AN IER BRIEFING

The Social Right to Paid Annual Leave: Sick Workers and Level of Pay

Published January 2012

Michael Ford, Old Square Chambers

The Institute of Employment Rights
4TH Floor
Jack Jones House
1 Islington
Liverpool
L3 8EG
0151 207 5265
www.ier.org.uk

The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER Briefing, kindly drafted by the expert named, reflects the authors' own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

Carolyn Jones
Director, Institute of Employment Rights
23 November 2012
cad@ier.org.uk
07941 076245

THE SOCIAL RIGHT TO PAID ANNUAL LEAVE: SICK WORKERS AND LEVEL OF PAY

MICHAEL FORD, OLD SQUARE CHAMBERS

Introduction

1. The social right to paid annual leave owes its origin to Article 7 of the Working Time Directive 93/104/EC, now in the Working Time Directive 2003/88/EC, implemented in UK law by the Working Time Regulations 1998 ("WTR"). This paper analyses (i) how the entitlement in Article 7 applies to workers who are or have been absent on sick leave, and how that translates into WTR; and (ii) what are the requirements of Article 7 as to the level of pay in respect of annual leave, and the interpretation of domestic law to achieve the result required by the Directive.

2. **Sick workers**. The Article has generated a considerable body of cases before the Court of Justice ("CJ"), in particular to how it applies to workers who are off sick. The meaning, scope and effect of that right in relation to sick workers was initially clarified by the Grand Chamber in Case C-520-06, ***Stringer v Revenue and Customs*** and C-350-06, ***Shultz-Hoff v Deutsche Rentenversicherung Bund*** (both reported at [2009] ICR) 932). That case in turn spawned other authorities: see Case C-277/08, ***Pereda v Madrid Movilidad*** [2009] IRLR 959; Case C-214/10, ***KHS AG v Schulte*** [2012] IRLR 156); Case C-282/10, ***Dominguez v Centre Informatique du Centre Ouest Atlantique*** [2012] IRLR 321; Case C-337/10, ***Neidel v Stadt Frankfurt am Main*** [2012] IRLR 607; and Case C-78/11 ***ANGED v FASGA*** [2012] IRLR 779. Whether those principles apply to workers absent from work for other reasons was considered in Case C-229/11 and C-230/11, ***Heimann v Kaiser GmBH***.

3. What those principles are, and how they are to be applied at domestic level, has gradually been clarified, most recently by the Court of Appeal in ***NHS Leeds v Larner*** [2012] IRLR 825. However, some issues still remain unclear. As Mummery LJ put it in ***Larner***:

> The unfolding law on paid annual leave is not in a completed state, which must be a great disappointment to those hooked on the hopeless quest for completeness.

4. **The level of pay**. In addition, another set of litigation has been set in train by the decision of the CJ in ***British Airways v Williams***, Case C-155/10 [2012] ICR 847. It concerns the level of payment during the period of annual leave, drawing on the earlier case on rolled-up holiday pay, ***Robinson-Steele v RD Retail Services Ltd*** [2006] ICR 932. The ruling in ***Williams*** has implications not only for workers in civil aviation, whose annual leave is governed by Clause 3 of the Aviation Agreement annexed to the Aviation Directive, 2000/79/EC (implemented by Civil Aviation (Working Time) Regulations 2004), but also for those workers whose annual leave is regulated by WTR.

5. **Basic principles**. It is trite law that domestic law in the field of an EU Directive must, so far as is possible, be interpreted to achieve the result sought by the Directive: see, for example, ***Pfeiffer*** [2005] ICR 1307 at paras 109-120. The duty is especially strong when the domestic measure is intended to implement a Directive, as is the case with WTR: see ***Pfeiffer*** at para 112. For their part, the domestic courts increasingly recognise an aggressive duty of interpretation in order to meet the requirements of a Directive, even if this means reading words into the domestic legislation: see ***Ghaidan v Godin-Mendoza*** [2004] 2 AC 560 and the lucid summary of the domestic authorities in ***EBR Attridge LLP v Coleman (No.2)*** [2010] ICR 242 at paras 11-14. The only limitation on this duty, according to ***Ghaidan***, is that the interpretation must not be inconsistent with a fundamental feature, the underlying thrust or the essential principles of the legislation.

6. It is likely that domestic courts will be able to interpret WTR so as to comply with the interpretation given by the CJ to Article 7. This is exemplified by ***Larner*** where the Court of Appeal was prepared to read words into regulations 13(9) and 14.[1] In the unlikely event that WTR cannot be interpreted to accord with the

[1] See to similar effect the decision of the Supreme Court in ***BA v Williams*** [2012] IRLR 1014 in the context of interpreting the Civil Action (Working Time) Regulations to provide the same level of paid annual leave as is required by the Aviation Directive 2000/79/EC. The Supreme Court rejected BA's argument based on the principle of legal certainty that an employment tribunal could not give a remedy based on average pay calculated over a representative period.

result required by Article 7 of the Directive, there remain other possible claims:

(1) It is now established that Article 7 is directly effective: see ***Dominguez*** above, effectively reversing the Court of Appeal in ***Gibson v East Riding*** [2000] ICR 390. ***Gibson*** is one in a series of Court of Appeal decisions which were wrong on annual leave;[2] it is interesting to consider the reasons for this. However, a Directive is only directly effective against an emanation of the state, and not a private employer.[3] Nonetheless the conception of the state is a broad one,[4] so that a worker may enforce Article 7 against employers such as, for example, NHS trusts, local authorities, police authorities and most kinds of school. Note that the trend of the CJ is to treat interpretation as the primary course of action for a domestic court, with direct effect only necessary in the event that interpretation cannot achieve the required result.

(2) Where direct effect is not available, a ***Francovich*** action may be brought against the state.

The Directive and WTR

7. **Background to the Directive**. The Directive was introduced as a health and safety measure under former Article 118A of the Treaty (now Article 153), and lays down "*minimum safety and health requirements for the organisation of working time*".[5] It deals shortly with the question of annual leave, providing as follows:

Article 7 - Annual leave

---

[2] Examples of cases where the Court of Appeal refused or declined to refer a question to the CJ but its confident analysis proved to be completely wrong include: ***Caulfield*** (rolled up holiday pay did not infringe Article 7; cf. ***Robinson-Steele*** [2006] ICR 932, CJ); ***Gibson v East Riding*** [2000] IRLR 598 (Article 7 not directly effective; cf. ***Dominguez***); ***Stringer*** [2005] ICR 1149 (sick worker not entitled to take annual leave; cf. CJ); ***Williams*** [2009] ICR 906 (no prescribed level of pay for annual leave; cf. ECJ).To those can probably be added ***Bamsey***, which is probably inconsistent with ***Williams***, CJ.

