

Paid Annual Leave in the United Kingdom: The Problem of Holiday Pay

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A requirement for employers to allow their workers to take leave, and continue to pay them while on such leave, is not a new or difficult concept but it is one which continues to trouble employers, workers and the courts in the United Kingdom.

In order to explore the scale of problem, this article first reviews international and European obligations involving paid leave and the approach taken to them the United Kingdom. It then considers in particular the provisions of the Working Time Regulations,¹ which implement the Working Time Directive,² in the light of recent

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¹ The Working Time Regulations 1988, SI 1998/1833, amended by the Working Time Regulations 1999, SI 1998/3372, the Working Time (Amendment) Regulations 2001, SI 2001/3256, the Working Time (Amendment) Regulations 2002, SI 2002/3128, the Working Time (Amendment) Regulations 2003, SI 2003/1684, the Working Time Regulations 1998 (Amendment) Regulations 2004, SI 2004/2516, and The Working Time Regulations 1998 (Amendment) Order 2005, SI 2005/2241. This article will refer to these as the “Working Time Regulations” or simply the “Regulations”. In Northern Ireland, the provisions are contained in the Working Time Regulations (Northern Ireland) 1998, SR 1998/386, as amended by the Working Time (Amendment) Regulations (Northern Ireland) 1998, SR 1998/422, the Working Time (Amendment) Regulations (Northern Ireland) 1999, SR 1999/133, the Working Time (Amendment) Regulations (Northern Ireland) 2000, SR 2000/7, the Working Time (Amendment) Regulations (Northern Ireland) 2002, SR 2002/93, the Working Time (Amendment) Regulations (Northern Ireland) 2003, SR 2003/119 and the Working Time (Amendment No. 2) Regulations (Northern Ireland) 2003, SR 2003/330. This article will focus on the process in England and Wales and Scotland.

cases before United Kingdom employment tribunals and courts, in particular the references to the European Court of Justice in *Robinson-Steele v RD Retail Services*³ and *Clarke v Frank Staddon/Caulfield v Marshalls Clay Products*⁴ relating to rolled up holiday pay. Finally, it seeks to draw some conclusions as to how the requirement to give paid leave will operate in the United Kingdom in the future and whether any changes to the system would be desirable.

International obligations

Over the years there has been a reluctance in the United Kingdom to take on international obligations regarding paid leave for workers. Even where the United

² Directive 2003/88 concerning certain aspects of the organisation of working time [2003] OJ L299/9. This replaced the original Working Time Directive, Directive 93/104 [1993] OJ L307/18, as amended by Directive 2000/34 [2000] OJ L195/41 and Directive 2002/15 [2002] OJ L80/35 and as supplemented by Directive 2000/79 [2000] OJ L302/57. In general, this article will use the “Working Time Directive” or simply the “Directive” to refer to both; where necessary to distinguish, Directive 93/104 will be referred to as the “1993 Directive” and Directive 2003/88 as the “2003 Directive”.

³ Reference of 9 March 2004 by the Leeds Employment Tribunal as Case C-131/04 [2004] OJ C106/37.

⁴ This arose from a number of Employment Tribunal decisions: *Pearce v Huw Howatson* (11 October 2001), *Clarke v Frank Staddon* (15 April 2002), *Sutton v Potting Construction* (12 July 2002), *Caulfield v Marshalls Clay Products* (12 December 2002) and *Hoy v Hanlin Construction* (26 March 2003). These were joined for the appeal to the EAT which handed down judgment on 24 July 2003 [2004] ICR 436, [2004] IRLR 552. Two of them, *Clarke* and *Caulfield*, were further appealed to the Court of Appeal, which handed down judgment on 28 April 2004 [2004] EWCA Civ 422, [2004] ICR 1502, [2004] IRLR 564 and on 15 June 2004 referred four questions to the ECJ as Case C-257/04 [2004] OJ C217/13.

Kingdom has ratified treaties containing such obligations these have typically not been implemented by legislation but rather left to individual and collective bargaining.

In 1936 the International Labour Organization (ILO) Holidays with Pay Convention required a minimum of six days annual leave, but this was not ratified by the United Kingdom. Nor was its successor in 1970, which increased this minimum to three weeks.⁵

However, the United Kingdom did sign up to Article 24 of the Universal Declaration of Human Rights, which was adopted in 1948 and states that 'Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. The United Kingdom was one of the eight countries on the drafting committee and one of the 48 which voted in favour of it.

In 1962 the United Kingdom ratified the European Social Charter of the Council of Europe, which entered into force in 1965.⁶ Article 2(2) requires public holidays with pay and Article 2(3) requires a minimum of two weeks' annual paid holiday. However, the European Committee on Social Rights has queried whether the United Kingdom is in compliance with its obligations under the Charter⁷ and the United

⁵ Conventions Nos. 52 and 132 respectively. Although the United Kingdom did ratify the Holidays with Pay (Agriculture) Convention (No.101) of 1952 in 1956, this did not specify a minimum duration for annual leave and was later renounced by the United Kingdom in 1994.

⁶ European Social Charter, ETS 35 signed in Turin on 18 October 1961.

⁷ The Committee determined in 1973 that the United Kingdom was in compliance with both Articles 2(2) and 2(3). However, in its 1994 Conclusions (covering the period 1990-1991) the Committee

Kingdom has not ratified the revised Charter of 1996 which extends the minimum annual paid holiday to four weeks.⁸

In 1966 the International Covenant on Economic, Social and Cultural Rights was adopted. Article 7 of the Covenant states that ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular...(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’. The Covenant was ratified by the United Kingdom in 1976, just after it entered into force, and although the United Kingdom made reservations to various Articles it did not do so in relation to Article 7(d).

Despite these international obligations, domestic legislation which provided for paid leave, such as the Factories Act 1961, was not of wide scope and much of it was

queried whether the United Kingdom was actually in compliance with Article 2(3) in relation to those in atypical employment, such as fixed-term contracts, casual short-term work, part-time work or home-based work. In its 1999 Conclusions (covering the period 1992-1996) the Committee referred to the 1992 Labour Survey Report, which indicated that 10% of the working population in the United Kingdom did not benefit from annual paid leave. The Committee therefore deferred its conclusion, seeking more information from the United Kingdom in relation to the paid leave rights of such workers, together with the position where workers fell ill during their leave. This information had still not been provided by the time of the Committee’s 2003 Conclusions (referring to the period 1997-2000) and the question of the United Kingdom’s compliance remains outstanding.

⁸ Revised European Social Charter, ETS 163 signed in Strasbourg on 3 May 1996.

subsequently repealed.⁹ The United Kingdom did not implement a general statutory right to paid leave until it was obliged to do so by the Working Time Directive.

European Community obligations

In 1973 the European Commission submitted a Social Action Programme to the European Council. Among other things, the Commission asked the Council to fix four weeks' paid annual holiday as an immediate objective to be achieved by 1976.¹⁰ This was approved by the Council¹¹ and in 1975 the Council recommended that the Member States implement four weeks annual paid holiday by the end of 1978.¹²

The Commission then produced a draft Council recommendation on the reduction and reorganisation of working time in 1983.¹³ This draft was considered by the European Parliament¹⁴ and by the Economic and Social Committee.¹⁵ However, in June 1984 the Council acknowledged that it was unable to reach unanimous agreement as the United Kingdom 'had serious doubts as to whether a reduction in working time could

⁹ For a more detailed review of the situation in the United Kingdom prior to the entry into force of the Working Time Regulations see (1996) 544 IRLB 2.

¹⁰ Social action programme COM (73) 1600.

¹¹ Council Resolution of 21 January 1974 concerning a social action programme [1974] OJ C13/1.

¹² Council Recommendation 75/457/EEC of 22 July 1975 on the principle of the 40-hour week and the principle of four weeks' annual paid holiday [1975] OJ L199/32.

¹³ COM (83) 543 [1983] OJ C290/4.

¹⁴ [1983] OJ C342/145.

¹⁵ [1984] OJ C23/54 .

improve the employment situation'.¹⁶ The draft recommendation was recognised as obsolete in 1995¹⁷ and was formally withdrawn in 2004.¹⁸

Meanwhile, in 1988 the Commission asked the Economic and Social Committee to debate and appraise possible components of a Community Charter of Basic Social Rights. The Committee gave its Opinion in early 1989.¹⁹ This Opinion listed the 'basic social principles and rights which should be guaranteed by all Member States', among which the Committee listed the right to annual leave (referring to ILO Convention 132, the European Social Charter and the UN's International Covenant on Economic, Social and Cultural Rights).

This Opinion was followed by a Resolution of the European Parliament in March 1989²⁰ and then a draft Community Charter of Fundamental Social Rights from the Commission in May 1989.²¹ Point 13 of this draft stated that 'Every worker residing in the European Community shall have a right to annual paid leave'.

After further discussion in the European Council in June 1989, where the draft was generally accepted by all Member States except the United Kingdom,²² an amended draft was presented by the Commission in September 1989, with point 11 again

¹⁶ Commission Response to Written Question E-1073/95 by Michel Rocard [1995] OJ C257/18.

¹⁷ Commission Response to Written Question E-1072/95 by Michel Rocard [1995] OJ C230/24.

¹⁸ [2004] OJ C5/2, 3.

¹⁹ [1989] OJ C126/4.

²⁰ [1989] OJ C96/61.

²¹ COM (89) 248.

²² Bull. EC 6-1989, points 1.1.8 and 1.1.14.

reading ‘Every worker residing in the European Community shall have a right to annual paid leave’.²³

This draft was amended by the Council in October 1989 and was then debated by the European Parliament in November 1989.²⁴ The European Parliament passed a number of Resolutions, among other things complaining that the draft had been weakened by new references to ‘national practices’.²⁵ Nevertheless, the Charter was adopted as a ‘solemn declaration’ by all EC Member States except the United Kingdom in December 1989 as ‘The Community Charter of the Fundamental Social Rights of Workers’.²⁶ Point 8 of the Charter as adopted states that ‘Every worker in the European Community shall have a right ...to annual paid leave, the duration of which must be progressively harmonized in accordance with national practice.’

However, even this watered-down Charter was not a Community instrument. In order to implement it through the Community institutions, it was necessary to find a suitable legal basis which did not require unanimous agreement in the Council (and so avoided the United Kingdom veto). One possibility was Article 118a of the Rome Treaty²⁷ permitted the adoption of Directives to harmonise conditions in the area of the health and safety of workers so long as they maintained improvements already made in this area. Directives under Article 118a required adoption under Article 189c of the

²³ COM (89) 471.

²⁴ [1989] OJ C323/44.

²⁵ *Ibid.* at p45, Resolution on the Community Charter of Fundamental Social Rights, point 4.

²⁶ Luxembourg, Office for Official Publications of the European Communities, 1990 (not published in the Official Journal). The Council proceedings are described in Bull. EC 12-1989, point 1.1.10.

²⁷ This legislative power is now contained in Article 137.

