
**WORKING TIME AND THE RIGHT TO PAID ANNUAL LEAVE:
THE IMPLICATIONS OF *STRINGER*, *PEREDA* and *WILLIAMS***

MICHAEL FORD, OLD SQUARE CHAMBERS¹

1. The social right to paid annual leave owes its origin to the Working Time Directive 2003/88/EC (the “Directive”), implemented in UK law by the Working Time Regulations 1998 (“WTR”). The meaning, scope and effect of that right has been radically affected by the litigation in *Ainsworth*, reported under the name of *Stringer v HM Revenue and Customs*, Joined Cases C-520/06, [2009] IRLR 214 (ECJ²) and [2009] UKHL 31, [2009] IRLR 677 (HL), and clarified by the later ECJ decision in *Pereda v Madrid Movilidad SA*, Case C-277/08, [2009] IRLR 959. In March this year, in *British Airways plc v Williams* [2010] UKSC 16 the Supreme Court referred further questions to the ECJ concerning the level of pay required for annual leave under the Directive.

2. *Stringer* was concerned with three main issues:
 - (1) The circumstances in which workers off sick can take and be paid for holidays under regulations 13 and 16 WTR and/or Article 7 of the Directive. The issue has been further clarified by the subsequent decision in *Pereda*.
 - (2) How compensation for untaken holiday is to be calculated under regulation 14 WTR in circumstances in which workers are sick in all or part of the leave year prior to termination.
 - (3) Whether claims for holiday pay under regulation 16 and/or 14 WTR can be

¹ Junior Counsel for the workers in *Stringer* and in *Williams*.

² Strictly the ECJ is now called the “Court of Justice”

brought as a claim for unlawful deduction from wages under s.23 ERA. The answer is that, at least where the sum is liquidated or certain, they can be: see the House of Lords in *Stringer*. Hence a claim for a series of under-payments or non-payments of holiday pay can be brought within three months of the last under-payment under s.23 ERA.

3. **Human rights instruments.** In the last century, numerous international human rights instruments set out the right to paid annual leave. See in particular:

- (1) Article 24 of the United Nations' Universal Declaration of Human Rights of 1948 says that everyone has the right to "reasonable limitation on working hours and periodic holidays with pay".³
- (2) By Article 2(3) of the European Social Charter of 1961, ratified by the UK, the contracting parties undertook "to provide for a minimum of two weeks annual holiday with pay". The revised Social Charter of 1996, which the UK has signed but not ratified, refers to a minimum of four weeks' annual holiday with pay.
- (3) The Community Charter of the Fundamental Social Rights of Workers, adopted in 1989 by all member states except the UK and finally adopted by the UK in 1998, says in paragraph 8 that every worker has the right to "annual paid leave, the duration of which must be harmonised in accordance with national practices".
- (4) The Community Charter of Fundamental Rights of the European Union, signed at Nice in 2000, also includes rights to working conditions which respect the worker's health, safety and dignity, and includes a right to annual paid leave.⁴
- (5) ILO Convention No. 132 of 1970 says that all employed persons are entitled to

³ See too the UN International Covenant on Economic, Social and Cultural Rights of 1966, referring to a right to periodic holidays with pay, as well as remuneration for public holidays (Article 7).

⁴ See Article 31.

annual paid holiday of a minimum length, which is no less than three working weeks after one year's service.⁵ Article 7(1) specifies that a person shall receive for that holiday "at least his normal or average remuneration". The Convention has not been ratified by the UK but has been by many other member states of the EU.

4. These human rights instruments are relevant to informing the interpretation of the Directive: see the Advocate General in *BECTU* [2001] ICR 1152 at paragraphs 23-28 and in *Stringer* at paragraph 48. Thus the entitlement is a fundamental social right, "*a particularly important principle of Community social law from which there can be no derogations*" save as expressly permitted by the Directive: see the ECJ in *BECTU* at paragraph 43 and *Stringer* at paragraph 22. The ILO Convention is especially relevant. As well as being the most detailed of the international instruments, recital (6) to the Directive expressly states that account "*shall be taken of the principles of the International Labour Organisation with regard to the organisation of working time*". In *Stringer* the Advocate General referred to the Convention and said that the Directive "*seeks to provide a level of protection at least comparable to ILO Convention No. 132*".⁶ The Court, too, made clear that the Convention was relevant to interpreting the Directive, and had regard to the provisions of the Convention in deciding how the Directive applies to workers absent through sickness.⁷

The provisions of the Directive

5. WTR implemented the Working Time Directive 93/104/EC, now codified in the Working Time Directive 2003/88/EC. The Directive was introduced as a health and safety measure under former Article 118A of the Treaty, and lays down "minimum safety and health requirements for the organisation of working time".⁸ Health and safety in this context has been defined broadly, as meaning a "state of complete physical, mental and social well being that does not consist only in the absence of illness or infirmity": see *United*

⁵ Article 3.

⁶ Paragraph 64.

⁷ See paragraphs 37-38.

⁸ See Article 1.

Kingdom of Great Britain v Council of the European Union, Case C-84/94, [1996] ECR I-5755 at paragraph 15.⁹

6. The Directive deals shortly with the question of annual leave, providing as follows:

Article 7 - Annual leave

(1) Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

(2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

....

Article 15 - More favourable provisions

This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of health and safety of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.