[3] See ***Marshall*** [1986] QB 401, ***Pfeiffer***. The CJ has not yet decided whether the right in Article 7 has the status of a fundamental right , like the right not to he discriminated against (see ***Kükükdeveci***), which therefore has horizontal effect against private sector bodies: see the discussion of AG Trstenjak on the point in ***Dominguez.***

[4] See ***Foster v British Gas*** [1991] ICR 84.

[5] Health and safety in this context has been defined broadly, as meaning a "*state of complete physical, mental and social well being that does not consist only in the absence of illness or infirmity*": see ***United Kingdom of Great Britain v Council of the European Union***, Case C-84/94, [1996] ECR I-5755 at para 15.

(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.....

The reference to "*in accordance with conditions for entitlement to, and granting of such leave laid, down by national legislation and/or practice*" was given a narrow interpretation in ***BECTU*** limited, according to the AG, to the procedural aspects of taking leave and not allowing restrictions as to the entitlement itself.[6]

8. Article 7 gives effect to numerous international human rights instruments referring to the right to paid annual leave. See in particular:

(1) Article 24 of the United Nations' Universal Declaration of Human Rights of 1948 says that everyone has the right to "*reasonable limitation on working hours and periodic holidays with pay*".[7]

(2) By Article 2(3) of the European Social Charter of 1961, ratified by the UK, the contracting parties undertook "*to provide for a minimum of two weeks annual holiday with pay*". The revised Social Charter of 1996, which the UK has signed but not ratified and which is referred to in the preamble to the Lisbon Treaty, refers to a minimum of four weeks' annual holiday with pay.

(3) The Community Charter of the Fundamental Social Rights of Workers says in paragraph 8 that every worker has the right to "*annual paid leave, the duration of which must be harmonised in accordance with national practices*".[8]

(4) The Community Charter of Fundamental Rights of the European Union,

[6] See AG at paragraph 34, ECJ at paragraph 65.

[7] See too the UN International Covenant on Economic, Social and Cultural Rights of 1966, referring to a right to periodic holidays with pay and remuneration for public holidays (Article 7).

[8] It was expressly referred to in the preamble to the original Working Time Directive.

signed at Nice in 2000 and which now has the same value as the Treaty, also includes rights to working conditions which respect the worker's health, safety and dignity, and includes a right to annual paid leave.[9]

(5) ILO Convention No. 132 of 1970 says that all employed persons except seafarers[10] are entitled to annual paid holiday of a minimum length, which is no less than three working weeks after one year's service.[11] The Convention has not been ratified by the UK but has been by many other member states of the EU.

9. These human rights instruments are relevant to informing the interpretation of the Directive.[12] As a consequence, the CJ has repeatedly stressed the importance of the entitlement, repeatedly referring to it as "*a particularly important principle of Community social law from which there can be no derogations*" save as expressly permitted by the Directive.[13] Second, it is a right which must not be interpreted restrictively.[14]The ILO Convention is especially relevant. As well as being the most detailed of the international instruments, recital (6) to the Directive expressly states that account "*shall be taken of the principles of the International Labour Organisation with regard to the organisation of working time*". The Court has repeatedly taken account of ILO Convention C-132, in interpreting Article 7: see e.g. ***Schultz-Hoff*** at paras 37-38; ***Schulte*** at paras 41-42; see too the AG in ***Williams*** at para 50.

10. There are similar rights to annual leave applying to workers who originally fell outside the scope of the Working Time Directive, such as workers in the transport sector and those at sea:[15] see e.g. the Working Time of Seafarers Directive 1999/63/EC and the Aviation Directive 2000/79/EC, giving effect to the European Agreement on the Organisation of Working Time of Mobile Staff

---

[9] See Article 31.

[10] Who are governed by a separate convention, C 146.

[11] Article 3.

[12] See the AG in ***BECTU*** [2001] ICR 1152 at paras 23-28 and in ***Stringer*** at para 8.

[13] See the CJ in ***BECTU*** at paragraph 43 and ***Stringer*** at paragraph 22.

[14] See e.g. ***Land Tirols*** [2010] IRLR 631 at para 29; ***ANGED*** at para 18.

[15] See the original Article 1(3) to Directive 93/104/EC, since amended by Directive 2000/34/EC. The 2000/34 Directive brought transport workers under the umbrella of the Working Time Directive but at the same time permitted more specific community requirements for certain occupations: see Article 14 of the Working Time Directive.

in Civil Aviation. Clause 3 of the Agreement annexed to the Aviation Directive adopts, for example, almost identical wording to Article 7 of the Working Time Directive, stating that "*Mobile staff in civil aviation are 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*". Despite the different sources of the rights, the standards of annual leave are the same.[16]

11. Community law also confers rights to other kinds of leave from work. The right to maternity leave, for example, is conferred by Article 8 of the Pregnant Workers Directive 92/85/EEC, and clause 2.1 of the Framework Agreement on Parental Leave, Directive 96/34/EC, grants "*men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months*".[17] These rights serve different purposes and may not necessarily be interpreted in the same way as rights to annual leave under working time instruments.

12. **Domestic law - background.** There is no implied contractual right to take e.g. bank holidays.[18] Nor is there any automatic right to compensation for untaken holiday on termination of employment, the entitlement to which depends on the existence of an express or implied term to that effect: see ***Morley v Heritage*** [1993] IRLR 400.

13. The provisions in WTR, including those governing annual leave, apply to workers and not simply employees. Tracking the approach of the Directives, some sectors are governed by more specific regulations, such as the Civil Aviation (Working Time) Regulations 2004, the Merchant Shipping (Hours of Work) Regulations 2002, the Fishing Vessels (Working Time: Sea Fishermen) Regulations 2004, the Merchant Shipping (Inland Waterways) Regulations 2003 and the Road Transport (Working Time) Regulations 2005. Unhelpfully, these regulations are not always identical - see e.g. the different rules on how pay is calculated and the different remedies provisions.