Treaty,²⁸ which demanded only a qualified majority in the Council so long as the legislation was approved by Parliament. However, in part due to the limited scope of Article 118a, the Social Protocol to the Maastricht Treaty was signed in 1992.²⁹ This allowed the eleven Member States which had signed the Charter to implement it through the institutions of the European Community, without having to limit such legislation to health and safety measures under Article 118a.

Nevertheless, in November 1989, while the Charter was being finalised, the Commission produced an action programme to implement it³⁰ This programme included a proposal to revive its 1983 recommendation and produce a Directive for the adaptation of working time, including setting down minimum requirements for holidays, which Parliament then requested be done by the end of 1990.³¹ The Commission beat this deadline and in September 1990 produced a draft Directive, based on Article 118a, Article 5 of which stated that ‘Member States shall adopt the necessary measures to ensure that all workers are afforded an annual paid holiday for a minimum period; the procedures relating to duration and any splitting shall be determined in accordance with national practices.’³²

The proposal on annual leave was criticised as vague by the Economic and Social Committee in its opinion of December 1990, referring to the Council’s 1974

²⁸ This is now Article 252, although health and safety legislation under Article 137 must now be adopted under Article 251

²⁹ [1992] OJ C224/1, 126.

³⁰ COM (89) 568.

³¹ [1990] OJ C260/167, 172, paragraph 39.

³² COM (90) 317 [1990] OJ C254/4.

recommendation of four weeks.³³ The European Parliament then introduced the requirement of four weeks' annual leave to the proposal in its first reading in February 1991.³⁴ This was accepted by the Commission and made its way into an amended proposal in April 1991.³⁵

However, the Directive was then delayed in the Council, which did not produce a common position until June 1993.³⁶ This common position was approved by the European Parliament in October 1993, subject to 19 proposed amendments.³⁷ For present purposes, the most important of these was the introduction of a requirement that Member States 'ensure that an appropriate inspection system exists to monitor the application of the provisions of this Directive'. These proposed amendments were examined by the Commission, which on 16 November 1993 adopted a third draft of the proposal.³⁸ In relation to inspection systems, the Commission noted that it had rejected a similar proposal from the Parliament after its first reading and that '[t]here is a general obligation on Member States to ensure that Directives are correctly applied'. Finally, the Directive was adopted on 23 November 1993, with the United Kingdom abstaining from the vote.³⁹

³³ Opinion of 18 December 1990 [1991] OJ C60/26, 29.

³⁴ [1991] OJ C72/86, 89.

³⁵ COM(91)130 final [1991] OJ C124/8, Art 5.

³⁶ Council Document 7253/2/93 and ADD 1.

³⁷ [1993] OJ C315/125.

³⁸ COM (93) 578.

³⁹ n 2 above.

Four months later, the United Kingdom proceeded to challenge the Directive before the European Court of Justice (ECJ), primarily on the basis that it should not have been adopted under Article 118a. However, the challenge was rejected by the ECJ in November 1996.⁴⁰ The only part of the Directive which was annulled was the requirement in Article 5 that a worker's minimum weekly rest period should include Sunday.

Subsequently, with the change of government in 1997, the United Kingdom became rather more positive to social policy being agreed at a European level and accepted the Social Protocol to the Maastricht Treaty. Under the Treaty of Amsterdam in 1997 the provisions of the Protocol were therefore brought into the EC Treaty as the Social Chapter, new Articles 136 to 143.⁴¹ These included a new Article 142, which stated that 'Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.'

The right to paid leave is now also covered by Article 31(2) of the December 2000 Charter of Fundamental Rights of the European Union, which declares that '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'.⁴²

Finally, an updated Working Time Directive was adopted in November 2003.⁴³

⁴⁰ Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, [1997] IRLR 30.

⁴¹ [1997] OJ C340/1.

⁴² [2000] OJ C364/1.

⁴³ n 2 above.

Paid leave requirements of the Working Time Directive: Article 7

Under Article 7(1) of the Directive, ‘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’.

Under Article 18 of the 1993 Directive, this provision had to be fully implemented by Member States by 23 November 1999 and provision had to be made for three weeks’ paid leave by 23 November 1996.

United Kingdom implementation: Regulations 13 and 16

Despite losing its case before the ECJ in 1996, the United Kingdom did not implement the Directive until the adoption of the Working Time Regulations 1998, which entered into force on 1 October 1998.⁴⁴

The leave entitlement is laid down by Regulation 13(1), which now says that ‘a worker is entitled to four weeks’ annual leave in each leave year’.⁴⁵ This is subject to

⁴⁴ n 1 above.

⁴⁵ The Regulations initially gave an entitlement to three weeks’ paid leave for leave years beginning on or before 23 November 1998. This period rose to four weeks from 23 November 1999, with transitional provisions covering leave years which started between those dates.

Regulation 13(5), under which a worker's entitlement is reduced proportionately where the worker starts employment in the course of a leave year.

Entitlement to payment for leave is covered by Regulation 16(1), which states that '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.' Under Regulation 16(4), the right 'does not affect any right of a worker to remuneration under his contract', but under Regulation 16(5) 'any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period'.

It is not possible to reduce these rights by contract. Regulation 35(1) states that 'any provision in an agreement (whether a contract of employment or not) is void in so far as it purports (a) to exclude or limit the operation of these Regulations, save in so far as these Regulations provide for an agreement to have that effect'. The rights are therefore a statutory minimum, although it is possible for an employer to allow additional or better-compensated leave.

Most employees are entitled to written particulars of their terms and conditions of employment. Although not provided for in the Regulations, the particulars include holiday entitlement and holiday pay. These written particulars must be supplied

within two months of the employee starting work and any changes must be provided to the employee in writing within one month of the change.⁴⁶

Consequences of late implementation

Given that the Directive was implemented almost two years late by the United Kingdom Government, one of the first questions which arose was whether the Directive could be relied upon in the intervening period. The general position is that, once the deadline for implementation of a Directive has passed, the Directive can be relied upon if it is sufficiently clear and precise, but only against the Government or another State body (so-called vertical direct effect).⁴⁷

The possibility of vertical direct effect of the Directive was considered in *Gibson v East Riding of Yorkshire Council*, where the Court of Appeal overturned the Employment Appeal Tribunal and reinstated the employment tribunal's decision, holding that Article 7 was insufficiently precise in its scope to be directly effective, in

⁴⁶ Employment Rights Act 1996, ss1(1), 1(2), 1(4)(d) and 4. Where the employer fails to provide such statements, the employee can take his or her case to an employment tribunal under s11.

⁴⁷ For an overview of the concept of direct effect of Directives, see Weatherill & Beaumont, "EU Law" (3rd Ed, Penguin, 1999), pp 400-409. If a party cannot rely upon direct effect, the other possible remedy is to bring an action for damages against the Member States on the basis of Joined Cases C-6/90 and C-9/90 *Frankovich and Bonifaci v Italy* [1991] ECR I-5357, described in Weatherill & Beaumont at pp 423-432.

particular by failing to make clear the length of time for which a worker must work for an employer before becoming entitled to annual leave.⁴⁸

How is the obligation to give paid leave enforced?

Private enforcement by workers

Since October 2004, if a worker believes that his or her employer has refused to permit the worker to exercise his or her rights to annual leave, or has failed to pay the worker when leave is taken or for unused leave upon termination of employment, the worker must first begin statutory grievance procedures by submitting the grievance in writing to the employer.⁴⁹ This must be done at least 28 days before submitting a claim to an employment tribunal and within three months of date on which the employer is alleged to have refused to permit the worker to take annual leave or not paid the worker for leave taken.⁵⁰ The normal three month time limit for bringing a complaint before a tribunal will be extended to six months so long as the worker submits the written grievance within three months or, having made a complaint to an

⁴⁸ Decision of 23 July 1998 (ET) and Judgments of 3 February 1999 (EAT) [1999] ICR 622, [1999] IRLR 358 and 21 June 2000 (CA) [2000] ICR 890, [2000] IRLR 598.

⁴⁹ This appears to be the case even if the claim is linked to an unfair dismissal claim, where there is otherwise no need for a written grievance to be submitted: Employment Act 2002, Regulation 6(5). The statutory grievance procedure is set out in Schedule 2, Part 2 and this is implemented by the Employment Act 2002 (Dispute Resolution) Regulations 2004, SI 2004/752.

⁵⁰ Employment Act 2002, ss.32 (3) and 32(4).

employment tribunal within three months without having first followed the grievance procedure, submits a written grievance within four months of the relevant date.⁵¹

The aim of the grievance procedure is to try to resolve the matter without having to go to an employment tribunal. By way of incentive, if the employer fails to comply with the statutory grievance requirements, any damages awarded to the worker are likely to be increased by between 10 and 50%. Equally, if the worker submits a written grievance but fails to comply with the remaining requirements, any damages may be reduced by between 10 and 50%.⁵²

Assuming that the matter is not settled through the grievance procedure, the worker may then complain to an employment tribunal.⁵³ The Employment Tribunals Rules of Procedure provide for a thirteen week conciliation period before the hearing on the merits.⁵⁴ Conciliation, which is voluntary, takes place through the Advisory, Conciliation and Arbitration Service (ACAS).

If conciliation is unsuccessful and the employment tribunal finds in favour of the worker on the merits, the tribunal is required to make a declaration to that effect and may make an award of compensation to be paid by the employer to the worker.⁵⁵ The level of compensation is what the tribunal considers just and equitable in all the

⁵¹ Employment Act 2002 (Dispute Resolution) Regulations 2004, Regulations 15(1) and 15(3).

⁵² Employment Act 2002, s.31.

⁵³ Regulation 30(1)(a)(i) and 30(1)(b).

⁵⁴ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, Schedule 1, Rule 22.

⁵⁵ Regulation 30(3).

circumstances, having regard to the employer's default and any loss suffered by the worker.⁵⁶ Where the complaint relates to a failure to pay the worker, the tribunal is required to order that the employer pay the worker the amount found due.⁵⁷ Although compensation is typically the amount of holiday pay which should have been paid, the tribunal does have some discretion.

The decision of the employment tribunal can be appealed on any question of law to the Employment Appeal Tribunal.⁵⁸ Any appeal must be made within six weeks of the date on which the decision was sent to the parties.⁵⁹

With leave from the Employment Appeal Tribunal or the relevant appellate court, an appeal can then be made from the Employment Appeal Tribunal on a question of law to the Court of Appeal (in England and Wales) or the Inner House of the Court of Session (in Scotland).⁶⁰ Application to the Employment Appeal Tribunal for leave to appeal must be made at the time of judgment in England and Wales and within six weeks of judgment in Scotland.⁶¹

Finally, a further appeal lies to the House of Lords, again only with leave of the House of Lords or (in the case of England and Wales) the Court of Appeal.⁶²

⁵⁶ Regulation 30(4).

⁵⁷ Regulation 30(5).

⁵⁸ Employment Tribunals Act 1996, s.21.