The reference to “in accordance with conditions for entitlement to, and granting of such leave laid down by national legislation and/or practice was given a narrow interpretation in *BECTU* limited, according to the Advocate General, to the procedural aspects of taking leave and not allowing restrictions as to the entitlement itself.¹⁰

7. There are similar rights to annual leave applying to workers who originally fell outside the scope of the Working Time Directive, such as workers in the transport sector and those at sea:¹¹ see e.g. the Working Time of Seafarers Directive 1999/63/EC; the Aviation

⁹ It should be noted that in this case the UK government argued that the right, *inter alia*, to paid annual leave had too tenuous a connection with health and safety to fall within the scope of Article 118A (see paragraph 13). The Court rejected that argument.

¹⁰ See Advocate General at paragraph 34, ECJ at paragraph 65.

¹¹ See the original Article 1(3) to Directive 93/104/EC, since amended by Directive 2000/34/EC. The 2000/34 Directive brought transport workers under the umbrella of the Working Time Directive but at the same time permitted more specific community requirements for certain occupations: see Article 14 of the Working

Directive 2000/79/EC, giving effect to the European Agreement on the Organisation of Working Time of Mobile Staff in Civil Aviation. Clause 3 of the Agreement annexed to the Aviation Directive adopts, for example, almost identical wording to Article 7 of the Working Time Directive, stating that “*Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of such leave, laid down by national legislation and/or practice*”. Despite the different sources of the rights, the use of similar language in the same field suggests that the European standards of annual leave are the same in all the Directives.¹²

8. Community law also confers rights to other kinds of leave from work. The right to maternity leave, for example, is conferred by Article 8 of the Pregnant Workers Directive 92/85/EEC, and clause 2.1 of the Framework Agreement on Parental Leave, Directive 96/34/EC, grants “*men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months*”.¹³ These rights serve different purposes and may not necessarily be interpreted in the same way as rights to annual leave under working time instruments.

The key provisions of WTR.

9. The provisions in WTR, including those governing annual leave, apply to workers and not simply employees. But, tracking the approach of the Directives, by virtue of regulation 18 WTR (or certain provisions of WTR) do not apply to workers governed by more specific sets of regulations. There are other sets of domestic regulations applying to specific sectors of activity, such as the Civil Aviation (Working Time) Regulations 2004, the Merchant Shipping (Hours of Work) Regulations 2002, the Fishing Vessels (Working Time: Sea Fishermen) Regulations 2004, the Merchant Shipping (Inland Waterways) Regulations 2003 and the Road Transport (Working Time) Regulations 2005. Unfortunately, the wording of these Regulations is not always identical to the corresponding provisions of WTR - the litigation in *Williams v British Airways*, which

Time Directive.

¹² See the judgment of the Supreme Court in *BA v Williams* at paragraph 10.

¹³ See clause 2.1 of the Framework Agreement on Parental Leave.

the Supreme Court has referred to Europe, concerns regulation 4 of the Civil Aviation (Working Time) Regulations 2004, which does not expressly include provisions explaining how holiday pay is to be calculated (cf. regulation 16 WTR) but simply confers a right to “*paid annual leave of at least four weeks*”. The central provisions of WTR on annual leave are set out below.

10. **The entitlement.** Implementing the basic right in Article 7(1) of the Directive, regulation 13(1) WTR states that “*Subject to paragraph (5), a worker is entitled to four weeks’ annual leave in each leave year*”.¹⁴ Regulation 13(5) states:

Where the date on which a worker’s employment begins is later than the date on which (by virtue of a relevant agreement¹⁵) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.

The entitlement under regulation 13 is not subject to any exceptions. By regulation 13(9) leave “*may only be taken in the leave year in respect of which it is due*” and it may not be replaced by a payment in lieu except on termination of employment.

11. **Regulation 13A: the right to additional leave.** Lengthy consultation took place on the DTI’s proposals to increase the holiday entitlement by giving a period of “additional leave”. The Working Time (Amendment) Regulations 2007¹⁶ inserted a new regulation 13A in WTR, giving a worker a right to 0.8 weeks additional leave from 1 October 2007 and to 1.6 weeks from 1 April 2009.¹⁷ The entitlement does not apply to an employer who already provided, as at 1st October 2007, *each* worker employed by it with an annual leave entitlement of 1.6 weeks or eight days.¹⁸ The Regulations thus envisage (i) workers with

¹⁴ The former provisions, limiting the amount of leave in leave years beginning before 23 November 1999, were revoked by the Working Time (Amendment) Regulations 2001.

¹⁵ Defined in regulation 2(1) as a workforce agreement, a collective agreement or a written contract or agreement.

¹⁶ SI 2007 No.2079.

¹⁷ See the DTI, *Increasing the Holiday Entitlement: A Further Consultation* (June 2007).

¹⁸ See new regulation 26A.

an entitlement under WTR to the additional period of leave and (ii) workers entitled under contract to the additional period of leave. The distinction will often not be clear: it may not be easy to establish retrospectively whether, as at 1 October 2007, the conditions of regulation 26A are met. Note that under a relevant agreement, leave due under regulation 13A *may* be carried forward into the following leave year (regulation 13A(7); cf. regulation 13(9)).