14. Implementing the basic right in Article 7(1) of the Directive, regulation 13(1)

---

[16] See Case C-155/10, ***Williams v British Airways***,[2012] ICR 847 .

[17] See clause 2.1 of the Framework Agreement on Parental Leave.

[18] See ***Campbell and Smith Construction v Greenwood*** [2001] IRLR 588 (announcement of additional bank holiday on 31 December 1999 had no effect on workers' holiday entitlement). Cf. the *obiter* comments in ***Tucker v British Leyland*** [1978] IRLR 493 (County Court).

WTR states that "*Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year*".[19]The entitlement under regulation 13 is not subject to any exceptions. By regulation 13(9) leave "*may only be taken in the leave year in respect of which it is due*" and it may not be replaced by a payment in lieu except on termination of employment.

15. Lengthy consultation took place on the DTI's proposals to increase the holiday entitlement by giving a period of "additional leave". The Working Time (Amendment) Regulations 2007[20] inserted a new regulation 13A in WTR, giving a worker a right to 0.8 weeks additional leave from 1 October 2007 and to 1.6 weeks from 1 April 2009.[21] The entitlement does not apply to an employer who already provided, as at 1st October 2007, by virtue of a "relevant agreement" *each* worker employed by it with an annual leave entitlement of 1.6 weeks or eight days.[22] The problems of applying such a test retrospectively many years after 2007 appear to have been overlooked. Regulation 13A(7) says that a "*relevant agreement*" may provide for the leave due under regulation 13A "*to be carried forward into the leave year immediately following the leave year in which it is due*". The same restricted carry-over is permissible if the right arises by contract under regulation 26A.[23]

16. By virtue of regulation 16(1), a "*worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave*". For this purpose, a week's pay is calculated by reference to ss 221 to 224 of ERA (regulation 16(2)-(3)), the general provisions for calculating a week's pay for the whole gamut of statutory employment rights including e.g. redundancy payments and unfair dismissal basic awards.[24] There is no maximum applicable to payment for annual leave.[25] The provisions are complicated, as the Court of Appeal acknowledged in ***Bamsey v Albon***

---

[19] The former provisions, limiting the amount of leave in leave years beginning before 23 November 1999, were revoked by the Working Time (Amendment) Regulations 2001.

[20] SI 2007 No.2079.

[21] See the DTI, *Increasing the Holiday Entitlement: A Further Consultation* (June 2007).

[22] See regulation 26A.

[23] See regulation 26A(2)(b).

[24] See on basic awards ***Wings Aeromedical Services v Alderson***, UKEAT/0411/07/ZT.

[25] See WTR regulation 16(3)(d) by which s.227 ERA, setting out the statutory maximum, is inapplicable.

Engineering & Manufacturing [2004] IRLR 457.[26] But the result is that the amount of a week's pay is not necessarily identical to the contractual rate for a week's pay, or the amount which would in fact have been paid during the week of leave if the employee were working, clearly illustrated by the result in ***Bamsey*** itself.[27]

17. The formula for a payment on termination is set out in regulation 14. For this purpose the entitlement includes leave due under regulations 13 and 13A.

Sick workers - the cases of the CJ on Article 7

18. ***Merino-Gomez*** [2005] ICR 1040, CJ, gave the first hint that workers off work on one form of leave were entitled to take annual leave at another time. The CJ ruled that a worker on maternity leave, which coincided with the general period of holiday fixed for the workforce, was entitled to take leave at another time, on her return. But in this case two social rights, each required by EU law, were at stake: the right in Article 7 of the Directive and the entitlement to 14 weeks' maternity leave conferred by Article 8 of the Pregnant Workers' Directive, 92/95.

19. The CJ went further in ***Stringer***. The workers fell into two categories: (i) Mrs Khan, who applied to take paid annual leave while on sick leave and had her request refused; (ii) Mr Ainsworth, Mr Kilic and Mr Thwaites[28] , each of whom was dismissed having been absent on sick leave throughout the leave year in which his employment was terminated. None of them had taken any annual leave in that leave year. The Revenue succeeded in the Court of Appeal, arguing that 'leave' meant leave from an obligation to work. Following the reference in the ***Schultz-Hoff***, the House of Lords referred questions to the CJ.

20. ***Schultz-Hoff*** was a reference from the Higher Labour Court in Düsseldorf. Mr Schultz-Hoff was absent on sick leave from September 2004 until termination of the employment relationship on 30 September 2005.[29] The leave year was the calendar year.[30] His request to take his annual leave for 2004 from 1 June 2005

---

[26] See Auld LJ paragraph 9.

[27] For example, overtime which the employee is required to work but which the employer is not obliged to provide does not count towards "normal working hours" under s.234 and so does not fall within the statutory formula if the employee has fixed pay for normal working hours: see ***Bamsey***.

[28] Except Mrs Stringer who took no part in the proceedings following the Court of Appeal.

[29] See AG at paras 10- 12, at 962.

[30] See CJ para 13.

was refused on the ground that he was unfit for work.[31] He claimed compensation on termination of his employment for his untaken leave in both 2004 and 2005.[32] Under German law, there was a restricted right to carry over untaken leave into the subsequent leave year but Mr Schultz-Hoff lost the right both to take annual leave for 2004 and to a payment in lieu as compensation within the first six months of the following calendar year.[33]

21. Considering both cases together, the CJ adopted a radically different starting position from the Court of Appeal. It rejected the argument that "leave" means leave from an obligation to work. A worker off sick was, it held, still a worker who retained the same entitlement as a fit worker to annual leave.[34] It was strongly influenced by ILO Convention C-132, which provides that periods of sick leave cannot count towards the minimum period of guaranteed annual lave, rather than focussing on the meaning of the word "leave".

    (1) Nevertheless, according to the CJ, sick leave and annual leave serve different purposes,[35] and member states have a discretion to lay down the circumstances in which workers may exercise the right.[36] Accordingly, a member state may provide that a worker is not entitled to take annual leave while on sick leave provided - and this is the sting in the tail - "*that the worker in question has the opportunity to exercise the right conferred by the Directive during another period*".[37] The point is underlined by the ruling in relation to ***Schultz-Hoff.*** While national law could provide that the right to annual leave was lost at the end of a leave year or carry-over period, according to the CJ this is only if the worker has actually had the

---

[31] See CJ para 12.

[32] See C J paras 11-13.