⁵⁹ Practice Direction (Employment Appeal Tribunal – Procedure) 2004, para.3.

⁶⁰ Employment Tribunals Act 1996, s.37.

⁶¹ Practice Direction (Employment Appeal Tribunal – Procedure) 2004, para.21.

⁶² Administration of Justice (Appeals) Act 1934, s.1(1); Court of Session Act 1988, s.40(1)(b).

Limitation period and series of claims

The short limitation period for bringing claims is likely to have the effect of restricting the number of cases brought under the Regulations and this is compounded by the fact that there is no provision allowing workers to bring a claim for a series of failures to allow paid holiday.

By contrast, although any claim for an unauthorised deduction from wages under section 13 of the Employment Rights Act 1996 must be made within three months of the deduction, under section 23(3) of the Act time only runs from the last deduction if there have been a series of deductions. If the deduction also amounts to a breach of contract, the time limit is three months from the end of the contract.

In *List Design Group v Douglas and others*,⁶³ the Employment Appeal Tribunal accepted an ingenious argument to avoid the limitation, holding that holiday pay due under the Regulations falls within the definition of wages under section 27 of the Act and that failure to pay such holiday pay therefore constitutes an unauthorised deduction from wages under section 13. As a consequence, the workers were permitted to bring their claims under the Act for unpaid holiday pay over a two year period, even though the limitation period under the Regulations had already expired in relation to the earlier failures to pay.

⁶³ Judgment of 22 January 2002 (EAT) [2002] ICR 686, [2003] IRLR 14,.

The judgment in *List Design* was followed by both employment tribunal and the Employment Appeal Tribunal in *Canada Life v Gray*.⁶⁴ The Employment Appeal Tribunal held that, on both statutory construction and policy grounds, workers should be able to claim for all annual leave under s13 of the Employment Rights Act, regardless of whether it was actually taken or not, within three months of the last unlawful deduction.

List Design was also followed by the Scottish Employment Appeal Tribunal in *P J Carey (Contractors) v Greene and others*, which upheld the decision of the employment tribunal and indicated that it believed it was bound by the decision in *List Design*.⁶⁵

However, the question was subsequently considered by the Court of Appeal in *Commissioners of Inland Revenue v Ainsworth*.⁶⁶ Although in four of the cases under appeal the proceedings had been brought under the Regulations, one of the cases had been brought under the Act. The Court of Appeal pointed to section 205(2), which states that the remedy for any breach of s13 of the Act 'is by way of a complaint under section 23 and not otherwise' (Court's emphasis). Therefore, the Court held, if a claim for failure to pay holiday pay could be brought under the Act then it could not be brought under Regulation 30. To avoid that result, the Court concluded that *List Design* and *Canada Life* were wrongly decided and that claims could only be brought

⁶⁴ Decision of 16 May 2003 (ET) and Judgment of 13 January 2004 (EAT) [2004] ICR 673.

⁶⁵ Judgment of 17 November 2004 (EAT).

⁶⁶ Judgments of 4 February 2004 (EAT) and 22 April 2005 (CA) [2005] EWCA Civ 441, [2005] ICR 1149, [2005] IRLR 465.

under Regulation 30. The Court held that the Regulations post-dated the Act and were intended to provide an exclusive regime for their own enforcement. Leave to appeal to the House of Lords has been granted, and at least two cases before the Employment Appeal Tribunal, *Apex Masonry Contractors v Everitt*⁶⁷ and *Plumbing Services v Miller and Miller*,⁶⁸ have been stayed pending that judgment. **[TO UPDATE AT PROOFING]**

The consequence of the Court of Appeal's judgment in *Ainsworth* is to reduce the potential liability of employers who fail to implement their obligations to allow paid leave. While this does seem to be an accurate reflection of the legislation, which does not allow recovery for a series of failures to allow paid leave, it significantly reduces the scope for private enforcement of the legislation, as workers are unlikely to bring claims within the limitation period while still employed and are less likely to bring claims after termination of employment where the recovery is limited to three months (even if, where leave has not been taken in that leave year, that may amount to all or most of a year's leave). The policy basis behind this appears difficult to discern. Former workers are required to bring claims within three months of the termination of employment so that employers do not face the risk for an unduly long period, but this should not impact on the time period which such claims may cover, particularly given the difficulty of bringing a claim within the context of an ongoing employment relationship. Also, it appears strange that a worker who has taken leave without being

⁶⁷ Judgment of 9 February 2005 (EAT).

⁶⁸ *Plumbing Services v Miller and Miller*, Decision of 17 September 2004 (ET) and Judgment of 23 March 2005 (EAT).

paid more than three months before bringing a claim should be worse off than a worker who took no leave at all.

Detriment or dismissal for claiming holiday pay

A worker has the right not to be subjected to detriment by his or her employer on the ground that he or she refuses to forgo the right to annual paid leave or in good faith alleges that the employer has infringed the right or brings proceedings against the employer to enforce the right.⁶⁹ Moreover, a worker will automatically be regarded as unfairly dismissed if the principal reason for the dismissal was one of these actions.⁷⁰ In such cases the normal requirements for unfair dismissal protection, namely one year's service and being below retirement age, do not apply.⁷¹

In *Budzynska v Resource Management Holdings Ltd t/a Malla Technical Recruitment Consultancy*⁷² the employer, an employment agency, had originally told the worker that she would not receive holiday pay despite the coming into force of the Working Time Regulations. The worker raised a tribunal claim which was settled through ACAS with the employer increased the worker's hourly rate by eight per cent. As a result of this the employer was paying more for the worker than it was receiving from its client for her services, and as the client refused to increase the rate the employer terminated the contract. The worker raised a second tribunal claim, claiming that she

⁶⁹ Employment Rights Act 1996, s.45A.

⁷⁰ Employment Rights Act 1996, ss.101A and 104.

⁷¹ Employment Rights Act 1996, ss.108(3) and 109(2).

⁷² Decision of 22 February 2000 (ET) (2000) 663 IDS Brief 16.

had been dismissed by the employer for bringing proceedings to enforce a right under the Regulations. Adopting a “but for” test, the employment tribunal agreed with the worker, noting that the employer had not discussed with the worker a possible reduction in her hourly rate or employment elsewhere, and therefore found that the dismissal was unfair.

Administrative enforcement

Although certain provisions of the Regulations are enforced by the Health and Safety Executive, the Civil Aviation Authority, the Vehicle and Operator Services Agency and local authorities, with various criminal sanctions, this does not extend to the provisions on annual leave.⁷³

A Private Members’ Bill was brought before the House of Commons on 2 March 2005, proposing to extend the enforcement powers relating to the minimum wage to cover annual leave entitlements.⁷⁴ It proposed to give minimum wage compliance officers the same powers to enforce rights to paid leave and to extend criminal sanctions to such conduct. Anne Begg MP, who brought the Bill before the House of Commons, referred to various studies indicating that tens or hundreds of thousands of

⁷³ Regulations 28 and 29. The definition of “relevant requirements” does not include Regulations 13 or 16.

⁷⁴ Annual Leave Entitlement (Enforcement) Bill, Commons Bill 75 of the 2004-05 session. This Bill was introduced under Standing Order No. 23, also known as the Ten Minute Rule, which very rarely leads directly to the introduction of legislation but is used to make a point about the need for legislation in a particular area. See House of Commons Information Office “Factsheet L2: Private Members’ Bills Procedure” (September 2003).

workers in the United Kingdom are still not receiving a full four weeks of paid leave.⁷⁵ She observed that the workers most at risk of being denied paid leave were those who were denied the minimum wage and who would be most likely to be subject to detriment or dismissal if they raised a grievance. However, this Bill was dropped with the end of the Parliamentary session and at the time of writing had not been reintroduced.

Who is entitled to paid leave?

‘Worker’ is defined by Regulation 2(1) as ‘an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.’

In *Byrne Brothers (Formwork) v Baird*,⁷⁶ the Employment Appeal Tribunal held that, by virtue of Regulation 2(1)(b), the term ‘worker’ is intended to go further than the concept of an ‘employee’ who has a contract of service rather than a contract for

⁷⁵ Trades Union Congress “Closing the bank holidays loophole” (August 2002); National Association of Citizens Advice Bureaux “Still Wish You Were Here” (December 2004); BMRB Research “Department of Trade and Industry Employment Relations Research Series No. 31: A survey of workers’ experiences of the Working Time Regulations” (November 2004).

⁷⁶ Decision of 13 March 2001 (ET) and Judgment of 18 September 2001 (EAT) [2002] ICR 667, [2002] IRLR 96.

services. The Regulations ‘extend protection to workers who are, substantively and economically, in the same position’ and ‘whose degree of dependence is essentially the same as that of employees’ but do not cover ‘contractors who have a sufficiently arms’-length and independent position to be treated as being able to look after themselves in the relevant respects’. Possible factors would be ‘the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc.’ In this case, the Employment Appeal Tribunal upheld the employment tribunal’s finding that the carpenters and labourer in question were indeed workers.

The Employment Appeal Tribunal has subsequently had to examine this again in a stream of cases concerning joiners and carpenters,⁷⁷ bricklayers and labourers,⁷⁸

⁷⁷ *Torith v Flynn*, Judgment of 21 November 2002 (EAT), upholding the finding that the joiner was a worker; *Cavil v Barratt Homes*, Decision of 31 December 2002 (ET) and Judgment of 1 July 2003 (EAT), overturning the employment tribunal by holding that the joiner was a worker; *McCarthy v Blue Sword*, Decision of 7 January 2003 (ET), holding that the carpenters were workers.

⁷⁸ *Barlow and Nelson v PE Jones Contractors*, decisions of 7 June 2000 (ET) and 4 March 2002 (EAT), overturning the finding that the bricklayers were not workers and sending the case back to the employment tribunal; *Bryant v Britannia Developments*, Decision of 5 December 2001 (ET) and Judgment of 14 March 2003 (EAT), overturning the finding that the bricklayer was not a worker and sending the case back to the employment tribunal; *Frank Staddon v Dent and Williams*, n 4 above, upholding the finding that the bricklayers were workers; *Redrow Homes (Yorkshire) v Wright and Roberts*, Decisions of 26 February and 24 September 2002 (ET) and Judgments of 20 May 2003 (EAT) and 23 April 2004 (CA) [2004] EWCA Civ 469; [2004] ICR 1126; [2004] IRLR 720, upholding the findings that the bricklayers and labourer were workers; *RJ Prentice Brickwork v O’Brien*, Decision of 23 August 2002 (ET) and Judgment of 7 July 2003 (EAT), overturning the employment tribunal by

plumbers⁷⁹ and sub-postmasters and sub-postmistresses.⁸⁰ These cases confirm that, although the Regulations extend beyond the normal definition of “employee”, they do not cover self-employed people who are genuinely pursuing a business activity on their own account.

