might be in other cases (for example, when a worker is paid in part for annual leave, or is underpaid) a worker can only carry over and accumulate a claim for payment in lieu on termination when the worker is prevented from exercising the right to paid annual leave, and does not take some or all of the leave entitlement, or takes unpaid leave, for reasons beyond his control, because the employer refuses to recognise the right and to remunerate annual leave. The principles which justify treating these two cases differently from other cases derive from *King* (and the subsequent cases), as explained above. The three-month time limit for making a claim, which runs from the termination of employment, applies in either case. Provided a claim for payment in respect of the breach of these rights is made within a period of three months beginning with the date of termination, it will be in time.

88. In my judgment, it follows that both tribunals below erred in their approach to article 7(1) and *King*. In essence, they focussed unduly on one aspect of the single composite right, and on the provisions of the domestic remedial system. They therefore understood the principles established by *King* too narrowly.

89. Mr Smith's claim form was lodged with the employment tribunal within three months of his date of termination. His pleaded claim was that he was denied "paid holidays from the outset". That is consistent with the fact that his contract precluded paid annual leave, and his employer failed to recognise his status as a worker who had such rights. He alleged that the failure to allow his entitlement to paid holidays continued each year up to the date of termination. Accordingly, a claim that he was denied the single right to paid annual leave because his employer disputed the right and refused to remunerate leave was inherent in Mr Smith's pleaded claim. It was not necessary for him to specify whether the leave was untaken or taken but not paid. His case was that unpaid leave breached his rights. In the light of *King*, as I have understood it, the taking of unpaid leave could not and did not discharge the obligation to provide paid annual leave. Rather, the respondent's approach meant Mr Smith was prevented by reasons beyond his control from exercising the right throughout his employment. Since he could only lose the right to paid annual leave if he actually had the opportunity to exercise the right to paid annual leave under article 7(1) WTD *(Kreuziger* at [42]; *Shimizu* at [35]), those rights accumulated and crystallised on termination.

90. It follows that the employment tribunal was wrong to hold that the principles established in *King* did not apply to Mr Smith's pleaded claim, and also wrong to hold

that this claim was made outside the relevant time limits. The appeal on this ground accordingly succeeds. These conclusions make it unnecessary to address the further argument in relation to remedy based on the principle of effectiveness.

**Issue (iii): is a 'series of deductions' within the meaning of section 23(3)(a) ERA broken by a gap of three months or more?**

91. In the light of my conclusions above, issue (iii) also does not strictly arise. However, the court was urged by counsel for Mr Smith to deal with it because the conflicting authorities of the EAT in *Bear Scotland* and the NICA in *Agnew* (construing the equivalent legislation in Northern Ireland, article 55(3) of Part V of The Employment Rights (Northern Ireland) Order 1996) continue to cause uncertainty at tribunal and EAT level; and the point was fully argued. It is a point of pure domestic law. In the circumstances, I deal with it relatively briefly and set out what is and can only be a strong provisional view.

92. As I indicated earlier, a claim for unpaid leave can be brought as a claim for unlawful deduction from wages under section 23 ERA. In general such a claim must be presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction is made. However, where a complaint is made about "a series of deductions", the three-month period runs from the last deduction in the series: see section 23(3). An amendment to section 23 ERA was introduced by the Deduction from Wages (Limitation) Regulations, 2014/3322. It inserted a new subsection (4A) in section 23 ERA. This placed a two-year long stop on the period of recovery in a case based on a series of deductions. However, the amendment only applies to complaints presented to an employment tribunal after 1 July 2015 and so could not have affected Mr Smith's case.

93. Mr Smith sought to rely on a series of deductions occurring throughout his employment and linked to his final payment on termination, in order to bring himself within the extended time limit afforded by section 23(3). However, both tribunals below held that they were bound by, or should follow, *Bear Scotland* so that a gap of more than three months between one deduction in a series and the next deduction in the series was to be treated as, in effect, bringing the series to an end and extinguishing the jurisdiction.