[33] The CJ at para 16 referred to a carry-over period of three months from the end of the leave year. But in fact the relevant collective agreement provided that, in the case of incapacity for work, annual leave had to be commenced six months after the end of the leave year: see para40 and footnote 12 to the AG's Opinion in ***Schulte***.

[34] This is clear not only from the result but also because the CJ noted the absence of any distinction in the Directive between workers off sick and those working, adding that the right to annual leave cannot be subject to a condition of actually working during the leave year: see paras 40-41.

[35] Para 25.

[36] Para 28.

[37] Para 29.

opportunity to exercise the right.[38] A worker who was not allowed to take annual leave while on sick leave was never had that opportunity, and so could not lose the right.

(2) On the other hand, *"nor does Directive 2003/88 preclude national legislation or practice which allow a worker on sick leave to take paid annual leave during that sick leave"*.[39] Thus it was permissible for UK law to allow a worker, such as Mrs Khan, to take annual leave while off sick. In this limited respect Article 7 goes beyond ILO Convention No.132.

(3) As to the allowance in lieu payable on termination for untaken leave, the CJ held that the entitlement to annual leave and the payment for it were both aspects of a single right. The purpose of the payment is to ensure that the worker is, financially, in a position comparable to that while he is working (which means he receives his normal remuneration).[40] On termination of employment, the allowance must ensure that the worker is in same position as he would have been in had he exercised the right to take leave while working.[41] In other words, he must receive compensation for the outstanding period of annual leave which he could not take owing to sickness.

22. On return of the cases to the House of Lords, the Revenue conceded the issues on WTR. No issue of interpretation arose in relation to Mrs Khan, who had served a regulation 15 notice, because she was still a "worker" for the purpose of taking annual leave. The other three claimants in ***Stringer*** were entitled to a payment on termination based on the formula in regulation 14,unaffected by sickness absence. No issue of carry-over from previous leave years arose in relation to the other workers, each of whom claimed only for the untaken leave in the leave year prior to termination.

23. Neither ***Stringer*** nor ***Schultz-Hoff*** considered the position of a worker who is unwilling to take annual leave, which arose in ***Pereda***. Mr Pereda had been

---

[38] Para 43.The same applies if a worker is sick for part of the leave year and his sickness is the reason why he cannot take annual leave in that leave year: see paras 50-52.

[39] Para 31.

[40] Paragraph 61. The meaning of normal remuneration has been clarified by the CJ in ***British Airways v Williams*** - it does not mean roughly comparable.

[41] Paragraph 61.

allocated leave for the period 16 July to 15 August 2007, and was off sick following an accident at work from 3 July 2007 until 13 August 2007.[42] His request to be allocated a new period of annual leave in the 2007 leave year was refused.[43] Emphasising again that a worker must actually be able to exercise the right to take annual leave and that sick leave and annual leave served different purposes, the CJ (which did not even require an Opinion of the AG) held that the worker was entitled to take annual leave at a period outside sickness leave, even if that fell outside the relevant leave year. It stated:

> 22. It follows...that a worker who is on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave.....
>
> 23. If [the interests of the undertaking] preclude acceptance of the worker's request for a new period of annual leave, the employer is obliged to grant the worker a different period of annual leave....without excluding in advance the possibility that that period may fall outside the reference period for annual leave in question.
>
> 25. Consequently, although Directive 2003/88 does not preclude national legislation or practice which allow a worker to take paid annual leave during that sick leave (*Schultz-Hoff*, paragraph 31), it follows from paragraph 22 of the present judgment that where the worker does not wish to take annual leave during a period of sick leave, annual leave must be granted to him for a different period.
>
> 26. In light of all the foregoing....Article 7 must be interpreted as precluding national provisions or collective which provide that a worker on sick leave arising during a period of annual leave scheduled in the annual leave planning schedule of the undertaking which employs him does not have the right, after his recovery, to take his annual leave at a time other than that originally scheduled, if necessary outside the corresponding reference period.

It follows that, even if it is permissible under Article 7 for a Member State to allow a worker to take annual leave while on sick leave, it must also permit the worker to take leave at another time if he or she is unwilling or unable to take annual leave owing to sickness. Note, too, that the need for a request arose in ***Pereda*** because otherwise the employer would not know that the worker wanted

[42] See ECJ paragraph 11.

[43] ECJ paragraph 13-14.

to take leave at a different time.

24. The fourth case on sick workers and Article 7 was Case C-214/10, ***KHS AG v Schulte***. Mr Schulte was absent owing to sickness from January 2002 until termination of his employment on 31 August 2008.[44] Under the relevant provisions of German law, leave which could not be taken because of illness was lost fifteen months after the end of the calendar year in which the entitlement arose.[45] Mr Schulte claimed his lost leave for the years 2006-2008. The Court accepted that because of his sickness Mr Schulte was denied the opportunity to benefit from his paid annual leave in 2006.[46] However, the purpose of the right to annual leave - to guarantee a period of rest from work and leisure - was only met if the carry over period did not exceed a "*certain temporal limit*".[47] As to that temporal limit, it must (i) be *"substantially longer than the reference period in respect of which it is granted*" (para 38) - that is, must be longer than the reference period of one year under German (and UK law) and (ii) must take account of Article 9(1) of ILO Convention No.132 (paras 41-42). In that light, a period of 15 months' carry over after the end of the relevant leave year was permissible under Article 7, even if that period is slightly shorter than the 18-month period referred to in Article 9 (1) (cf. ***Schultz-Hoff***, in which a carry over period of only six months from the end of the leave year was too short. [48]).

25. The next case to reach the CJ was ***Dominguez***. The relevant provisions of the *Code du travail* required a minimum period of one month of actual work in the reference year. Periods of sick leave only counted for this purpose if they were not more than one year and were the result of a work-related accident or occupational disease.[49] Ms Dominguez was absent sick for more than a year following an accident on a journey to work so that, the *Cour d'appel* found, she was not entitled to leave in respect of her period of absence on her return to work.[50] In light of ***Stringer***, ***Schultz-Hoff*** and ***Pereda***, it is hard to see why a reference was made at all, and the Court repeated again that the Directive made

---

[44] See CJ at para 15.

[45] See CJ paras 11-13.

[46] See CJ para 27.

[47] See CJ para 33.

[48] See C J at para 40 and AG at para 40 and footnote 12.

[49] See Article L-223-2 and L 223-4 cited at paras 7 and 8 of the judgment.