Exclusions of sectors

Under Article 1(3) of the 1993 Directive, which was implemented by Regulation 18, the Directive initially applied to all sectors except

- air, rail, road, sea, inland waterway, and lake transport
- sea fishing
- other work at sea
- the activities of doctors in training

In *Coleman and others v Eddie Stobart*,⁸¹ the workers were employed to unload coils of metal from lorries, deliver it to the production line of another company on the same

holding that the bricklayer was not a worker; *JNJ Bricklaying v Stacey and others*, Judgment of 8 July 2003 (EAT), upholding the finding that the bricklayers and labourers were workers; *Morris Homes (North) v Batty and Doyle*, Decision of 21 July 2003 (ET) and Judgment of 3 August 2004 (EAT), overturning the finding that the bricklayers were workers and sending the case back to the employment tribunal; *Bamford and others v Persimmon Homes NW*, Decision of 30 September 2003 (ET) and Judgment of 3 August 2004 (EAT), upholding the finding that the bricklayers were not workers.

⁷⁹ n 68 above, upholding the finding that the plumbers were workers.

⁸⁰ *Commissioners of Inland Revenue and others v Post Office*, Judgment of 18 December 2002 (EAT) [2003] ICR 546, [2003] IRLR 199, holding that they were not workers.

⁸¹ Decision of 11 October 1999 (ET) (2000) 663 IDS Brief 16.

site and then load the finished product onto lorries for distribution. They claimed that they were entitled to holiday pay under the Regulation but the employment tribunal held otherwise: as their employer's business was road transport and the workers' activities were an integral part of that activity, they were covered by Regulation 18 and so excluded from the right to holiday pay.

This decision was confirmed and extended in *Bowden and others v Tuffnells Parcels Express*,⁸² where the workers concerned worked for a parcel delivery service as clerical staff, receiving and sorting consignment notes and entering data from the notes into a computer. The employment tribunal held that the workers were indeed excluded, but on appeal the Employment Appeal Tribunal referred the case to the ECJ, asking whether all workers in the road transport sector were necessarily excluded from the Directive and suggesting possible ways in which the ECJ could avoid that result. The ECJ held that, on a proper construction of the Directive, all workers in the road transport sector were excluded from its scope, including clerical workers. However, the ECJ did distinguish 'air, rail, road, sea, inland waterway and lake transport', sectors which were excluded as a whole, from 'other work at sea' and the 'activities of doctors in training', where only those specific activities were excluded.

⁸² Judgments of 6 April 2000 (EAT) [2000] IRLR 560 and 4 October 2001 (ECJ) Case C-133/00 [2001] ECR I-7031, [2001] IRLR 838.

However, the provisions of Article 7 were extended to seafarers from June 2002 by an industry agreement⁸³ and the Directive was then extended to air, rail, road, sea, inland waterway and lake transport, sea fishing and other work at sea (excluding seafarers) from 1 August 2003 and to activities of junior doctors in training from 1 August 2004.⁸⁴ In relation to mobile staff in civil aviation, an industry agreement was then entered into under Article 14 of the Directive which replaced the Directive in this field from 1 December 2003.⁸⁵

Now, under the 2003 Directive, Article 1(3) reads as follows:

This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive.

This Directive shall not apply to seafarers, as defined in Directive 1999/63/EC without prejudice to Article 2(8) of this Directive.

⁸³ Directive 1999/63 [1999] OJ L167/33, implemented by the Merchant Shipping (Hours of Work) Regulations 2002, 2002/2125 (in force from 7 September 2002).

⁸⁴ Directive 2000/34/EC [2000] OJ L195/41 (the Horizontal Amending Directive), implemented by the Working Time (Amendment) Regulations 2003, SI 2003/1684 (in force from 1 August 2003 save as regards doctors in training, where the date was 1 August 2004); the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003, SI 2003/3049 (in force from 24 December 2003) and the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004, SI 2004/1713 (in force from 16 August 2004).

⁸⁵ Directive 2000/79 [2000] OJ L302/57, implemented by the Civil Aviation (Working Time) Regulations 2004, SI 2004/756 (in force from 13 April 2004).

There are therefore no longer any sectors which are excluded from the Working Time Directive, save seafarers who are covered by Directive 1999/63 and mobile workers in civil aviation who are covered by Directive 2000/79. Although derogations from aspects of the Directive for various sectors are permitted under Article 18, no derogations to Article 7 are permitted.

Certain sectors of workers are still excluded from Regulation 13 by Regulation 18, namely seafarers, workers on sea-going fishing vessels, workers on ships operating on inland waterways and mobile workers in civil aviation. However, these workers are all covered by separate Regulations.⁸⁶

Finally, under Regulation 18(2)(a), Regulations 13 and 16 do not apply 'where characteristics peculiar to specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these regulations'. There is no provision in the Directive for such a derogation from the right to annual leave for workers performing these services, despite an explicit provision for derogations from other provisions of the Directive for 'activities involving the need for continuity of service or production, particularly...civil protection services'.⁸⁷

⁸⁶ ns 83, 84 and 85 above.

⁸⁷ Article 17(3)(c)(iii).

Exclusion of children below school-leaving age

A further limitation resulted from the judgment of the Employment Appeal Tribunal in *Addison & Addison (t/a Brayton News) v Ashby*.⁸⁸ In this case, the question was whether the employment tribunal was right to hold that a 15-year-old paper boy still of compulsory school age was entitled to annual leave under the Regulations. After a lengthy comparison of the implementation of the Working Time Directive and of the Young Workers Directive,⁸⁹ the Employment Appeal Tribunal held that the Regulations were not intended to cover children still of compulsory schooling age because the majority of the provisions in the Regulations which might have applied to children were overridden by more stringent rules in the Young Workers Directive and the Children and Young Persons Act 1933. As a result of this judgment, child workers are only entitled to the less stringent protection in the section 18(1)(j) of the Act to at least two consecutive weeks without employment during a period in the year in which they are not required to attend school. This judgment has been heavily criticised on the basis that there is no exclusion for children from the Directive.

How does leave accrue?

The basis for calculation of leave is a 'leave year', which under Regulation 13(3) will begin '(a) on such date during the calendar year as may be provided for in a relevant

⁸⁸ Judgment of 17 January 2003 (EAT) [2003] ICR 667, [2003] IRLR 211.

⁸⁹ Directive 94/33/EC [1994] OJ L 216/12, implemented by the Children (Protection at Work) Regulations 1998 SI 1998/276 which amended various statutes including the Children and Young Persons Act 1933.

agreement; or (b) where there are no provisions of a relevant agreement which apply – (i) if the worker’s employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or (ii) if the worker’s employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.’⁹⁰ A ‘relevant agreement’ is one that is legally enforceable between the employer and the worker, including workforce agreements, collective agreements and individual agreements.

As a general rule, at the start of each leave year a worker is immediately entitled to take the full four weeks of paid leave, subject to the normal rules for agreeing the time of leave. However, for workers in their first year of employment, the right to leave will only accrue a month at a time (although there is no longer a qualifying period before the right to leave begins to accrue).

Qualifying period

Under the original Regulations, the right to leave did not arise at all until the worker had been continuously employed for 13 weeks. This qualifying period caused some particular problems. Although in *Wellicome v Kelly Services*⁹¹ the employment tribunal held that employment prior to 1 October 1998 would count towards this period, another employment tribunal reached the opposite conclusion in *Orme v*

⁹⁰ This calculation itself can prove difficult in certain cases: see *Hyman v Chief Constable of South Wales Police*, Decision of 30 July 2002 (ET) and Judgment of 8 April 2003 (EAT).

⁹¹ Decision of 25 March 1999 (ET) (1999) 641 IDS Brief 12; discussed further below.

Office Angels.⁹² In *Stewart v Heron Recruitment*, the employment tribunal accepted that a period of unpaid leave could count towards the period of continuous employment, at least where the employment contract continued during the period of leave.⁹³ More widely, however, in industries where there may be no employment some weeks (such as temporary agency work) the requirement was often interpreted in such a way that the right might never arise.

More fundamentally, as there is no mention of any such qualifying period in the Directive, a challenge to the Regulations was brought before the English High Court by the Broadcasting Entertainment, Cinematographic and Theatre Union (BECTU). In turn, the High Court made a reference to the ECJ on 14 April 1999 for a preliminary ruling under Article 234 of the EC Treaty. In *ex parte BECTU*⁹⁴ the ECJ held that the Directive ‘does not allow a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks’ uninterrupted employment with the same employer.’ However, it did also say that ‘the Directive does not prevent the Member States from organising the way in which the right to paid annual leave may be exercised by regulating, for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment.’⁹⁵

⁹² Decision of 17 February 1999 (ET) (1999) 641 IDS Brief 13.

⁹³ Decision of 20 April 1999 (ET) (1999) 641 IDS Brief 13.

⁹⁴ Judgment of 26 June 2001, Case C-173/99 *R v Secretary of State for Trade and Industry, ex parte Broadcasting Entertainment, Cinematographic and Theatre Union* [2001] ECR I-4881, [2001] ICR 1152, [2001] IRLR 559, para 64.

⁹⁵ Para 61.

As a result of the judgment, the United Kingdom Government held a brief consultation and then amended the Regulations by removing the qualifying period and replacing it with provisions for gradual accrual of leave in the first year of employment, described further below. Therefore, contrary to the claims of some employers, rights to paid leave now accrue from the first day of employment.

However, this did not help those workers who had lost their rights as a result of the qualifying period. The Employment Appeal Tribunal in both *Voteforce Associates v Quinn*⁹⁶ and *South Tyneside MBC v Toulson*⁹⁷ followed *Gibson*⁹⁸ and held that Article 7 was not directly effective in place of the defective provisions in the Regulations which required the 13 week qualifying period.

Accrual systems

One of the first decisions by an employment tribunal on the Regulations, *Wellicome v Kelly Services*,⁹⁹ concerned an employment contract entered into on 28 September 1998 which aimed to cover the new rules. The contract included the following terms: (i) holiday entitlement would be 15 days per year rising to 20 days per year from November 1999 (ii) holiday entitlement would accrue at the rate of 0.29 days per week worked and (iii) holiday entitlement could not be taken until it had accrued.

⁹⁶ Judgment of 30 July 2001 (EAT) [2001] ICR 1.

⁹⁷ Judgment of 1 November 2002 (EAT) [2003] 1 CMLR 28.

⁹⁸ n 48 above.

⁹⁹ n 91 above.

The worker took five days of holiday in November 1998 but was only paid for two, and a further five days over the Christmas period but was only paid for one. The employment tribunal, however, held that the clause providing for a weekly accrual of holiday entitlement was void as of 1 October 1998 and so the worker was entitled to the full three week holiday entitlement for the current leave year, which under the contract ended on 10 January 1999. The worker was therefore entitled to the additional seven days of holiday pay claimed.