12. **The exercise of the right.** To exercise his entitlement to annual leave under regulation 13, a worker is required to give prior notice to his employer in compliance with regulation 15. An employer may also give notice under regulation 15. A “relevant agreement” may vary or exclude these notice rules. There is potential for this provision to be exploited by employers;¹⁹ but see further below.
13. **The amount of leave which may be taken.** In the first year of his employment “*the amount of leave a worker may take at any time in the exercise of his entitlement under regulation 13*” is limited by a formula, in accordance with which a worker accrues the right to take leave over the course of the year, at the rate of one twelfth of four weeks on the first day of each month (regulation 15A). Thereafter a worker has the right to take four weeks’ annual leave from the first day of each leave year. (Regulation 15A was introduced following the decision in *R (BECTU) v Secretary of State for Trade and Industry* [2001] ICR 1152, in which the ECJ held that the then requirement in regulation 13(7) WTR of 13 weeks’ continuous employment before the entitlement to four weeks’ annual leave arose was incompatible with Article 7 of the Directive.²⁰)
14. **The amount of pay.** By virtue of regulation 16(1), a “*worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week’s pay in respect of each week of leave*”. For this purpose, a week’s pay is

¹⁹ See *Industrial & Commercial Maintenance Limited v Briffa*, UKEAT/0215/08, 22 July 2008: employer gave employee notice of dismissal, referring to contractual provision by which an employee not required to work his notice period was deemed to be on holiday during notice period. EAT held this was an effective relevant agreement for the purpose of regulation 15(5).

²⁰ The regulation only applies to persons employed as at 25 October 2001. It illustrates that when Parliament wishes to reduce the four week entitlement it has done so explicitly, and carefully.

calculated by reference to ss 221 to 224 of ERA (regulation 16(2)-(3)), the general provisions for calculating a week's pay for the whole gamut of statutory employment rights including e.g. redundancy payments and unfair dismissal basic awards.²¹ There is no maximum applicable to payment for annual leave.²² The provisions are complicated, as the Court of Appeal acknowledged in *Bamsey v Albon Engineering & Manufacturing* [2004] IRLR 457.²³ In broad terms (i) if there are normal working hours with fixed remuneration, the pay is the amount payable "if the employee works...his normal hours";²⁴ (ii) if there are normal working hours²⁵ but the remuneration payable varies with the amount of work done, a week's pay is calculated on the average hourly remuneration when the employee was actually working;²⁶ and (iii) if there are no normal working hours, the weekly remuneration is based on the average over 12 weeks, ignoring weeks when no remuneration was payable to the employee.²⁷ The result is that the amount of a week's pay is not necessarily identical to the contractual rate for a week's pay, or the amount which would in fact have been paid during the week of leave if the employee was working. For example, overtime which the employer is required to work but which the employer is not guaranteed to provide does not count towards "normal working hours" under s.234 and so does not fall within the statutory formula if the employee has fixed pay for normal working hours: see *Bamsey*. Although in *Bamsey* the Court of Appeal held that these provisions are compatible with the Directive, the issue has re-emerged collaterally in *Williams v BA* (see below).

15. Regulation 17 provides for the position where a worker "*is entitled to.... annual leave both under a provision of these Regulations and under a separate provision (including*

²¹ See the recent authority on basic awards, *Wings Aeromedical Services v Alderson*, UKEAT/0411/07/ZT.

²² See WTR regulation 16(3)(d) by which s.227 ERA, setting out the statutory maximum, is inapplicable.

²³ See Auld LJ paragraph 9.

²⁴ See s.221.

²⁵ See s.224 ERA.

²⁶ See s.221(3). For some of the difficult questions which arise in applying these provisions in relation to bonus payments, see *Evans v The Malley Organisation* [2003] ICR 432 (pay did not vary with amount of work done because commission was not linked to amount of work) and cf. *Gurney v Adshead*, UKEAT/0150/06 (variable bonuses were sufficiently linked to output for pay to vary with amount of work done).

²⁷ See s.224.

a provision of his contract)” and allows the worker “*to take advantage of whichever right is, in any particular respect, the more favourable*”. It thus envisages an overlap between leave under WTR and contractual leave.

16. **Payment on termination.** In relation to compensation due on termination of employment, regulation 14 states:

(1) This regulation applies where -

- (a) a worker’s employment is terminated during the course of his leave year, and*
- (b) on the date on which the termination takes effect (‘the termination date’), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 differs from the proportion of the leave year which has expired.*

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

(3) The payment due under paragraph (2) shall be-

- (a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or*
- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula -*

(A x B) - C

where -

- A is the period of leave to which the worker is entitled under regulation 13,*
- B is the proportion of the worker’s leave year which expired before the termination date, and*
- C is the period of leave taken by the worker between the start of the leave year and the termination date.*

17. **Remedies.** Regulation 30 of WTR deals with remedies and states:

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

....

- (a) has refused to permit him to exercise any right he has under....regulation 13; [or]*
- (b) has failed to pay him the whole or any part of any amount due to him*

under regulation 14(2) or regulation 16(1).

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented-

- (a) before the end of the period of three months (or, in a case to which regulation 38(2) applies²⁸, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.*

If a tribunal upholds a complaint under regulation 30(1)(a) it grants a declaration and “may” make an award of compensation, whereas under regulation 30(1)(b) it “shall” order the employer to pay the amount due to the worker.²⁹

Contractual rights

18. The rights in WTR operate in conjunction with parallel contractual rights. A worker may take the benefit of whichever right is more favourable - WTR or contractual - see regulation 17. Difficult questions may arise as to what is the precise scope and meaning of a contractual document. For example, if particulars of employment refer to a right to statutory holidays, is this provision intended to give a contractual right to such holidays or is it merely referring to the rights contained in WTR? Note the following:

- (1) It is unlikely that the rights to take and be paid for annual leave laid down in regulations 13 and 16 WTR operate as implied terms of the contract of employment (cf. *Barber v RJB Mining (UK) Ltd* [1999] ICR 679: implied term that a worker should work no more than 48 hours on average). In some cases, however, particulars of employment or the contractual documents may, depending upon their proper interpretation, give rise to separate and overlapping contractual rights, which may be more favourable to the worker (e.g. if the right is to statutory

²⁸ This paragraph concerns claims brought by members of the armed forces.