[50] See AG Trstenjak at paras 15-17.

no distinction between sick workers or other workers, so that the right to annual leave could not be made subject to a condition that a worker had actually worked in the reference period (para 20).

26. The case is of interest for two reasons.

(1) First, after giving a strong steer that interpretation of the *Code du Travail* could achieve this result,[51] the CJ also held that if it could not, Article 7 imposed a clear and precise obligation so that it was directly effective as against an emanation of the state: see paras 34, 38. ***Gibson*** and the comments by the SC in ***Williams*** [2010] IRLR 541 are therefore wrong.

(2) Second, the third question referred concerned the position if national law provided for annual leave exceeding the four weeks required by Article 7. The CJ agreed with Advocate General Trstenjak that Article 7 did not prohibit Member States laying down national rules in relation to annual leave which exceeded the minimum four-week period in Article 7.[52] It added at para 49:

> Thus it is permissible for Member States to provide that entitlement to paid annual leave under national law may vary according to the reason for the workers's absence provided that the entitlement is always equal to or exceeds the minimum period of four weeks laid down in Article 7 of that Directive.

This is, of course, principally relevant to the period of additional leave granted by regulation 13A.

27. Further clarification was provided in ***Neidel***, published after oral submissions in ***Larner***. Mr Neidel went off sick from 12 June 2007 until his employment terminated on retirement in August 2009 when he reached 60.[53] He was entitled to more than the four-week period of annual leave guaranteed by Article 7 of the Directive - over 30 days in each of the leave years 2007 to 2009.[54] Under the

---

[51] That is, by treating an accident on a journey to work as a work-related accident: see para 31.

[52] See para 47.

[53] Judgment paras 8, 14

[54] Judgment para 16.

Hessen Leave Regulation "Leave that has not been commenced within nine months after the end of the leave year shall be forfeited". Mr Neidel had not made any request to take annual leave. After citing the principles of ***Schultz-Hoff*** at paras 28-30 of its judgment, and holding that his retirement terminated his employment, the ECJ held that:

> Article 7(2) of Directive 2003/88 must be interpreted as meaning that a public servant is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness.

This reasoning undermined part of the argument for the employer in ***Larner***, that a worker needed to make a request to take annual leave before being paid compensation on termination of employment.

28. The fifth question in ***Neidel*** concerned whether the national rule providing for forfeiture of leave not taken within nine months after the end of the leave year was permissible.[55] Citing its ruling in ***KHS v Schulte***, the CJ again made clear that the carry-over period must be substantially longer than the reference period for taking annual leave.[56] Accordingly, the carry over period of nine months was not permissible under the Directive, because it was shorter than the one-year period for taking annual leave.[57]

29. The second, third and sixth questions in ***Neidel*** were treated together by the CJ because they all related to provisions of German law precluding a payment in lieu in respect of a period of leave additional to the minimum period of four weeks guaranteed by Article 7 where a worker had been unable use that additional entitlement because he was prevented from working by sickness.[58] The ECJ answered that Article 7 did not preclude:

> provisions of national law conferring on a public servant an entitlement to further paid leave in addition to the entitlement to a minimum paid annual leave of four weeks, which do not provide for the payment of an allowance in lieu if a public servant who is retiring has been unable to

[55] Judgment paras 12, 18.

[56] See para 41.

[57] See paras 42-3.

[58] See Judgment paras 33-37.

use that additional entitlement because he was prevented from working by sickness.[59]

30. Thus, a Member State can make different provision for the forfeiture of leave additional to the four-week entitlement in circumstances where a worker has been unable to take that leave owing to sickness. Parliament has made such provision in regulation 13A(7), by which a worker may carry forward his entitlement to the additional period of leave conferred by regulation 13A if a "relevant agreement"[60] so provides and then only into immediately following leave year.

31. In the next case, ***ANGED***, the relevant part of the Spanish Workers' Statute allowed workers to take annual leave at another time if it coincided with pregnancy-related reasons, breast-feeding, or other reasons related to child birth.[61] FASGA challenged the absence of a similar rule for workers affected by temporary incapacity for work. The CJ ruled, following ***Pereda***, that it was irrelevant at what point in time the incapacity arose, so that it was not necessary that a worker was already sick when annual leave commenced.[62] Consequently, national law must allow a worker who becomes unfit for work during annual leave to take that leave at another time, when he or she is fit for work.[63]

32. The last in the series, for now, is ***Heimann***. It did not involve workers off sick but was an attempt to read across the principles from the case-law into circumstances in which workers were placed on "zero hours" working as a result of financial difficulties rather than being dismissed. The purpose of the zero hours arrangement was to allow the workers to claim a financial allowance replacing their salary. The CJ declined to apply the principles on sick workers because of this "*fundamentally different*" situation. Specifically (i) the workers to rest or spend time on leisure activities during the period of short-time working and (ii) if the workers were given their full entitlement to paid annual leave, it would make the employer reluctant to agree to such a social plan. However, the workers were

[59] Judgment para 37.

[60] This is defined in regulation 2(1) so as to include provisions of a collective agreement forming part of a contract between the worker and his employer or "any other agreement in writing which is legally enforceable as between the worker and his employer".

[61] See para 7.

[62] See paras 20-22.

[63] See para 24.

comparable to part-time workers so that, following ***Land Tirols*** [2010] IRLR 631 their right to annual leave could be reduced proportionately to their working time, save in relation to an entitlement already accrued while working full-time.[64]

Applying the principles

33. The principles of the authorities in the CJ are increasingly clear. Their understanding and application at domestic level, at least prior to ***Larner***, proved problematic. For example, some tribunals held that a worker was only entitled to a payment in lieu on termination if he actually made a request to take holiday[65] - inconsistent with ***Pereda***. Some commentators interpreted the decision in ***Fraser v Southwest London St Georges MHT*** [2012] ICR 403 as meaning that a worker had to make a request to take annual leave while on sick leave if he was not to lose the entitlement on termination of employment - even though it makes no sense for a worker to request to take leave off sick when, according to ***Stringer***, ***Pereda*** and other cases, he has the right to take that leave at another time when not sick.

34. Many of these problems have been resolved by the decision in ***Larner***, in which Mummery LJ closely analysed the authorities of the CJ and set out the principles to be derived from them. However, some areas of doubt remain. In what follows, rather than set out the principles themselves, I give practical illustrations of how I think the interpretation of Article 7 set out in the CJ authorities applies to WTR. The usual disclaimer applies.