The application of an accrual system to deny the right to payment for holiday leave taken early in a leave year was also rejected in *Kennedy v Select (Appointments)*.¹⁰⁰

A similar question on accrual arose in *Bowling v Grove Leisure*,¹⁰¹ where, although accepting that a worker could take more leave than he or she had ‘accrued’ at a particular stage in the leave year, the employers argued that they were only obliged to pay holiday pay for the portion of leave which the worker had accrued by that time and could delay paying the remainder until the worker accrued the right to such pay. This was rejected by the employment tribunal, which said that any unfairness to the employer could be resolved by (a) serving a counter-notice on the worker to limit the leave taken to that accrued or (b) entering into an agreement requiring any excess holiday pay to be repaid by the worker if the employment ended before such rights were accrued.

¹⁰⁰ Decision of 25 June 1999 (ET) (2000) 663 IDS Brief 15.

¹⁰¹ Decision of 26 October 1999 (ET) (2000) 663 IDS Brief 14.

This approach to accrual provisions was amended in the aftermath of *BECTU* for workers who began employment after 25 October 2001. Under Regulation 15A, for the first year of employment the statutory entitlement will only accrue at the rate of one twelfth of the annual statutory entitlement at the start of each month of employment (with fractions rounded up to the nearest half day). However, on the basis of the previous case law, such an accrual approach cannot be taken by employers in the second and subsequent years of employment.

When can leave be taken?

Under Regulation 15(1), a worker must give notice to the employer before taking leave. Under Regulations 15(3) and 15(4)(a) the notice period is twice as long as the proposed leave. Therefore, if a worker proposes to take three days' leave the worker must give the employer at least six clear days' notice before the start of that leave.

An employer can require a worker to take leave on particular days under Regulation 15(2). Again the notice period is twice as long as the proposed leave. This enables an employer to require a worker to take paid leave on certain dates, such as public holidays or other days when the employer wishes to close the premises.

If an employer does not wish a worker to take leave on particular days, again under Regulation 15(2) the employer must give a notice or a counter-notice to the worker and this will overrule a worker's notice under Regulation 15(1). Under Regulations 15(3) and 15(4)(b) the notice period is the same length as the proposed leave (or period during which the worker cannot take leave). Thus if an employer wishes to

prevent a worker taking leave for a three day period the employer must give the worker at least three clear days' notice before the start of that period.

It should be noted that, under Regulation 15(5), any right or obligation under Regulations 15(1) to (4) may be varied or excluded by a 'relevant agreement'. Also, Regulation 15 does not apply to workers employed in agriculture unless a relevant agreement so provides, but instead the dates on which leave is taken are determined in accordance with an agricultural wages order which applies to the worker.¹⁰²

Allocation of days as statutory leave

In some cases, where a worker takes leave there may be a question as to which days (if any) should be treated as the worker's statutory leave, entitling the worker to the statutory rate of pay. This will particularly arise where the worker would be entitled to a lower rate of pay, or none, for leave which does not form part of the worker's statutory entitlement.

For example, in *Barton v SCC*¹⁰³ the question arose whether, where workers were contractually entitled to 29 days' paid holiday per year but where the rate of pay for such days could be less than that provided for under Regulation 16, the employer could determine which days were paid at the lower contractual rate. The employment tribunal held that, as statutory holiday pay is an entitlement, the worker has the right to choose which of the days should be paid at the higher statutory rate. Moreover, any

¹⁰² Regulation 15(6) and Schedule 2, paragraph 1.

¹⁰³ Decision of 6 October 1999 (ET) (2000) 663 IDS Brief 13.

payments made for the non-statutory leave could not be used to make up the difference between the lower contractual rate and the higher statutory rate during the statutory leave period.

By contrast, in *Poole v Link Electrical Testing*¹⁰⁴ a worker did not return to work after her husband died, later submitting a medical certificate based on her bereavement and shortly afterwards resigning by letter without notice. The employers paid her full salary up to the date of her resignation, designating the first two weeks (before the certificate was received) as holiday. The worker claimed that she was also entitled to payment in lieu of the two weeks' holiday leave she had accrued before she left. However, the employment tribunal held that, as the worker had resigned without notice in breach of contract, the employers were entitled to designate the two weeks as holiday and so the worker had no claim to payment in lieu.¹⁰⁵

That principle does not indicate a more general entitlement for an employer to deem particular days as a worker's leave, however. In *Ferguson v Anglo Beef Processors*¹⁰⁶ the workers' annual leave was deemed to be incorporated into their rest periods between rostered shifts. The employment tribunal rejected such an approach and

¹⁰⁴ Decision of 11 January 2000 (ET) (2000) 663 IDS Brief 15.

¹⁰⁵ Contrast this to *Whittle Contractors v Smith*, Judgment of 1 November 1994 (EAT), where the EAT held that a worker paid in lieu of notice when taking voluntary redundancy (and so not required to work his notice) could claim an additional payment in lieu of leave which would have been accrued during the time of his notice. Following *Poole*, where possible an employer should ensure that the worker is deemed to take the accrued holiday during such a notice period.

¹⁰⁶ (2003) 736 IDS Brief 12, 15.

confirmed that annual leave should be permitted to be taken at times when the worker would otherwise be working.

Relationship with sick leave, maternity leave, paternity leave and adoption leave

Various questions arise from the relationship of annual leave to other forms of leave, such as sick leave, maternity leave, paternity leave and adoption leave. First, as the rates of pay can vary for the different types of leave, there is the question whether the worker can choose which type of leave to take, in particular whether they can take annual leave while on sick leave. Second, there is the question of whether the right to annual leave continues to accrue during another form of leave. Third, there is the question of whether an employer can require that annual leave is taken while some other leave is being taken. Finally, there is the question of whether a worker who falls sick during annual leave is entitled to take that annual leave at another time or to receive payment in lieu of such leave.

In relation to the first question, *Kigass Aero Components v Brown*, *Bold Transmission Parts v Taree* and *Macredie v Thrapston Garage*¹⁰⁷ were three cases all concerning entitlement to holiday pay when on sick leave. In the first two cases the employment tribunals had found that the workers were entitled to annual leave while on sick leave, while the third employment tribunal had disagreed. The Employment Appeal Tribunal noted that, while Regulations 10, 11 and 12 require the worker to have worked in order to benefit from the entitlements to daily rests, weekly rest period and rest breaks

¹⁰⁷ Decisions of 20 March 2000, 20 July 2000 and 20 April 2001 (ET), and Judgment of 25 February 2002 (EAT) [2002] ICR 697, [2002] IRLR 312.

respectively, Regulation 13 has no such limitation. Moreover, although sick leave would constitute a non-statutory rest period under Regulation 2(1), under Regulation 17 the worker would be entitled to rely on the statutory annual leave provisions to the extent that these were more favourable. However, proper notice to take such leave must be given, as required by Regulation 15, and under Regulation 13(9) the entitlement will expire if leave is not taken. Although the Employment Appeal Tribunal indicated that this may not have been the intended effect of the Regulations, in the light of the wording of the Regulations it said that the remedy for this ‘was a matter not for us but for the legislature’.

However, in *Commissioners of Inland Revenue v Ainsworth*¹⁰⁸ the Employment Appeal Tribunal again considered whether workers on long-term, unpaid sick leave were entitled to paid holiday leave. The Employment Appeal Tribunal did not wish to reconsider the merits so soon, but instead gave permission for the appeal to go straight to the Court of Appeal. Rejecting the approach of Employment Appeal Tribunal in *Kigass*, Maurice Kay LJ followed counsel’s argument in holding that those already on sick leave are not working and so cannot properly be regarded as taking annual leave. Leave to appeal to the House of Lords has been granted.

Shortly after the judgment in *Ainsworth*, the Scottish Employment Appeal Tribunal gave its judgment in *Chief Constable of Strathclyde Police v Lavery*.¹⁰⁹ In that case, a police sergeant on sick leave at half-pay sought to take two weeks of annual leave at full pay. Noting that the question was before the House of Lords in *Ainsworth*, the

¹⁰⁸ n 66 above.

¹⁰⁹ Decision of 24 November 2004 (ET) and Judgment of 19 May 2005 (EAT).

case was remitted back to the employment tribunal with a direction to sist (stay) the proceedings pending that judgment.

For the time being, it appears that workers already on sick leave are not entitled to take annual leave. Given the reasoning of the Employment Appeal Tribunal, annual leave should similarly be unavailable to other workers whose contracts are continuing but who are not attending work, such as those with maternity, paternity or adoption leave or those taking a sabbatical.¹¹⁰ However, the judgment of the House of Lords is eagerly awaited.

Turning to the second question, at the instigation of the Law Society of England and Wales an attempt was made in January 2002 to amend the Employment Bill while it passed through the Committee stage in the House of Commons in order to clarify the position on whether leave should accrue during paternity or adoption leave.¹¹¹ The Minister for Employment, Alan Johnson MP, rejected this stating that ‘An employee continues to accrue holiday rights under the [Working Time] regulations while they are on maternity leave, and we propose exactly the same rights with paternity leave. Unless we make special provision, holiday entitlement will similarly accrue while someone is on paternity leave. We do not intend to introduce special provisions, because we intend for holiday rights to accrue as I described.’ The proposed amendment was withdrawn.

¹¹⁰ (2002) 754 *IR* Employment Review 56, 58.

¹¹¹ HC Standing Committee F col 287-289 8 January 2002.

However, there may be a different approach taken in relation to the question of whether a worker returning from sick leave, as opposed to maternity leave, is entitled to his or her full four weeks of annual leave. Although *Ainsworth* does not address the point, some employers have taken an aggressive approach on the basis of the Court of Appeal's judgment and decided that annual leave should not accrue while a worker is on sick leave. Some caution against this has been suggested,¹¹² and this must be particularly so in the light of the approach taken by the Council of Europe's European Committee of Social Rights described below.

Turning to third question, in *Gómez v Continental Industrias del Caucho* a factory worker returning from maternity leave sought to take her annual leave during September, but her employer said that, under the collective agreement with the employer, her maternity leave coincided with the annual leave for all workers and so she was not entitled to take further leave.¹¹³ The ECJ was asked by the Juzgado de lo Social No 33 de Madrid whether this was a permissible approach under the Directive and had no difficulty in holding that 'where the dates of a worker's maternity leave coincide with those of the entire workforce's annual leave, the requirements of the Directive relating to paid annual leave cannot be regarded as met'. Therefore, a worker 'must be able to take her annual leave during a period other than the period of her maternity leave'.

¹¹² (2005) 781 IDS Brief 2.

¹¹³ Case C-342/01 *María Paz Merino Gómez v Continental Industrias del Caucho* [2004] ECR I-2605, [2005] ICR 1040, [2004] IRLR 407.

Finally, turning to the fourth question, in *Warnes v Situsec Contractors*¹¹⁴ the worker claimed that, as his contract entitled him to payment for bank holidays and leave which had to be taken at Easter and Christmas, he was entitled to payment in lieu of such leave when he was off sick. The employment tribunal rejected this claim, on the basis that (a) the worker was not working within the meaning of Regulation 2(1) and so could not be taking leave under the Regulation and also (b) under Regulation 13, payments in lieu of leave can only be made when the employment is terminated.