94. In *Bear Scotland* Langstaff J (President) interpreted "series of deductions" for the purposes of section 23(3)(A) ERA. He reasoned that for deductions to form part of a series, it is necessary to establish a sufficient factual, and temporal, link between them (see [79]); and these features were likely to be clear within a short time after the deduction occurs, if not at the time the employer fails to make the payment concerned. Further, the term "series" had to be understood in its legislative context, which included the fact that a period of any more than three months is generally seen as too long a time to wait before making a claim, and the legislative intent that claims should be brought promptly.

95. At paragraph 81, the EAT held:

> "81. Since the statute provides that a tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series

> of deductions being made (section 23(2) and (3) of the 1996 Act taken together) (unless it was not reasonably practicable for the complaint to be presented within that three-month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid."

96. On this basis, the EAT construed "series of deductions" to mean two or more deductions which are no more than three months apart. Any longer gap between the deductions would not "satisfy the temporal link" intended by the drafter of the legislation.

97. Mr Jeans submitted that this analysis is to be preferred to the approach adopted in *Agnew* where the opposite conclusion was reached: "*A series is not ended, as a matter of law, by a gap of more than 3 months between unlawful deductions …*": see [105] and [108]. The NICA reasoned that there is nothing in the provision which expressly imposes a limit on the gaps between particular deductions making up a series and nothing that can be implied from the terms of the provision which compels such an interpretation.

98. Mr Jeans submitted that the word "series" cannot simply mean things of a kind which "*follow each other in time*" since all events which are not contemporaneous "*follow each other in time*". He emphasised that Parliament confined the extension to a "series" of deductions rather than making it sufficient, for example, that the claim relates to a similar or connected right, and decided (in contrast, for example to the position under section 129 Equality Act 2010 governing equal pay claims) *not* to defer the running of time until the end of employment. Further, in the context of limitation it would be heterodox, and contrary to the principle of legal certainty, if a claim which was out of time could be automatically revived by a new breach. The *Bear Scotland* approach promotes certainty and a consistency, allowing both parties to the employment relationship to know where they stand in respect of the applicable time limits.

99. My strong provisional view is that *Agnew* is correct on this point. With respect to the EAT, the reasoning in *Bear Scotland* derives no support from the express words used in section 23(3) ERA. The existence of a three-month time limit for bringing claims is a weak basis for inferring that Parliament did not intend to link similar payments occurring more than three months apart: see [81]. Nor is there anything in the history or background to the legislation that supports this reasoning. It is not an approach that has been applied in relation to other similar limitation provisions based on a series, for example, section 43(8) ERA. Had this been Parliament's intention, it could and should quite easily have been stated expressly.

100. It seems to me that section 23(3) means what it says: the period within which a claim can be brought is three months from the date when the last deduction was made.

There is nothing to suggest that the three-month time limit was intended to restrict or qualify the meaning of a "series of deductions".

101. Further, I agree with the EAT in *Bear Scotland* at [79], the word "series" is an ordinary English word connoting a number of things of a similar or related kind coming one after another. It is a question of fact and degree, based on the evidence, whether deductions are sufficiently similar or related over time to constitute a "series". The identification of a sufficient factual and temporal link between deductions will answer the question whether there is a "series" without the need to imply or infer a limit on the gaps between particular deductions relied on as making up the series.

## Conclusion

102. In conclusion, in my judgment the appeal should succeed. The language of article 7(1), article 31 of the Charter, and *King*, establishes that the single composite right which is protected is the right to "paid annual leave", for the reasons given above. If a worker takes unpaid leave when the employer disputes the right and refuses to pay for the leave, the worker is not exercising the right. Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.

103. A claim to payment for all the leave which Mr Smith took but for which he was not paid in breach of his right to paid annual leave was inherent in Mr Smith's pleaded case. It follows that the tribunals below erred in law in deciding otherwise. Moreover, this claim was in time because he was denied the opportunity to exercise the right to paid annual leave throughout his engagement with the respondent. The respondent could not discharge the relevant burden. The right did not therefore lapse but carried over and accumulated until termination of the contract, at which point Mr Smith was and remains entitled to a payment in respect of the unpaid leave.

104. However, for the reasons I have given, the tribunals below did not err in holding that Mr Smith did not plead a claim, either, for payment in respect of the paid leave to which he was entitled during his employment but which he did not take, or for a remedy under regulation 14 of the WTR on termination.

**Lady Justice Elisabeth Laing**

105. I agree.

**Lady Justice King**

106. I also agree.