35. **(1) Worker on sick leave who asks to take holiday during sick leave**. If a worker on sick leave wishes to take annual leave at that time - perhaps because the rate of pay is higher for holiday than sick pay - he must serve a regulation 15 notice, just as any other worker must do. It seems clear that the employer must allow him to take that annual leave because (i) a sick worker remains a "worker" for the purpose of Article 7, and hence WTR; (ii) it is permissible for a member state to allow a worker to take annual leave while off sick (***Stringer***); (iii) there is no difficulty in construing regulation 13 WTR so as to allow a worker to take annual leave.

---

[64] See paras 34-35. Strictly, if the right is expressed in weeks of leave, there is no need for a proportionate reduction.

[65] See e.g. ***Khan v Martin Mcoll***, Exeter ET, 22.3.10; ***Souter v RCN***, Edinburgh ET, 13.9.10.

36. The position may be more complicated in relation to any leave additional to the four-week minimum guaranteed by Article 7. It seems that the rules here are a matter for a member state and are not affected by the case-law on Article 7: see ***Neidel*** paras 33-37. In that light. In summary:

(1) A tribunal must first consider whether the right to the additional period of leave arises by virtue of (i) regulation 13A or (ii) a relevant agreement (typically a contract of employment). This is because regulation 26A provides that no additional statutory leave arises under regulation 13A if, "as at 1st October 2007 and by virtue of a relevant agreement" an employer provides *each* of his workers with an additional period of 1.6 weeks or 8 days (whichever is the lesser) in addition to the minimum four-week entitlement.

(2) If the right to an additional period of leave arises by virtue of contract, then the issue is whether there is an express or implied contractual right to take annual leave while sick. interpreting the relevant rights against their background or implying terms in accordance with normal principles.

(3) In the event that the right to the additional period of leave arises by virtue of regulation 13A and not contract, it seems unlikely a tribunal or court would assign a different meaning to "worker" or "leave" in regulation 13A from that in regulation 13, even if strictly this is open to it. On that basis, a sick worker should be able to take additional leave due under regulation 13A in the same way as under regulation 13.

37. **(2) Worker falls sick before or during annual leave**. The position on the basic four-week entitlement is clear - the worker must be allowed to take the part of the leave which coincides with sickness at another time: see ***Pereda*** and ***ANGED***. It is not clear what evidence will be required to establish that the worker suffered from a temporary incapacity. Again, on her return, the worker must serve a regulation 15 notice to take leave, just like any other worker. Carry-over into a subsequent leave year may be necessary (see example (3) below)).

38. If the right to the additional entitlement arises under regulation 26A, in contract, then the question of whether annual leave is unused during a period of sickness falls to be determined by normal contractual rules. The approach a tribunal would adopt to taking the additional leave under regulation 13A is an open

question, and gives rise to some difficult issues (e.g. did the worker fall sick during the regulation 13 period of leave or the additional period?)

39. **(3) Worker off sick for all of leave year, returns to work and wishes to take untaken annual leave on return**. Suppose a worker is off sick for the whole of the 2011-12 leave year and takes no leave. She returns to work in the course of the 2012-13 leave year. She applies to take her unused annual leave for 2011-12. What is the position?

40. As to the four-week minimum period, under Article 7 the worker has the right to take annual leave at another time, when she is not sick, and if necessary beyond the leave year - see ***Schultz-Hoff***, ***Pereda***, ***ANGED***. Regulation 13(9) of WTR can be interpreted so as to allow carry-over in these circumstances: see ***Larner*** at para 90, adding the underlined words to regulation 13(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, <u>save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence could not exercise his right to annual leave</u>, and
>
> (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

41. As to the additional period of leave, in the event that the right to the additional period of leave arises by virtue of regulation 13A and not contract, then by virtue of regulation 13(A)(7) the tribunal must consider whether a "relevant agreement" provides for the carry forward of annual leave (whether untaken due to sickness or another reason) from a leave year prior to the year of termination. If the right to an additional period of leave arises by virtue of contract, then the tribunal must address whether carry forward was permissible under that contract.

42. **(4) Worker off sick for whole or part of leave year in which termination occurs and claims compensation in lieu on termination for that leave year**. The calculation under regulation 14 WTR must take place ignoring any periods of sickness - see ***Stringer***.

43. The same probably applies to the regulation 13A entitlement if it arises under WTR on the basis that it would be artificial to apply a different calculation under regulation 14. If the entitlement arises in contract, however, it all depends on whether there is an express or implied entitlement to a payment in lieu on termination: see ***Morley v Heritage*** [1993] IRLR 400.

44. **(5) Worker off sick for all of preceding leave year and takes no leave; dismissed in course of current leave year while still off sick**. This was precisely the case for Mrs Larner. She was off sick for the April 2009-March 2010 leave year. She was dismissed a short period into the 2010-11 leave year, on 8 April. She was only paid a payment in lieu for untaken leave in 2010-11, and not for the preceding year.

45. The answer is clear in relation to the basic four-week entitlement:

(1) If the worker is unable or unwilling to take leave because of sickness, then the untaken leave carries over into the following leave year under Article 7. The same applies to WTR: see ***Larner*** at para 90.

(2) The carry-over period must be substantially longer than the one-year reference period under UK law: see ***Schulte***.

(3) Regulation 14 WTR can be interpreted so as to ensure that the compensation reflects the lost annual leave for the preceding leave year: see ***Larner*** at para 91, reading the following into regulation 14:

> (5) Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under regulation 16 for the period of untaken leave.

(4) Note that (i) no payment in lieu can be made before termination, for this would be contrary to Article 7(2) and regulation 13(9); (ii) it is irrelevant that the worker made no request to take annual leave during employment for it is her right, *ex hypothesi*, to take leave at another time (***Larner*** para 88); (iii) it makes no difference whether the worker is unwilling or unable to take annual leave because of sickness; and (iv) the worker need not

make a request to carry over the untaken annual leave; and (v) consistent with the principle that the regulation 14 payments reflects accrual across time, the payment for the untaken leave in the previous leave year is not discounted as a function of how much of the current leave year has expired.

46. The position is probably different in relation to the period of additional leave in light of ***Neidel***, though these are uncharted waters. Here, carry-over will only occur into the subsequent leave year if a relevant agreement so provides: see regulation 13A(7) (or under a contractual provision if the right arises in contract). It is only in such circumstances, it seems, that the entitlement for the preceding year forms part of the entitlement in the succeeding year and therefore should be included in the regulation 14 calculation.