²⁹ See regulation 30(3) and 30(5).

rights plus bank holidays).

- (2) There is no implied contractual right to take e.g. bank holidays.³⁰ In *Campbell and Smith Construction v Greenwood* [2001] IRLR 588 under a working rule, workers were entitled to seven working days' winter holiday, which in each year included 31 December in practice, plus Christmas Day, Boxing Day and New Year's Day. The government announced an additional bank holiday on 31 December 1999, and the workers claimed they were entitled to another working day off as a result. The EAT concluded that in the absence of a change to the contract, the Government declaration had no effect on 31 December which therefore remained a working day. But everything turns on the provisions of the contract: a contract which refers to a right to "public holidays", for example, may mean such holidays as varied from time to time.³¹
- (3) Contractual rights as to payment for annual leave depend upon a proper interpretation of the contract or upon implied terms (cf. the provisions for calculating a week's pay in ss 221-224 ERA which apply for the purpose of WTR). There is no automatic right to compensation for untaken holiday on termination of employment, which depends on the existence of an express or implied term to that effect: see *Morley v Heritage* [1993] IRLR 400.
19. The distinction between (i) contractual rights to paid holiday and (ii) rights derived from WTR fortunately has less practical importance following the decision of the House of Lords in *Stringer* that a claim for regulation 16 or 14 payments can be brought as a claim for unlawful deduction from wages, just like a contractual claim. The contractual limitation period is six years, three months after termination of employment in the ET or three months from the last of series of deductions in a claim under s.23 ERA, whereas a

³⁰ Cf. the *obiter* comments in *Tucker v British Leyland* [1978] IRLR 493 (County Court) at paragraph 17 to the effect that in the absence of a contractual provision to the contrary a worker an hourly paid employee is entitled to a day's holiday on recognised public holidays. But in that case it appears that the employees had a contractual right to seven bank holidays, including New Year's Day and the August bank holiday, and the issue was whether the employer was able to transfer the dates of those holidays without the consent of the employees.

³¹ The EAT in *Campbell* envisaged such a possibility: see paragraph 8.

claim under WTR must be brought within three months of (i) the failure to pay (regulation 30) or three months from the last of a series of deductions (s.23 ERA). Following the Employment Tribunals Act 1996 (Tribunals Composition) Order 2009, SI 2009/789, a complaint under regulation 30 WTR can be heard by a chairman sitting alone, in common with claims for unlawful deduction or breach of contract.³² But it is nonetheless possible to envisage complex intersections between contractual and WTR rights: it is possible, for example, that under regulation 13 the statutory formula in ss 221-224 ERA for a week's pay applies to the sums due under WTR, whereas payments for additional leave are due only under contract.³³

The *Stringer* and *Pereda* Decisions

20. ***Stringer***. The claimants in ***Stringer*** fell into two distinct categories:

- (1) The first category concerns Mrs Khan, an employee of the Revenue who was absent on indefinite sick leave for several months, and was in receipt of sick pay. She wished to exercise her right to take annual leave under WTR. On 10 October 2003 she gave notice to the Revenue that she wished to take 20 days' paid annual leave from 17 November until 11 December 2003. The Revenue refused her request. A Tribunal upheld her claim under regulations 13 and 16.
- (2) Mr Ainsworth, Mr Kilic and Mr Thwaites³⁴ fall into the second category. Each was dismissed by the Revenue. Each had been absent on sick leave throughout the leave year in which his employment was terminated. None of them had taken any annual leave in that leave year. In three separate cases a different ET upheld the claims and calculated the compensation due in accordance with the formula in regulation 14(3) WTR. Mr Ainsworth's claim succeeded in the ET for the sum of £16.14.

³² See s.4(3) Employment Tribunals Act 1996.

³³ See regulation 26A. Note that, even if the additional 1.6 weeks' leave is granted as a matter of contract, still the rate must not fall below the statutory formula under ss 221-224 ERA; but this does not apply to any leave additional to those 1.6 weeks: see regulation 26A(2).

³⁴ Except Mrs Stringer who took no part in the proceedings following the Court of Appeal.

- (3) In the claim brought by Mr Ainsworth, the tribunal ordered the sum to be paid as an unlawful deduction from wages (even though he also claimed under WTR).
21. The EAT dismissed the Revenue's appeals without hearing full argument because of an earlier EAT authority, *Kigass Components v Brown* [2002] ICR 697. The Court of Appeal (*Commissioners of Inland Revenue v Ainsworth* [2005] ICR 1149) allowed the Revenue's further appeal, holding that a worker cannot take paid annual leave under WTR during a period in which the worker is absent on sickness leave. According to the Court of Appeal, "leave" for the purpose of WTR means release from an obligation to work. In the cases of Mr Ainsworth, Mr Kilic and Mr Thwaites, the Court held that if a worker had no entitlement to take annual leave prior to termination then he had no entitlement to compensation on termination.
22. The ECJ. At the outset of the hearing on 30 October 2006 the House of Lords decided to refer questions to the ECJ.³⁵ The ECJ hearing was linked with a similar German case, *Schultz-Hoff*. The ECJ held as follows:
- (1) The ECJ rejected the Revenue's argument that "leave" means leave from an obligation to work. This is clear not only from the result but also because the ECJ noted the absence of any distinction in the Directive between workers off sick and those working and added that the right to annual leave cannot be subject to a condition of actually working during the leave year.³⁶
- (2) Nevertheless, according to the ECJ, sick leave and annual leave serve different purposes,³⁷ and member states have a discretion to lay down the circumstances in which workers may exercise the right.³⁸ Accordingly, a member state may provide

³⁵ The reference arose largely because a German court had referred similar issues: see *Schultz-Hoff*, Case C-350/06.