However, the Council of Europe's European Committee of Social Rights, in its most recent review of the United Kingdom's provisions on annual leave, queried 'whether an employee who falls ill or suffers an accident during the holiday is entitled to take the days lost at another time'.¹¹⁵ In response to the United Kingdom Government's report that this was a contractual matter, the Committee stated that it 'considers that workers should be entitled to take holidays "lost" due to illness or accident at another time so as to ensure that they benefit from at least two weeks annual holiday and it therefore asks that the next report provide evidence that the great majority of workers are protected in this respect'.

¹¹⁴ Decision of 3 November 1999 (ET) (2000) 663 IDS Brief 15.

¹¹⁵ Conclusions XVI-2 of 2003 on the United Kingdom, considering the United Kingdom's 22nd Report of 2002 on the application of the European Social Charter.

Entitlement to bank or public holidays

Bank holidays in the United Kingdom are laid down by the Banking and Financial Dealings Act 1971 and subsequent royal proclamations. There are typically eight bank holidays in England, Wales and Scotland and ten in Northern Ireland, as follows:

England and Wales	Scotland	Northern Ireland
New Year's Day	New Year's Day	New Year's Day
	2 January	
		St Patrick's Day
Good Friday	Good Friday	Good Friday
Easter Monday		Easter Monday
May Day	May Day	May Day
Spring Bank Holiday	Spring Bank Holiday	Spring Bank Holiday
		Battle of the Boyne
Summer Bank Holiday	Summer Bank Holiday	Summer Bank Holiday
Christmas Day	Christmas Day	Christmas Day
Boxing Day	Boxing Day	Boxing Day

Where bank holidays would fall on a Saturday or Sunday, they are normally postponed until the following Monday (or until the following Tuesday, where Boxing Day or (in Scotland) 2 January would fall on a Sunday). Bank holidays are not always observed by other businesses in Scotland, but local authorities may observe traditional local holidays, such as Glasgow Fair Monday (the third Monday in July).

The Department of Trade and Industry states that ‘there is no statutory right to take bank holidays off’¹¹⁶ and the United Kingdom Government has previously stated that there is no right for employees to be paid on public holidays.¹¹⁷ However, before the last election the Labour Government made a manifesto commitment to extend the right to paid leave to 28 days so that the bank holidays cannot be considered as part of the 20 days required by the Working Time Directive.¹¹⁸

Although entitlement to public holidays is determined by contract, it has been held that there is a implied term that employees paid by the hour have a right to take (unpaid) leave on public holidays without being dismissed for their absence.¹¹⁹ Similarly, employees have a right to take public holidays without their guaranteed weekly pay being reduced. However, both are implied terms, subject to contractual provision or general practice to the contrary, and are thus far from a general entitlement. Moreover, if workers are allowed to take public holidays as paid leave the employer may count this towards the discharge of its statutory obligations to give paid annual leave.

In *Campbell & Smith Construction v Greenwood*,¹²⁰ the Scottish Employment Appeal Tribunal confirmed that this also applied to the additional public holiday declared by

¹¹⁶ Department of Trade and Industry, “Your Guide to the Working Time Regulations: Workers and Employers” (July 2003), Section 7.

¹¹⁷ Fourth periodic report on the UN International Covenant on Economic, Social and Cultural Rights, E/C.12/4/Add.8 (28 February 2001), at 7.21.

¹¹⁸ The Labour Party, “Manifesto 2005”, p.27.

¹¹⁹ *Tucker v British Leyland Motor Corporation* [1978] IRLR 493.

¹²⁰ Judgment of 2 May 2001 (EAT) [2001] IRLR 588.

the Government to mark the millennium. As a result, employees were only entitled to take this as a holiday if it was provided for in their contracts.

In its most recent report to the Council of Europe's European Committee of Social Rights, the United Kingdom Government stated that, in the period 1999-2000, 'the collective agreements that apply to 37% of employees make provision for public holidays with pay'.¹²¹

What happens if leave is not taken?

Under Regulation 13(9), 'leave to which a worker is entitled under this regulation...(a) may only be taken in the leave year in respect of which it is due, and (b) may not be replaced by a payment in lieu except where the worker's employment is terminated'. Therefore, where a worker is entitled to holiday pay but fails to take it then there is no statutory entitlement to "roll it over" to the next leave year nor, avoiding any incentive not to take holiday, to receive a payment in lieu. It is likely that any rolled-over leave taken under a contractual entitlement may be used by the employer to reduce a claim to statutory paid annual leave in the subsequent leave year.

The position is different upon termination of the employment. If the worker has taken less than his or her proportional entitlement to leave upon termination, under

¹²¹ Twenty second report on the implementation of the European Social Charter submitted by the Government of the United Kingdom on 30 April 2002, response to Question C on Article 2(2).

Regulation 14(2) the worker is entitled to a payment in lieu of untaken leave.¹²² Under Regulation 14(3), the amount of such a payment can be agreed in a relevant agreement, failing which it is calculated as normal under Regulation 16. This appears to allow a loophole for an unscrupulous employer to set a nominal value for such payments in lieu. By contrast, under Regulation 14(4) where a worker has taken more than his or her proportional entitlement to leave, the employer is only entitled to compensation (by way of a payment or otherwise) where this is provided for in a relevant agreement.

*Hill v Howard Chappel*¹²³ concerned a worker who had taken fifteen days of paid leave in the first six months of employment before resigning due to non-payment of her salary for the previous month. The employment tribunal deducted the ‘five days’ overpaid holiday’ from the award for unpaid wages under section 14 of the Employment Rights Act 1996 and under common law principles. The worker appealed and the Employment Appeal Tribunal overturned the employment tribunal, holding that there was no “overpayment” of wages for the purposes of section 14 of the Employment Rights Act 1996 and that the Regulations are clear that such a deduction is only permitted where this is provided for in a relevant agreement, which was not the case.

¹²² By contrast, the question of an entitlement to payment in lieu of a contractual right to leave is determined by the contract, *Morley v Heritage* (CA) [1993] IRLR 400, although it may be possible to have an implied right to payment in lieu of such leave, *Janes Solicitors v Lamb-Simpson*, Judgment of 27 June 1995 (EAT).

¹²³ Decisions of 31 August and 21 September 2001 (ET) and Judgment of 20 March 2002 (EAT).

By contrast, in *Witley & District Men's Club v Mackay*¹²⁴ the question was whether an employment agreement could validly provide that an employer need not pay any accrued holiday pay to a worker summarily dismissed for misconduct. In this case, the Employment Appeal Tribunal upheld the employment tribunal in holding that such a provision would be void under Regulation 35(1)(a).

Turning now to the situation where the employer has refused to pay for annual leave during the course of employment, in *List Design Group v Douglas and others*¹²⁵ the Employment Appeal Tribunal confirmed the finding of the employment tribunal that a worker can claim as an unlawful deduction all holiday pay to which he or she would have been entitled and not just pay in respect of leave which had actually been taken. The Employment Appeal Tribunal rejected the submission that this was forbidden by Regulation 13(9)(b), holding that that particular regulation was 'clearly aimed at the vice of an employer of persuading employees not to take the leave to which they are entitled, but to take more money instead'. It also mirrors the approach taken under Regulation 14(2) where a worker's employment is terminated during the course of a leave year and some accrued leave has not been taken.

The judgment in *List Design* was followed in *Canada Life v Gray*,¹²⁶ where both the employment tribunal and the Employment Appeal Tribunal, rejecting obiter

¹²⁴ Judgment of 7 June 2001 (EAT) [2001] IRLR 595. See also *CF&C Greg May v Dring* (EAT) [1990] ICR 188, [1990] IRLR 19, before the Regulations, where in relation to a similar contractual provision the EAT upheld the finding of the employment tribunal that the conduct in question was not gross misconduct in any event.

¹²⁵ n 63 above.

¹²⁶ n 64 above.

comments by the Employment Appeal Tribunal in *Kigass*,¹²⁷ held that it was unnecessary for the worker to have actually taken leave where the worker seeks compensation after termination of the employment. This decision preferred the principle that an employer should not unduly benefit from failing to allow its employees paid holiday to the countervailing argument that a worker should not be reimbursed for holiday not actually taken. This issue is not discussed by the Court of Appeal in *Ainsworth*,¹²⁸ which overruled *List Design* in other respects, but it remains to be seen whether the House of Lords will touch on the point in its judgment. **[TO UPDATE AT PROOFING]**

What is the rate for paid leave?

The rate of pay during paid leave is calculated under Regulation 16(1) as a week's pay in respect of each week of leave. A week's pay is determined by reference to sections 221 to 224 of the Employment Rights Act 1996. For workers on a regular weekly wage, under section 221(2) the weekly rate is 'the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week'. Where the number of hours worked or hourly rate varies, under sections 221(3) and 222 these are averaged over the previous twelve complete weeks ending on or before the date of calculation.

¹²⁷ n 107 above.

¹²⁸ n 66 above.

In *Thames Water Utilities v Reynolds*¹²⁹ the Employment Appeal Tribunal held that section 2 of the Apportionment Act 1870 should apply to holiday pay, on which basis the annual salary should be divided by the number of calendar days in the year to calculate the rate of pay due for each day of leave. This obviously produces a lower daily rate for holiday as payment will not be received for weekends.

Taking a similar approach, in *Taylor v East Midlands Offenders Employment Consortium*,¹³⁰ an employer had calculated the payment for 10 unused days of leave upon termination of employment by dividing the annual salary by 12, then dividing by the number of days in the calendar month of employment and multiplying by 10. This was accepted as correct by the employment tribunal, but overturned by the Employment Appeal Tribunal which said that the correct method for calculation should be to divide the annual salary by 365 and then multiply by 14 (to take into account that 10 working days equates to 14 calendar days).

In *Leisure Leagues v Macconnachie*¹³¹ the employment tribunal calculated the daily rate of holiday pay by dividing the worker's annual salary by the number of working days in the year (in this case 233 days). The employers appealed on the basis of *Reynolds* but in a preliminary hearing the Employment Appeal Tribunal held that this did not raise an arguable point of law under the Working Time Regulations and dismissed the appeal.

¹²⁹ (EAT) [1996] IRLR 186.

¹³⁰ (EAT) [2000] IRLR 760.

¹³¹ Decision of 6 April 2001 (ET) and Judgment of 14 March 2003 (EAT) [2002] IRLR 600.

Although criticised by some employer organisations, the outcome in *Taylor and Leisure Leagues* is manifestly correct, as the rate of pay should be the same for a day of leave as for a day of work and it cannot honestly be said that the method of calculation puts an unacceptable administrative burden on the employer. The approach taken by the employers would have cut their financial liability for holiday pay (and thus the worker's entitlement) by around 30%.