47. **(6) Worker off sick for most of leave year 1 in which took three weeks' leave; returns to work and is then dismissed in course of leave year 2**. This is a more difficult case. The essential question as regards the one-week outstanding from the basic four-week entitlement is whether the worker had the opportunity to take the one week's annual leave in leave year 1 or whether as a consequence of sickness he did not do so: see the suggested interpretation of regulation 13(9) in ***Larner***. This is presumably a factual issue. If the leave was untaken as a consequence of sickness then, following ***Schultz-Hoff***, ***Pereda*** and ***Larner***, the leave must have carried over into leave year 2 and therefore be compensated on termination in accordance with how Mummery LJ interpreted regulation 14 in ***Larner***. If the leave was not untaken because of sickness, it is lost at the end of leave year 1 under regulation 13(9).

48. For example, in ***Fraser*** , the leave year was April to March, Mrs Fraser went off sick in November 2005, was certified fit to work in November 2007 (although she did not return to work at that time because the trust could not find work for her[66]) and was eventually dismissed on 7 October 2008.[67] She claimed for untaken leave in the 2006-7 and 2007-8 leave years.[68] As Mummery LJ pointed out in

[66] See ***Fraser*** para 14.

[67] See paras 1 and 14.

[68] See para 19.

Larner,[69] Ms Fraser had about a year after her recovery from sickness in November 2007 in which to take annual leave. In those circumstances, the decision may be right, even if some of the reasoning seems inconsistent with ***Larner***.[70] For, even if her untaken leave for 2006-7 carried into the 2007-8 leave year, she had five months in that leave year (November-March) while not sick to take her annual leave. Assuming that sickness was not the reason why she did not use her untaken leave in the 2007-8 leave year, her leave would not carry over into the next leave year in accordance with the interpretation of regulation 13(9) in ***Larner***. Clearly, however, there will be difficult borderline cases here (and note the period of notice required under regulation 15 - twice the length of the period of leave).

49. The right to any payment in lieu for the additional period of leave is the same as in illustration (2).

50. **(7) Worker off sick for several years: how many years untaken leave may carry over, and so how much leave is due on return or how should payment on termination be calculated**? This equally gives rise to difficult issues, at least in relation to the basic four-week entitlement. There is no problem with the additional entitlement conferred by regulation 13(9) and/or contract. The national laws apply to this - see ***Neidel*** - and in either case a relevant agreement may provide for carry-over only into the "immediately following" leave year: see regulation 13A(7) or regulation 26A(1)(b).

51. As for the four-week period of leave required by Article 7, is clear that the carry-over period must be longer than the reference period to which it relates: see ***Schultz-Hoff*** and ***Schulte***. It must, therefore, be at least one year. On the other hand, as the CJ observed in ***Schulte***, an unlimited period of carry-over would mean that the purpose of annual leave - a period of rest - cases to apply.[71] Consequently, a carry-over period limited to fifteen months after the end of the

---

[69] At paras 46-47.

[70] Much of the decision focussed on whether the claimant had a right to be paid for untaken annual leave despite the absence of giving a regulation 15 notice as a matter of domestic law: see ground (6) of the appeal at para 22 and paras 23-30. The para dealing with ***Pereda*** (31)appears to assume that a request is necessary to defer leave to a later period, which is contrary to ***Larner***: see Mummery LJ at paras 81, 86. The EAT decision in ***Larner*** [2011] IRLR 894 was not cited to the EAT in ***Fraser.***

[71] See para 33.

relevant leave year was permissible under Article 7.[72]

52. The difficulty is how this translates into WTR. There are two competing arguments:

(1) According to the CJ, a member state may limit the period of carry over in national legislation and/or practice under Article 7, provided always that the period of carry over is longer than the reference period: see ***Schulte***. But if a Member State *fails* to restrict the temporal effect of carry over in national legislation or practice - as the United Kingdom government has failed to do in WTR - it can be argued that no such temporal restriction arises.[73] The current consultation by BIS seems to have stalled on this issue.[74]

(2) The alternative argument is that Article 7 itself requires some such temporal limitation. If so, it is probable possible to interpret WTR to prevent the indefinite carrying over of leave by adding words to the end of Mummery LJ's re-worded regulation 13(9) WTR - for example, by adding the qualification "(in which case the untaken leave entitlement may be carried forward into the two leave years immediately following the end of that leave year)".

53. In the event that argument (1) is accepted - and I think it is probably stronger than (2) - then the carry-over is indefinite. This means that the calculation under regulation 14 will have to include full compensation for untaken leave in all previous leave years. No limitation issue arises because (i) no payment in lieu could be made prior to termination so that (ii) the payment only should be made at around the point of termination of employment for the purpose of regulation 30(2)(a) WTR.

54. **(8) Workers in the boundary region**. We know, following ***Heimann***, that the

---

[72] The carry-over was in the collective agreement applicable to the metal and electrical industry : see judgment para 13.

[73] It should be noted in ***Larner*** the trust placed much emphasis on the need to read a temporal limitation into WTR. But the interpretation placed by Mummery LJ on regulation 13(9) contains no such restriction.

[74] See *Consultation on Modern Workplaces - (iii) Working Time Regulations*, May 2011.

principles applicable to sick workers cannot be read across to those who are kept on "zero hours" contracts. The same presumably applies to workers who are suspended: while they can take annual leave (because they are still workers), it is less clear that the principles applying to sick workers such as carry over, partly derived from ILO Convention No.132, can be stretched to their circumstances. What if a worker is only retained in employment to receive PHI benefits?[75] In none of the cases so far has the CJ suggested that it makes any difference that the employee has no prospect of recovery, and in some cases the sickness appears to have been prolonged with no prospect of recovery,[76] so that I think that the principles of the authorities beginning with ***Stringer*** apply.

55. **End note**. The above is not an exhaustive set of examples. It does not deal, for example, with the position of women on maternity leave who must be permitted to take annual leave at a period after the end of maternity leave.[77] The same applies to workers on paternity leave: see ***Land Tirol***.