³⁶ Paragraphs 40-41.

³⁷ Paragraph 25.

³⁸ Paragraph 28.

that a worker is not entitled to take annual leave while on sick leave provided - and this is the sting in the tail - “*that the worker in question has the opportunity to exercise the right conferred by the Directive during another period*”.³⁹ The point is underlined by the ruling in relation to ***Schultz-Hoff***. Mr Schultz-Hoff was not allowed to take annual leave because he was not fit for work.⁴⁰ His incapacity continued until the end of the carry-over period permitted under German law - three months after the end of the leave year.⁴¹ While national law could provide that the right to annual leave was lost at the end of a leave year or carry-over period, according to the ECJ, this is only if the worker has actually had the opportunity to exercise the right.⁴² The same applies if a worker is sick for part of the leave year and his sickness is the reason why he cannot take annual leave.⁴³

- (3) On the other hand, “*nor does Directive 2003/88 preclude national legislation or practice which allow a worker on sick leave to take paid annual leave during that sick leave*”.⁴⁴
- (4) As to the allowance in lieu payable on termination for untaken leave, the ECJ held that the entitlement to paid annual leave and the payment on termination are both aspects of a single right. In either case the purpose is to ensure that the worker is in a position comparable to that while he is working.⁴⁵ Consistent with its analysis on the first issue, the Court held that a worker off sick must be put in a position comparable to that he would have been in had he exercised the right to take leave while working.⁴⁶ In other words, he is treated just as if he had worked during the relevant leave year before termination.

³⁹ Paragraph 29.

⁴⁰ Paragraph 12.

⁴¹ See paragraph 16.

⁴² Paragraph 43.

⁴³ Paragraph 25.

⁴⁴ Paragraph 31.

⁴⁵ Paragraph 61.

⁴⁶ Paragraph 61.

23. The House of Lords. On remission to the House of Lords the Revenue effectively conceded that the appeals of both categories of worker should be allowed, agreeing with the analysis put forward on behalf of the workers. Consequently the House of Lords did not hear oral argument on the point and restored the order of the EAT, dismissing the appeals from the employment tribunals.
24. In Mrs Khan's case, national law could (i) allow her to take annual leave while off sick or (ii) deny her the right to do so. But under (ii), according to the ECJ, the worker "*must have the opportunity to exercise the right conferred by the Directive during another period*".⁴⁷ Mrs Khan gave due notice under regulation 15 WTR requesting annual leave. The Revenue did not allow her to carry leave forward.⁴⁸ WTR would be compatible with the Directive if a worker on indefinite sick leave, who made a request to take annual leave, was allowed to take annual leave.⁴⁹ There is no difficulty in achieving that result because regulation 13 simply says a "worker" is entitled to four week's annual leave, and a worker off sick remains a worker. The entitlement to "leave" under regulation 13 was therefore unaffected by her sickness absence, and it was agreed that Mrs Khan's appeal must be allowed.
25. In the case of the other workers, the ECJ was clear that the right to annual leave was not conditional upon a worker having worked during the year and was not extinguished because a worker, on account of sickness, did not have the opportunity to take leave.⁵⁰ The allowance in lieu must be based on normal remuneration and must put the worker in a position comparable to that he would have been in if he had exercised the right to take annual leave during the employment. Hence under national law a worker who was off sick for all or part of the leave year must be treated in the same way as a worker who was at work. It was therefore agreed that the appeals of Mrs Kilic, Mr Thwaites and Mr Ainsworth must also be allowed, and they should each receive undiscounted regulation 14 payments, just as the tribunals had ordered in each case.

⁴⁷ ECJ paragraph 29.

⁴⁸ In fact she was off sick for the whole of the relevant leave year.

⁴⁹ See paragraph 31 of the ECJ judgment.

⁵⁰ See paragraphs 41 and 54.

26. **Clarifying the effect of *Stringer*: *Pereda*.** An issue which was hinted at, but not definitely decided in *Stringer* was: what about a sick worker who does want or is unable to take annual leave? These were the circumstances in *Pereda*. Mr Pereda had been allocated leave for the period 16 July to 15 August 2007, and was off sick following an accident at work until 13 August 2007.⁵¹ His request to be allocated a new period of annual leave in the 2007 leave year was refused.⁵² Emphasising again that a worker must actually be able to exercise the right to take annual leave and that sick leave and annual leave served different purposes, the ECJ held that a worker who is on sick leave during a period of scheduled annual leave “*has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave*”.⁵³ Although that new period of leave must be requested in accordance with national rules and could take into account the interests of the employer, the overriding obligation on the employer is to ensure that the worker is granted his entitlement to annual leave for a different period, even if this period falls outside the leave year.⁵⁴

Outstanding questions

27. Although *Stringer* and *Pereda* have greatly clarified the nature of the entitlement to annual leave, some difficult questions still remain as to how domestic effect is to be given to the rights in the Directive. Some of these are highlighted below.
28. **Worker off sick for limited period.** What is the position of worker who is off sick initially for only a restricted period? If that worker serves a regulation 15 notice to take leave, can the employer deny the right, on the basis that the worker may take annual leave at another time? A worker off sick remains a “worker”, in accordance with the ECJ decision in *Stringer*, and the same must apply to the term “worker” in regulation 13, so

⁵¹ See ECJ paragraph 11.

⁵² ECJ paragraph 13-14.