In *Walker v Cooperative Insurance Society*, the worker sought to have procurement fees and commission on premiums included in his holiday pay.¹³² Rejecting this, the employment tribunal, the Employment Appeal Tribunal and the Court of Appeal held that the contractual holiday pay which he had received was in any event higher than the rate which would have been calculated under the statutory rules and so there was no breach of Regulation 16.

However, in *Evans v Malley Organisation Ltd t/a First Business Support*,¹³³ the Court of Appeal held that a worker's commission should not be taken into account when calculating holiday pay, even where the worker's basic salary of £10,000 was dwarfed by his commission (which he claimed averaged £1098 per week). The Court of Appeal held that the commission payments did not mean that worker's remuneration varied with the amount of work done, as the commission depended on successful sales rather than work done. Therefore, a week's pay should be calculated under section

¹³² Decision of 25 September 2001 (ET) and Judgments of 15 May 2002 (EAT) and 11 April 2003 (CA) [2003] EWCA Civ 632.

¹³³ Decision of 20 November 2001 (ET) and Judgments of 10 April 2002 (EAT) and 27 November 2002 (CA) [2002] EWCA Civ 1834, [2003] ICR 432, [2003] IRLR 156.

221(2) rather than under section 221(3). Pill LJ did indicate, however, that a claim might have been raised based on the lost opportunity to earn commission. Although this seems a rather more circuitous approach, a worker paid largely by commission would be well advised to bring a claim for lost opportunity in any holiday pay dispute.

In *Bamsey v Albion Engineering*,¹³⁴ the Employment Appeal Tribunal had to consider a similar case asking whether overtime pay should be included when calculating holiday pay. In this case the employment contract required the worker to work a basic 39 hours per week (for a wage of around £200) but the worker had in practice worked an average of 58 hours per week during the year in question and, in the 12 weeks prior to the worker's holiday, 60 hours per week (for an average wage of around £330).

The employment tribunal held that the overtime pay could not be included in calculating holiday pay and the Employment Appeal Tribunal and Court of Appeal both agreed. Although noting that 'the purpose of Article 7 is to ensure that workers are paid when on leave at a rate comparable to that which they normally receive when at work', the Employment Appeal Tribunal held that a purposive construction would be unworkable. Auld LJ went further, stating that he saw no basis for holding that the Directive requires 'that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn, and did earn, while at work'.

¹³⁴ Decision of 22 February 2002 (ET) and Judgments of 27 March 2003 (EAT) [2003] ICR 1224 and 25 March 2004 (CA) [2004] EWCA Civ 359, [2004] ICR 1083, [2004] IRLR 457.

Can employers pay rolled up holiday pay?

One of the most hotly-contested issues concerning holiday pay is whether employers can choose not to pay anything to their workers when they take leave but rather to include holiday pay rolled up as part of the worker's normal weekly pay. This has been particularly criticised by trade unions who have called upon the Government to legislate against such practices.¹³⁵

The purpose of providing for leave to be paid is to ensure that workers take the leave to which they are entitled. This is reflected in Article 7(2) of the Directive, implemented by Regulation 13(9)(b), which prohibits the replacement of leave by an allowance in lieu except where the employment relationship is terminated.

However, some employers have complained that the calculation of the appropriate level of pay can be complicated, particularly where workers do not work regular hours. One potential approach which has been taken is to include holiday pay as part of the worker's regular hourly pay (in many cases without an actual increase in the total hourly rate).

The first question is whether such an approach is permissible at all. If so, the second question is what form such an arrangement must take and, in particular, whether the workers need to agree to arrangement contractually or whether an employer can unilaterally deem a portion of hourly or weekly pay to be holiday pay.

¹³⁵ Trades Union Congress "Rolling up holiday pay: Can it ever be legal to do this?" (July 2003).

In *Miah v La Gondola*¹³⁶ the employers (at the request of the worker) paid him an additional week's pay in February 1999 instead of a week's holiday. The worker then left in March 1999 and claimed payment in lieu of untaken holiday. The employment tribunal, noting that under Regulation 13(9)(b) the entitlement under the Regulations cannot be replaced by a payment in lieu except where the employment is terminated, held that the payment in February 1999 would have to be ignored and the worker was therefore entitled to payment in lieu for all statutory leave which he had accrued but not taken.

In *Tompkins v Kurn*¹³⁷ the employer gave evidence that the worker's rate of pay had been increased from £6 to £7 in June 1998, with the worker's agreement that 50p of the increase was to cover his holiday pay entitlement. The worker had taken holiday, for which he was not paid, and then on leaving his employment brought a claim for accrued holiday pay. The employment tribunal dismissed the claim, holding that, although Regulation 14 provides that an employer must make a worker a payment in lieu of untaken leave, the worker had already agreed that part of his pay increase would operate to discharge his employer's obligation to pay holiday pay.

A similar decision was taken five days later in *Johnson v Northbrook College*,¹³⁸ where the employment tribunal again held that it was permissible to increase the hourly rate of pay and to incorporate in this a payment to cover annual leave and so not to pay workers when they actually take leave. It held that Regulation 13(9)(b),

¹³⁶ Decision of 29 June 1999 (ET) (2000) 663 IDS Brief 15.

¹³⁷ Decision of 20 October 1999 (ET) (2000) 663 IDS Brief 14.

¹³⁸ Decision of 25 October 1999 (ET) (2000) 663 IDS Brief 14.

which states that leave may not be replaced by a payment in lieu except where the worker's employment is terminated, merely outlaws payments in lieu of leave, whereas in this case the workers were still entitled to take leave. Therefore Regulation 16(5), which states that 'Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period', would apply to such increased hourly rates and so the employer's obligations would be satisfied.

By contrast to the above cases, in *Davies v MJ Wyatt (Decorators)*¹³⁹ the employers unilaterally reduced their workers' pay in order to pay holiday pay when it fell due. The employment tribunal had found that this was not in breach of the Regulations and that therefore it was not an unlawful deduction from wages. However, this was reversed by the Employment Appeal Tribunal, holding that the employer could not make such a unilateral reduction in wages. Moreover, on this basis the Employment Appeal Tribunal once again declined to make a finding on whether such a scheme would be permitted if carried out on a consensual basis.

*Blackburn v Gridquest t/a Select Employment*¹⁴⁰ then concerned a number of workers who were employed by various employment agencies to work for the Ford Motor Company. The workers complained that they had not received holiday pay but the employers said that holiday pay was included in the hourly rate as a rolled-up rate and that the workers knew this, which the workers disputed.

¹³⁹ Decision of 13 August 1999 (ET) and Judgment of 13 July 2000 (EAT) [2000] IRLR 759.

¹⁴⁰ Decision of 30 March 2000 (ET) and Judgments of 1 November 2001 (EAT) [2002] ICR 682, [2002] IRLR 168 and 23 July 2002 (CA) [2002] EWCA Civ 1037, [2002] ICR 1206, [2002] IRLR 604.

Initially, the employment tribunal found for the workers, holding that they had not been told of the rolled-up rate and that it was not documented. There was therefore no contractual term to that effect and so the arguments of the employers would amount to a breach of Regulation 16(4), which says that ‘a right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract’.

However, the Employment Appeal Tribunal disagreed, holding that the contractual position did not answer the question of whether the hourly pay did, in fact, include an element of holiday pay. It remitted the case to the employment tribunal to determine this question and, if answered in the affirmative, to count the holiday pay so paid against the employers’ liability to pay holiday pay under the Regulations.

While the case was under appeal to the Court of Appeal, the Employment Appeal Tribunal then had to decide *College of North East London v Leather*.¹⁴¹ Once again the employer had tried to determine unilaterally that the hourly rate of pay included holiday pay. However, this time the employment contract expressly said that the worker was not entitled to holiday pay, whereas in *Gridquest* the contracts were silent on the point. The Employment Appeal Tribunal used this as a basis to distinguish the cases and to hold that the worker was entitled to holiday pay.

¹⁴¹ Judgment of 30 November 2001 (EAT).

Meanwhile, across the border in *MPB Structure v Munro*¹⁴² the Scottish Employment Appeal Tribunal specifically considered the question of whether this approach is permissible under the Regulations. In this case the employer paid an allowance of eight per cent of weekly pay to workers each week to discharge its obligations under the Regulations to provide paid holidays.

In contrast to *Johnson*, the employment tribunal had held that such payments would amount to payment in lieu of leave, breaching Regulation 13(9)(b) and so void. However, on appeal to the Employment Appeal Tribunal both parties disputed the application of that regulation and the Employment Appeal Tribunal overruled the employment tribunal on that point, instead considering the question under Regulation 35. The Employment Appeal Tribunal noted that the basic aim of the Regulations was to ensure that workers receive paid holiday leave and that sufficient funds would have to be available for them to do so. The Employment Appeal Tribunal also noted that the rolled-up rate approach might mean that workers would not have sufficient funds when they wished to take leave, particularly if leave was taken before sufficient funds had been accumulated from the weekly allowance. The only way to ensure funds were available was to pay holiday pay as and when leave was taken, and therefore the contractual provisions had the effect of excluding or limiting the operation of the Regulations and so were void under Article 35.

This judgment was criticised, particularly given the brevity of its reasoning and its failure to refer to the earlier judgment of the Employment Appeal Tribunal in

¹⁴² Judgments of 28 March 2002 (EAT) [2002] IRLR 601 and 1 April 2003 (CS) 2003 SC 485, [2004] ICR 430, [2003] IRLR 350.

Blackburn and others v Gridquest Ltd t/a Select Employment and others and to Regulation 16(5).¹⁴³ However, it was upheld by the Inner House of the Court of Session, which stated that ‘it is essential not only that payment should be made for annual leave, but also that it should be made in association with the taking of that leave’ and that a contractual provision for rolled-up holiday pay purports ‘to exclude the operation of Regulation 16(1)’ and so is void for that purpose. According to the Employment Appeal Tribunal in *Caulfield v Marshalls Clay Products*, that judgment is binding on all employment tribunals and on the Scottish Employment Appeal Tribunal but may not be binding on the English Employment Appeal Tribunal.¹⁴⁴

The Court of Appeal then gave its judgment in *Gridquest*, reversing the Employment Appeal Tribunal’s judgment by holding that the rolled-up rate did not include an element to cover holiday pay as a matter of contract, since there was no evidence of any agreement to change the original rate to include such holiday pay and the employer could not make such a decision unilaterally. The case could not be distinguished from *Leather*. Therefore there could be no question of offsetting such pay against holiday pay under Regulation 16(5). However, despite referring to the judgment of the Employment Appeal Tribunal in *Munro* the court declined to determine whether a properly incorporated contractual provision would be in breach of the Regulations as there was no such provision in the instant case.¹⁴⁵

¹⁴³ (2002) 710 IDS Brief 16; Personnel Today, 9 July 2002, 19.

¹⁴⁴ n 4 above, paragraph 13 of the EAT’s Judgment.