The level of pay in respect of annual leave

56. The issue of the level of pay required in respect of annual leave has now been clarified by the CJ in Case C-55/10, ***British Airways v Williams***. BA paid pilots their basic pay in respect of annual leave but did not pay them other taxable supplements which they received if they were working (in particular flying pay supplement (FPS) and the taxable element of time away from base allowance (TAFB)). The issue arose whether the under-payment was a breach of the Civil Aviation (Working Time) Regulations 2004, which implement Clause 3 of the Aviation Agreement annexed to the Aviation Directive, 2000/79/EC. That Clause is worded in almost identical terms to Article 7 of the Working Time Directive. However, the implementing Regulations, unlike WTR, do not apply the statutory formula for a week's pay in ss 221-226 of ERA. Instead, they simply state in regulation 4 that civil aviation employees are entitled to "paid annual leave of at least four weeks" and are silent as to how you calculate pay.

57. The pilots' argument drew upon ***Robinson-Steele*** [2006] ICR 932, in which the

---

[75] See the implied term first recognised in ***Aspden v Webbs Poultry*** [1996] IRLR 521, meaning that in the absence of a good cause the employer may be prevented from dismissing the employee: see ***Briscoe v Lubrizol*** [2002] IRLR 607.

[76] See e.g. ***Schulte*** (heart attack leading to six years' absence).

[77] See ***Merino-Gomez***, above.

CJ said that during the period of annual leave *"remuneration must be maintained. In other words, workers must receive their normal remuneration for theat period of rest*". Similar comments were made in ***Stringer*** , with the AG saying that the worker has a right to payment of wages "*without any reduction*".[78] Finally, Article 7(1) of ILO Convention No.132, which has been repeatedly used by the CJ in interpreting the Working Time Directive, states that a worker "*shall receive in respect of the full period of that holiday at least his normal or average remuneration*" which suggests, again, that normal pay without deductions must be maintained in respect of annual leave. The history to the ILO Convention reinforced the argument that a collective bargain or contract could not set a lower standard.[79]

58. The Court of Appeal rejected the pilots' argument, ruling (i) that a member state was only required to "have regard to the principles of 'normality' and 'comparability' espoused by the ECJ" ; (ii) and that the pilots could not succeed unless they could demonstrate some'national law and/or practice' providing for the claimed level of their holiday pay.[80] The argument based on the ILO Convention was similarly rejected.[81] So, in the absence of any national rules as to the level of pay, one simply asked if pilots were paid during annual leave - which they were.

59. This reasoning is in marked contrast to the approach of the CJ, which held that payment during the four-week period of annual leave in both Article 7 and clause 3 of the Aviation Agreement must correspond with normal remuneration.[82] Starting from the premise that the right to annual leave is a fundamental social right, the AG Trstenjak paid much regard to the ILO Convention.[83] The CJ, which followed her approach , rejected BA's argument that it was sufficient if pay was broadly comparable to normal remuneration, or was at a sufficient level so as not to pose a risk that pilots would not take annual leave.[84] Nor was the amount of pay a matter for "national legislation and/or

---

[78] See paragraph 78.

[79] Cf. the earlier ILO Convention, 1936, which spoke of the level of pay being "usual remuneration" or remuneration determined by a collective agreement.

[80] See Rimer LJ at paras 58-59.

[81] See Rimer LJ at para 10.

[82] See paras 19-31.

[83] See e.g. AG at paras 50, 85; CJ at

[84] See BA's written observations for the CJ at para 41 and the CJ at para 21.

practice", so that there was no breach of the Directive if the pay during annual leave was set at the level of basic pay or as collectively agreed. AG Trstenjak, with whose opinion the CJ agreed, was explicit: "the level of holiday pay must correspond exactly to that of normal remuneration".[85] It was for the member state to determine whether elements of pay formed part of remuneration or were intended exclusively to cover expenses with, in the case of payments varying across time, the assessment of normal remuneration to be made on the basis of an average over a representative reference period.[86]

60. The Supreme Court later rejected BA's argument, based on the principles of legal certainty, that the Civil Aviation (Working Time) Regulations could not be interpreted to achieve this result in the absence of a formula, though it remitted to the tribunal the question whether TAFB was intended to be for expenses: see ***British Airways v Williams*** [2012] ICR 1375,

61. Here, too, one can see many implications of the ruling for the increasingly typical 'atypical' pay arrangements. A very substantial and growing body of workers now are paid supplements to their basic pay, often forming a very substantial part of their remuneration: see Kersley et al., *Inside the Workplace: Findings from the 2004 WERS*.[87] An employment tribunal has already referred questions to the CJ on whether it is compatible with Article 7 for a worker, paid mainly in commission, to receive commission earned on past sales while on annual leave but not to be paid anything in respect of commission he would have earned if at work during the period of annual leave: see ***Lock v British Gas Trading Limited.***[88] It is notable in ***Williams*** that the CJ did not talk of pay *during* annual leave corresponding to normal remuneration but, rather that remuneration "paid *in respect of* annual leave" (my emphasis) must correspond to normal remuneration, again echoing the wording of the ILO Convention.[89]

---

[85] Para 47.

[86] See paras 24-26.

[87] They found performance-related pay in 40% of workplaces and profit-related pay or bonuses in 37% of private sector bonuses. See too Graham, *Composition of Pay* (Labour Market Trends, August 2003): one in seven employees received incentive pay, contributing an average of 22% of gross pay.

[88] Leicester ET, reference of 16 August 2012.

[89] See para 21.

62. The issue to be explored in future is the extent to which the statutory scheme in ss 221-226 ERA can be interpreted to achieve the result required by ***Williams***. I think it many cases it probably can in light of the strength of the interpretative obligation, though it will need to be tested in the circumstance of each claim. See, for example, the ingenious argument of construction of regulation 16 WTR run by the workers ***Bamsey***, to the effect that "normal working hours" should mean the hours in fact normally worked by a worker (so including compulsory overtime which workers normally work) and should be interpreted without reference to the specific, and odd, definition in s.234 ERA (which is not referred to in regulation 16 WTR). Though this argument was rejected by the CA, it was on the premise we now know to be mistaken that Article 7 did not lay down any rules as to the level of holiday pay; and it appears to be a possible interpretation. In other cases it may be possible to interpret the statutory scheme so as to place claims within one of the averaging provisions in s.221(3) or s.224 and thus to achieve the same result, even if this requires departing from the existing case-law. There are currently many claims in various employment tribunals across the country which will test these difficult questions.

MICHAEL FORD
OLD SQUARE CHAMBERS