⁵³ ECJ paragraph 22.

⁵⁴ See paragraphs 23-26.

that he has the consequential entitlement to take annual leave, and the right to serve a regulation 15 notice in exercise of it.⁵⁵ Although on the face of it the employer could serve a counter-notice under regulation 15 denying the right to take leave on certain days, just as it could in the case of any other application for leave, the different treatment of a sick employee could give rise to possible breaches of trust and confidence; or it might be unlawful under WTR because amounting to the capricious exercise of a discretion.⁵⁶ Finally, if the worker did not recover before the end of the leave year, then the only means of ensuring compatibility with the Directive is to allow carry over of leave to the next year. All these reasons suggest that a worker who is off sick and who requests annual leave should be allowed to take it.

29. **No regulation 15 notice served.** What if a worker is off sick and does not serve a regulation 15 notice to take annual leave during the period of sickness? In such a case it is unlikely that there is any denial of the exercise of the right to take annual leave:⁵⁷ a sick worker who fails to serve such a notice should not be in a better position than a worker who is not sick, and a worker who fails to request leave in accordance with the statutory rules on notice, which may be modified by a relevant agreement,⁵⁸ may lose the right at the end of the leave year: see *Lyons v Mitie Security Ltd*, UKEAT/0081/09/CEA. But this is not likely to apply where a worker is sick during the year and, as a result of that sickness, claims he or she did not wish to take annual leave while sick (see below).
30. **Employer insists worker takes leave while off sick.** Can an employer *insist* that a worker takes annual leave during sick leave? Such a result is inconsistent with *Pereda*, a point underlined by Article 6(2) of ILO Convention No. 132, by which “*periods of incapacity for work resulting from sickness or injury may not be counted as part of the minimum annual holiday with pay*”. There is probably no difficulty in interpreting WTR to achieve this result by restricting the apparently unconstrained discretion on conferred on an employer to serve a regulation 15 notice: “may require” in regulation 15(2) means

⁵⁵ See the potential for variation by relevant agreement - regulation 15(5).

⁵⁶ See the recent EAT decision in *Lyons v Mitie Security Ltd*, UKEAT/0081/09/CEA, paragraph 34.

⁵⁷ See regulation 30 WTR

⁵⁸ See regulation 15(5).

“may require consistently with the Directive”.

31. **Worker who cannot benefit from rest because of sickness.** According to the ECJ, the purpose of the annual leave provisions are to give a worker rest, and to enjoy a period of relaxation and leisure,⁵⁹ whereas the purpose of sick leave is different, to allow recovery from illness.⁶⁰ Following *Pereda*, it is clear that under the Directive a worker who is on sick leave during a period of pre-booked annual leave is entitled to take that leave at another time. It is arguable that the reasoning should extend to a worker who falls sick while on holiday and thus who ceases to be capable of enjoying the period of relaxation and leisure which the Directive contemplates. On that argument, days of sickness while on annual leave should not count towards annual leave. But it appears that the worker must actually request the taking of leave at another time.
32. Less clear is how the decision in *Pereda* is translated into WTR if a worker remains sick during the relevant leave year or otherwise cannot take the outstanding leave in that year. There are, it seems to me, two possible routes to meeting the requirements of the Directive and a third means of providing an effective remedy for breach.
- (1) As against an emanation of the state, it has been suggested that a worker can rely directly on the Directive, and carry over any outstanding leave to the succeeding leave year. But in *Gibson v East Riding* [2000] IRLR 598 the Court of Appeal held that the rights to annual leave in the Directive are not directly effective. The decision in *Gibson*, however, pre-dated *BECTU* [2001] ICR 1152 in which the ECJ said that the Directive “*imposes a clear and precise obligation on member states to achieve a specific result*”⁶¹ and subsequent ECJ decisions, such as *Robinson-Steele* [2006] ICR 932 and *Stringer* which have arguably clarified the level of payment due under the Directive. Further, in *Bleuse v MBT Transport* [2008] IRLR 488, the EAT (Elias J) held that the Directive was directly

⁵⁹ ECJ paragraph 25.

⁶⁰ ECJ paragraph 25.

⁶¹ See paragraph 34.

effective,⁶² although he did not refer to *Gibson*. The decision in *Gibson* may, therefore, be vulnerable to challenge.⁶³

- (2) It is possible that WTR can be construed to allow carry over of leave when a worker cannot take his or her period of rest because of sickness. The principal difficulty faced by such an interpretation is the express wording of regulation 13(9) WTR by which the basic four weeks' annual leave "*may only be taken in the leave year in respect of which it is due*" (cf. the additional 1.6 weeks' leave, which may be carried over into the immediately following leave year if a "relevant agreement" so provides - see regulation 13A(7)). At least one tribunal, however, has construed WTR as permitting carry over of leave in circumstances where a worker could not go on leave because he was off sick, even though the worker was paid holiday pay for the days he had booked off: see *Shah v First West Yorkshire Ltd.*⁶⁴ The increasingly bold view that domestic courts take of the interpretative obligation assists this conclusion.⁶⁵ A more straightforward means of interpretation than the one used by the tribunal in *Shah* may be to argue that if a worker is unable to take leave owing to sickness, then that leave is not "due" to him in that leave year, so that regulation 13(9) is side-stepped.
- (3) A third possibility is the payment of compensation if leave is not carried over by means of a claim under the wages jurisdiction in s.23 ERA. In *Canada Life v Gray* [2004] ICR 673 the employer told self-employed commission agents that they were not entitled to holiday pay once WTR came into force because it believed that the claimants were not workers.⁶⁶ Although the workers unsurprisingly failed to serve regulation 15 notices (or take holiday) during employment, the EAT upheld their claims for holiday pay from 1998 to 2002 on

⁶² See paragraph 52.