¹⁴⁵ In *Frank Staddon v Dent and Williams*, Judgment of 17 March 2003 (EAT), the EAT again refused to consider whether a contractually binding rolled-up rate would be void. In *Mitchell v Amersham & Wycombe College*, Decision of 22 March 2002 (ET) and Judgment of 31 March 2003 (EAT), the EAT

In *McCarthy v Blue Sword*,¹⁴⁶ the Employment Appeal Tribunal followed *Gridquest*, overturning the employment tribunal and holding that the purported provisions on rolled-up holiday pay (a document headed 'Registration & Safety Induction Card' which was produced after the workers had been engaged) did not form part of any agreement between the workers and their employers and so could not be relied upon to preclude the statutory right in any event.

However, when the question came before the Leeds employment tribunal in the form of a properly-incorporated provision on rolled-up pay in *Robinson-Steele v RD Retail Services* the tribunal, which was of the preliminary view that rolled up pay amounted to a prohibited limitation of the right to paid leave, referred the following questions to the ECJ under Article 234 of the EC Treaty:¹⁴⁷

1. Is Article 7 of Council Directive 93/104 consistent with provisions of national law which allow pay for annual leave to be included in a worker's hourly remuneration and paid as part of remuneration for working time but not paid in respect of a period of leave actually taken by the worker?

held that there is no right to a declaration that rolled-up holiday pay is impermissible under the Regulations and so, given that the employer had agreed to meet the claim in full, stayed the case.

¹⁴⁶ Decision of 7 January 2003 (ET) and Judgment of 14 July 2003 (EAT).

¹⁴⁷ n 3 above.

2. Does Article 7.2 preclude the national tribunal from giving credit to an employer for such payments when it seeks to give the applicant an effective remedy according to powers contained in national regulations?

The issue was also before the English tribunals and courts in a number of other cases: *Pearce v Huw Howatson*, *Clarke v Frank Staddon*, *Sutton v Potting Construction*, *Caulfield v Marshalls Clay Products* and *Hoy v Hanlin Construction*.¹⁴⁸ In *Pearce*, *Clarke*, *Sutton* and *Hoy* a provision for rolled-up holiday pay was found to be lawful, while in *Caulfield* the employment tribunal found such a provision to be unlawful on the basis that it breached Regulation 13(9)(b) as a payment in lieu of leave.

The Employment Appeal Tribunal overturned the decision in *Caulfield* and upheld that in *Clarke* (although proposing to send the case back to the employment tribunal to determine whether there really was a contractual provision in place for specified holiday pay). It indicated that incorporating holiday pay into workers' normal earnings could be lawful, provided that it is a specifically agreed additional and appropriate amount clearly identified, for example, in the contract and/or wage slip; the rolled-up element amounts to a true addition to the contractual rate of pay; proper holiday records are kept; and the employer takes steps to require workers to take their holiday entitlement.

On appeal to the Court of Appeal, Laws LJ was strongly critical of the decision in *Munro* and indicated that he believed rolled-up pay was in principle compatible with the Directive and the Regulations provided that it was governed, as in this case, by an

¹⁴⁸ n 4 above.

appropriate agreed framework. He suggested that arrangements which were the product of a collective agreement were likely to be acceptable. However, he indicated that, on the basis that he disagreed with the result in *Munro*, he ought to refer the case to the ECJ for a preliminary ruling under Article 234 of the EC Treaty, asking that it be joined with the *Robinson-Steele* reference. The questions referred were as follows:

1. Does a contractually binding arrangement between an employer and a worker, which provides that a specific part of the wages paid to the worker represents that worker's 'holiday pay' (an arrangement known as rolled up holiday pay), involve a violation of the worker's right to be paid for his annual leave under Article 7 of the Working Time Directive 93/104/EC?

2. Would the answer to question 1 be different if the worker was paid the same before and after the binding arrangement in question coming into force so that the effect of the arrangement was not to provide for additional pay, but, rather, to attribute part of the wages payable to the worker to holiday pay?

3. If the answer to question 1 is yes, is it a violation of the right to paid annual leave under Article 7 for credit to be given for that payment so as to set this off against the entitlement afforded under the Directive?

4. In order to comply with the obligation under Article 7 of Directive 93/104/EC to ensure that a worker is entitled to paid annual leave of at least four weeks, is it necessary for the payment to be made to the worker in the pay

period in which he takes his annual leave, or is it sufficient to comply with Article 7 that the payment is made throughout the year in instalments?

In the meantime, in the case of *Smith v AJ Morrisroes & Sons*, the approach in *Caulfield* was followed.¹⁴⁹ This again was a conjoined appeal before the Employment Appeal Tribunal of several employment tribunal decisions: *Smith v AJ Morrisroes & Sons*, *Byrne v JJ Cafferkey & Co* and *Wiggins v North Yorkshire County Council*. In that case the Employment Appeal Tribunal indicated that it believed the tribunal must be satisfied that the employer is actually paying the workers for their holidays. It followed and refined the guidelines laid down in *Caulfield* as to the circumstances when rolled-up pay is lawful (subject to any judgment of the ECJ) as follows:

There must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked.

The best way of evidencing this is for;

- (a) the provision for rolled-up holiday pay to be clearly incorporated into the contract of employment;
- (b) the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in the contract, and preferably also in the payslip;
- (c) records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken

¹⁴⁹ Decisions of 22 August 2003 (ET – *Byrne*), 3 November 2003 (ET, *Smith*) and 23 December 2003 (ET – *Wiggins*) and Judgment of 22 November 2004 (EAT) [2005] ICR 596, [2005] IRLR 72.

to ensure that workers take their holidays before the end of the relevant holiday year.

On that basis, the Employment Appeal Tribunal found that there had been no mutual agreement (beyond the contractual agreement) in *Smith* or *Byrne* but that there had been such an agreement in *Wiggins*. In *Smith*, the worker had refused to sign a contract under which he would receive the same rate of pay as previously but a percentage of that would then be deducted as holiday pay, but the employer had made the deductions in any event. In *Byrne*, the worker had started work with an oral agreement as to the rate of pay and the following day signed a contract agreeing that this rate included holiday pay. In neither case was this regarded as a genuine agreement for holiday pay to be rolled-up. However, in *Wiggins* the worker was an “unattached” or supply teacher who worked for the council at an hourly rate of pay. This hourly rate was calculated as 1/1000 of the annual pay of a full-time teacher, on the basis that full-time teachers were required to work up to 195 days per year and they were paid during school holidays. Although there was a dispute as to whether it had been made clear to Mr Wiggins that his rate of pay included holiday pay, the Employment Appeal Tribunal upheld the finding of the employment tribunal that there was mutual agreement for genuine payment for holidays.

Then, in *British Airways v Noble and Forde*, the question arose as to whether, under terms collectively negotiated in 1975, a company could divide workers’ weekly salary by 52 and multiply by 48 and then pay this all year round, including during leave.¹⁵⁰ The Employment Appeal Tribunal held that ‘there is the same requirement in a case

¹⁵⁰ Decision of 2 November 2004 (ET) and Judgment of 22 June 2005 (EAT).

such as this for an employer to satisfy the Tribunal that there has been a genuine non-deduction of sums in respect of the holiday period, as there is in a rolled up holiday pay where no money is paid in respect of the holiday to show that there has been a genuine payment in respect of that holiday period by an increase in the amounts paid for the rest of the year'. Having reviewed the evidence, the Employment Appeal Tribunal said the tribunal could come to no other conclusion than that the calculation was aimed at ensuring that workers overall did not receive payment for an assumed 4 weeks' holiday out of 52 although that reduced amount was then spread evenly across the year and that, regardless of the age of the company's scheme, this was prohibited under the Regulations. However, as the workers were in fact entitled to 34 days' holiday rather than the statutory 20, and the employer was perfectly entitled to pay a reduced rate for the 14 non-statutory days, the formula for the reduction should have been $49.2/52$.

Conclusions

Although the concept of paid leave or holiday pay might appear to have been accepted politically in the United Kingdom, there remains a serious resistance to proper implementation from many employers and, in some instances, from the courts.

At one end of the spectrum, there are examples of compensation being sought in cases which are quite clearly outside the intended scope of the Directive and the Regulations, such as during sick leave. Similarly, there are cases where it is asserted simply as a lever to increase total salary. However, the courts at present seem perfectly capable of dealing with such speculative actions.

At the other end, there is the issue of rolled up holiday pay. Some employers have claimed that this is justified because of the high administrative burden of calculating the correct rate of holiday pay for those with highly variable pay. However, this administrative burden can be exaggerated and in many cases the real reason for operating a rolled-up system is likely to be the continuing reluctance of such employers to bear the burden of paying workers and providing cover when they take leave. In this light, it remains to be seen whether the requirement in *Smith v AJ Morrisroes & Sons* that employers take “reasonably practicable steps to be taken to ensure that workers take their holidays” will be sufficient to guarantee that paid leave is permitted by employers and taken by workers, even if the ECJ determines in *Robinson-Steele* and *Caulfield* that rolled up holiday pay is permissible. On the other hand, if the ECJ decides that rolled up holiday pay is impermissible under the Directive then many employers will have to change their current approach, although it would be overly optimistic to expect a docile acceptance of the spirit of the Directive. Rather, there is likely to be a strong demand for a new strategy to avoid the obligation to provide paid leave.

In any event, the result of the Court of Appeal’s judgment in *Ainsworth*, which operates to deny workers their full shortfall of holiday pay, combined with the lack of a strong administrative enforcement mechanism, may leave employers feeling that they have little to lose by operating a system which does not comply with the Directive. In many cases the relatively low sums involved will discourage workers from pursuing a complaint, particularly workers on low salaries who are the most likely to face problems in asserting their statutory rights and the least likely to have

enhanced contractual leave provisions. The newly-introduced grievance rules are likely to exacerbate this, as employers may simply avoid paying holiday pay to its workers except where they individually raise a grievance, thus managing to avoid the potential embarrassment of a tribunal case.

More generally, the approach to paid leave in the United Kingdom remains illustrative of the problems which may be faced by workers where employment rights are lightly regulated in the drive for a “flexible labour market”. If the Government wishes to ensure that workers do in fact take their annual leave entitlement under the Directive it may be necessary to provide a stronger enforcement mechanism. One method, if the House of Lords does not overturn the Court of Appeal in *Ainsworth*, would be to allow workers to obtain compensation for any series of failures to give paid leave. A second would be to allow overtime and bonuses to be included in calculating the rate of holiday pay. A third method would be to increase levels of compensation where the employer is regarded as blameworthy or wilful in its failure to provide paid leave. As suggested in the proposed Bill, a fourth way would be to introduce criminal sanctions for breach of the annual leave provisions and to provide for administrative enforcement.

However, the fact that there are currently no provisions in the Regulations for criminal sanctions or administrative enforcement would appear to support the view that paid leave is not taken seriously in the United Kingdom. Therefore, it seems likely that the United Kingdom Government, while paying lip-service to the spirit of the Directive, will ignore such approaches to enforcement in preference of a system

which in reality allows employers to minimise their cost base even to the detriment of the rights of low-paid workers.