⁶³ See too *BA v Williams* at paragraph 9; but note that there was no substantive argument as to the meaning of direct effect in that case because BA is not an emanation of the state.

⁶⁴ Leeds ET, 20 November 2009. See the report in *IDS Brief* March 2010.

⁶⁵ See *EBR Attridge Law LLP v Coleman (No.2)* [2010] IRLR 10, EAT, citing the House of Lords in *Ghaidan v Godin-Mendoza* [2004] AC 557.

⁶⁶ See EAT paragraph 16.

the basis that on termination of employment the provisions regulating taking of holidays cease to be relevant, so the workers could claim for their unpaid holiday as a series of deductions under s.23 ERA.⁶⁷ (The EAT said in such a case the date of deduction was the end of the leave year.⁶⁸) Although the Court of Appeal in *Stringer* said that *Canada Life* was wrongly decided,⁶⁹ its ruling has now been overturned, in effect, by the ECJ and HL, so that *Canada Life* is presumably resurrected. To my knowledge some tribunals have calculated payments on termination going back several years, linking a final under-payment with the earlier non-payment of holiday pay.⁷⁰ What is not clear is whether the decision should be restricted to claims on *termination*. If service of a regulation 15 notice is unnecessary where this would be futile because of the employer's stance, in principle why can a worker not claim for a series of deductions, relying on *Stringer* in the House of Lords, even in a case where employment is continuing? Perhaps the answer is that, in circumstances of continuing employment, carry over provides the effective remedy, whereas on termination the only effective remedy for the loss of the past entitlement is payment of compensation. But note that under s.23 there must be an under-payment which is within the three months' limitation period: if, for example, a regulation 14 payment on termination is paid in full, there may be no sufficiently proximate final under-payment.

33. **Carry over in other circumstances.** In *Merino Gomez v Continental Industrias del Caucho* [2004] ECJ 407 the ECJ held that a woman must be able to take annual leave during a period other than the period of her maternity leave, even if the maternity leave period covers a period of annual leave fixed for the whole workforce. It is probable that if a woman is unable to take annual leave because she is on maternity leave, carry over of annual leave should apply under the Working Time Directive. The same arguments as to the interpretation of WTR to achieve this result arise as set out above in relation to sick

⁶⁷ See EAT paragraph 23.

⁶⁸ See paragraph 28.

⁶⁹ See CA paragraph 24.

⁷⁰ See e.g. *Rawlings v Direct Garage Door*, Sheffield ET, 13 January 2010, reported in *IDS Brief* 901, May 2010.

workers and, in addition, a woman denied annual leave at a later time because of taking maternity leave has a good claim based on discrimination on grounds of sex or pregnancy: in *Merino Gomez* it was equally a breach of the Pregnant Workers' Directive not to allow leave to be taken at another time.

34. **Workers in receipt of PHI benefits etc.** What of workers who remain employed while e.g. in receipt of PHI benefits or on career breaks,⁷¹ or 'atypical' workers, who owe no future obligation to work for any specified period?⁷² I think they are probably entitled to take and be paid for annual leave just like any other worker: in *Stringer* the ECJ rejected the Revenues submissions of a linkage between leave and an obligation to work. Note the problem as to whether payments of PHI benefits can be set against the payments for annual leave because the off-setting provisions of regulation 16(5) are restricted to "contractual remuneration" paid to the worker.

Unlawful deduction from wages

35. This point only arose in the case of Mr Ainsworth because in his case the order was expressed as for unlawful deduction from wages. Although the point was wholly academic in his case - he claimed under WTR as well- the Court of Appeal decided to hear the matter, as did the House of Lords. No question relevant to this point was referred to the ECJ.
36. By virtue of s.13 ERA an employee has a right not to suffer an unauthorised deduction from wages unless this is authorised by statute, contract or written agreement. For this purpose, "wages" are defined in s.27 as follows:

In this Part, 'wages' in relation to a worker means any sum payable to the worker in connection with his employment, including-
(a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*

⁷¹ Cf. *Curr v Marks and Spencer plc* [2003] ICR 443, CA.

⁷² See e.g. the workers in *Carmichael v National Power* [1999] ICR 1226.

37. The critical distinction between a wages claim and a claim under regulation 30 WTR concerns time limits. A complaint of unlawful “deduction” from wages can be brought within three months of the last in a “*series of deductions*” under s.23(3) ERA, whereas a claim under regulation 30 WTR enjoys no such extension. For example, in *British Airways v Williams* [2009] EWCA Civ 281, pilots complained about the level of their holiday pay under the Civil Aviation (Working Time) Regulations 2004. Because of the Court of Appeal decision in *Stringer*, separate claims had to be lodged each time a pilot went on holiday, swamping London South ET with claims.
38. The House of Lords unanimously held that payments due for annual leave under regulation 16 and on termination under regulation 14 both fall within the concept of ‘wages’ in s.27 ERA, both in light of the wide wording of s.27 and of the EU principle of equivalence. The Revenue disclaimed any reliance on s.205 ERA which the Court of Appeal, oddly, thought was relevant
39. The principal issues arising are what kinds of payments under WTR constitute ‘wages’ and what constitute a ‘series of deductions’.
40. As to the first point, the workers accepted that a claim under s.23 for breach of WTR must be restricted to liquidated sums under WTR and did not extend to claims for unliquidated compensation under WTR.⁷³ This is consistent with the order which a tribunal makes on a claim for unlawful deductions - to pay the worker the amount of the deduction⁷⁴ - and the Court of Appeal’s decision in *Coors Brewers v Adcock* [2007] ICR 983. Hence it appears that only claims for failure to pay sums due under regulation 16(1) or 14(2) can be brought under the deduction from wages jurisdiction,⁷⁵ where a tribunal orders the employer to pay the sum which is due to the worker.⁷⁶ Claims for compensation for the refusal of an employer to exercise various rights under WTR,⁷⁷ which are as the tribunal

⁷³ See the different awards made by a tribunal under regulation 30 WTR.

⁷⁴ See s.24.

⁷⁵ See regulation 30(1)(b).

⁷⁶ See regulation 30(5).

⁷⁷ See regulation 30

considers to be just and equitable having regard to the factors in regulation 30(4), do not fall within s.27 ERA.

41. However, in *Canada Life v Gray* (above), the EAT held that, at least on termination of employment, workers who were denied the right to take paid annual leave over several years could bring claims of unlawful deduction from wages under regulation 16 and 14 in circumstances where the workers had not taken leave because of the employer's express statement that they would not be paid for it.⁷⁸ Similarly, in *List Design v Douglas* [2002] ICR 686 the employer contended that the workers hourly rates of pay covered holiday pay as a form of 'rolled up' holiday pay. Having rejected that contention, the EAT held that one of the claimants (Mr Catley) was entitled to payment under regulation 16 not only for annual leave he in fact took but also for the annual leave to which he was entitled but never took.⁷⁹ Both of these decisions were overruled by the Court of Appeal in *Stringer*.⁸⁰ Now that the House of Lords has overturned the Court of Appeal, they are restored as good law. Hence a refusal of the entitlement annual leave can, it seems, generate a claim under regulation 16 WTR and a claim under s.23 ERA, just as can a refusal to pay for annual leave in fact taken.
42. As to what constitutes a series of deductions, the EAT in *Canada Life* held that the failure to pay a regulation 14 payment on termination could be linked with the earlier failures to grant the workers their entitlement to paid annual leave under regulation 16. The net result is a form of carry over - not of the right to take annual leave but of the right to payment for it on termination.

Payment for annual leave: *BA v Williams*

43. As set out above, under WTR the detailed provisions in ss 221-224 of ERA govern the calculation of a week's pay for the purpose of annual leave. To calculate the amount due for annual leave, the statutory formula applies. Quite apart from difficulties in applying

⁷⁸ See paragraph 16 and 23.

⁷⁹ See paragraphs 38-43. Cf. the obiter comments in *Kigass* [2002] ICR 697.

⁸⁰ See paragraph 24.

that formula - see *Bamsey* - a further problem may be that the contractual provisions are not identical in effect. If a contract states, for example, that a worker is entitled to be “paid” for his or her annual leave, this might be interpreted against the factual background, as requirement the payment of normal pay, including overtime which the worker is required to work (cf. s.234 ERA and *Bamsey*, above).

44. Adding to the difficulties, in some cases the implementing Regulations do not expressly incorporate the statutory formula in ss 221-224 ERA. Both regulation 4 of the Civil Aviation (Working Time) Regulations 2004 and regulation 12 of the Merchant Shipping (Hours of Work) Regulations 2002 simply track the wording of the parent Directives and confer an entitlement to “paid annual leave” of four weeks, without specifying how this is to be calculated.
45. The issue has now been referred to the ECJ by the Supreme Court in *British Airways v Williams*. In *Williams*, BA paid pilots their basic pay during periods of annual leave but did not pay them other taxable supplements which they received if they were working. The annual leave of pilots is governed by the Civil Aviation (Working Time) Regulations 2004, derived from the Agreement annexed to Aviation Directive 2000/79/EC but the questions referred extend to the level of pay required under Article 7 of the Working Time Directive. The decision of the ECJ will probably clarify the level of pay, and the discretion conferred on Member States, under Article 7 of the WTD as well as under Clause 3 of the Aviation Agreement annexed to the Aviation Directive, 2000/79/EC.
46. British Airways, of course, argue that all a member state must do is ensure that pay is not at so low a level as to discourage workers from taking their holiday. They rely upon *Bamsey v Albon Engineering and Manufacturing* [2004] IRLR 457, where the Court of Appeal rejected an argument that there was a breach of the Directive in calculating payments under ss 221-224 ERA without including overtime which the employee was required to work and in practice worked but which employer was not under contractual duty to provide.
47. The argument for the claimants draws upon, first, *Robinson-Steele* [2006] ICR 932, in

which the ECJ said that during the period of annual leave “*remuneration must be maintained. In other words, workers must receive their normal remuneration for that period of rest*”.⁸¹ Second, in *Stringer* the ECJ spoke of a worker receiving their “*normal remuneration*” during the period of annual leave and said that a payment on termination must be based on normal remuneration,⁸² and the Advocate General said that the worker has a right to payment of wages “*without any reduction*”.⁸³ Third, Article 7(1) of ILO Convention No.132, which has been repeatedly used by the ECJ in interpreting the Directive, states that a worker “*shall receive in respect of the full period of that holiday at least his normal or average remuneration*” which suggests, again, that normal pay without deductions must be maintained during annual leave.

MICHAEL FORD
4 June 2010

OLD SQUARE CHAMBERS
10-11 Bedford Row, London WC1R 4BU
3 Orchard Court, St Augustine’s Yard, Bristol BS1 5DP

⁸¹ See paragraph 50.

⁸² See paragraphs 58 and 61.

⁸³ See paragraph 78.