Appeal No. UKEAT/0027/20/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
on 7 and 8 April 2021
Judgment handed down on 17 June 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS A HAYFORD AND MR K BIDDLE — APPELLANTS

P & O FERRIES (JERSEY) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	Mr O Segal QC Mr L Harris Instructed by: Richard Williams RMT Legal Department Maritime House Clapham Old Town London SW4 0JW
For the Respondent	Mr C Glyn QC Instructed by: Pinsent Masons LLP Princes Exchange 1 Earl Grey Street Edinburgh EH3 9AQ

SUMMARY

WORKING TIME - SEAFARERS

The claimants were seafarers who worked on a ferry sailing between Dover and Calais. Their statutory rights to paid annual leave were found not in the **Working Time Regulations 1998**, but in distinct domestic regulations. These implemented a Directive specifically applicable to seafarers, which adopted a social partners' agreement on the working time of seafarers. That in turn reflected the provisions of the **Maritime Labour Convention 2006**.

In any given year, the claimants each had a certain number of weeks during which they were rostered to work on the vessel, and a certain number of weeks during which they were on shore. Their terms and conditions accorded them contractual rights to paid annual leave which were less than their statutory rights.

The principal issues raised by the appeal and cross-appeal were (a) whether the claimants only accrued leave entitlement when they were working, or throughout their periods of employment, both when they were working on the vessel and when they were on shore; and (b) whether they had received their full statutory pay in respect of the leave that they had both accrued and taken.

Held:

(1) The claimants accrued leave entitlement throughout their employment, not only in periods when they were working on the vessel. The reasoning in **Harpur Trust v Brazel** [2020] ICR 584 (CA) is applicable to seafarers.

(2) The Tribunal had rightly concluded (which was not challenged on appeal) that, given the number of weeks in which each of them was not rostered on the vessel, the claimants had both been accorded their full statutory rights to take leave.

(3) The claimants had both been paid their full statutory pay in respect of the statutory annual leave that they had both accrued and been fully accorded, because they each received an annual salary in equal annual monthly instalments throughout the year. This was not affected by the fact that the contractual leave provision was less generous, nor by contractual provisions providing for standard annual hours of work, and supplemental payments based upon an hourly pay rate.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I will refer to the parties as they were in the Employment Tribunal ("the Tribunal"), as the claimants and the respondent. The claimants were employed by the respondent as Assistant Stewards on the Spirit of Britain, a ferry sailing between Dover and Calais. Ms Hayford was employed from 1 July 2003 to 31 August 2017. Her claim form was presented on 7 December 2017. Mr Biddle was employed from 31 October 2012 to 4 December 2017. His claim form was presented on 16 March 2018.

2. With effect from 17 March 2014, regulation 12 of **The Merchant Shipping (Hours of Work) Regulations 2002** (SI 2002 No 2125), as amended by **The Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014** (SI 2014/308) (the "**2002 Regulations**") conferred rights to paid annual leave on seafarers in respect of which certain complaints could be presented to the Tribunal, as provided in regulation 22.

3. The respondent's leave year was the calendar year. Both claimants claimed, or sought to claim, that their regulation 12 rights had not been fully honoured, in respect of the period from 17 March 2014 to their respective dates of termination of employment. For reasons that will appear, Ms Hayford's case was that her rights had been honoured only to the extent of 12.5 days per year. Mr Biddle's case was that they had been honoured, from when he started a new work pattern in March 2015, only to the extent of 14 days in each year.

4. The claims were heard together before Employment Judge Pritchard. In a reserved decision the Tribunal dismissed the claims in their entirety. The claimants appealed. The respondent resists the appeal and cross-appeals.

A

The Legal Framework

5. It is helpful, at the outset, to set out the essential legal framework at Community and domestic levels. We need to start with the Working Time Directive, **2003/88/EC** (the "**WTD**") (which replaced **Directive 93/104/EC**). At present it suffices to set out Article 7/1:

B

> **"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 of entitlement to, and granting of, such leave laid down by national legislation and/or practice."**

C

6. I note also that Article 15 preserves the right of Member States to apply or introduce more favourable provisions, or to facilitate or permit these being collectively agreed.

D

7. The **Working Time Regulations 1998** (SI 1998/1833) ("**WTR**") (as amended) contain detailed provisions in relation to paid annual leave, including the following. Regulation 13(1) provides that "a worker is entitled to four weeks' annual leave in each leave year." Regulation 13A makes provision for entitlement to additional leave in each leave year, of "1.6 weeks". Regulation 16 provides that a worker is entitled to be paid in respect of any period of annual leave under either regulation 13 or 13A "at the rate of a week's pay in respect of each week of leave." For these purposes "a week's pay" is calculated in accordance with the provisions found in sections 221 to 224 **Employment Rights Act 1996**, subject to various adaptations.

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8. Seafarers are excluded from the coverage of the **WTD** and the **WTR**. The Directive which applies to them is **Directive 1996/63/EC** (as amended by **Directive 2009/13/EC**), (the "**Seafarers Directive**"). As so amended, this adopted an amended agreement on the working time of seafarers, which was reached by the Community level social partners, and intended to

H

reflect the provisions of the **Maritime Labour Convention 2006** (the "**MLC**"), which had been adopted by the International Labour Organisation.

9. The standard set by the **MLC** in respect of hours of work and rest (standard A2.3) provides (at [3]) that the normal working hours' standard "shall be based on an eight-hour day with one day of rest per week and rest on public holidays." Standard A2.4 provides (at [2]) for annual leave with pay entitlement to be "calculated on the basis of a minimum of 2.5 calendar days per month of employment." The accompanying guideline states that "service off-articles should be counted as part of the period of service."

10. Article 2(1) of the **Seafarers Directive** provides that Member States may make more favourable provisions than it lays down. Clause 4 of the social partners' Agreement which it adopted provides, in part:

> **"Without prejudice to clause 5, the normal working hours' standard of seafarer is, in principle, based on an eight-hour day with one day of rest per week and rest on public holidays."**

11. Clause 16 of that Agreement provides:

> **"Every seafarer shall be entitled to paid annual leave. The annual leave with pay entitlement shall be calculated on the basis of a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."**

12. With effect from 17 March 2014, regulation 12 of the **2002 Regulations** provided:

> **"12.—(1) An employed seafarer is entitled to paid annual leave that is to be calculated on the basis of two and a half days for each month of employment in the leave year and pro rata for incomplete months.**
>
> **(2) An employed seafarer is entitled to additional paid leave of eight days in each leave year and pro rata for incomplete years.**
>
> **(3) Leave to which a seafarer is entitled under this regulation—**
>
> **(a) may be taken in instalments; and**
>
> **(b) may not be replaced by a payment in lieu, except where the seafarer's employment is terminated.**

(4) Justified absences from work shall not be considered as annual leave for the purposes of paragraph (1).

(5) For the purposes of this regulation, "justified absences from work" include an absence authorised by any enactment, contract between the seafarer's employer and the seafarer, collective agreement or workplace agreement or by custom and practice."

13. With effect from the same date, regulation 22 conferred jurisdiction in respect of complaints arising from regulation 12 upon the Tribunal. As further amended later in 2014, upon the introduction of compulsory ACAS Early Conciliation, it provided:

"22.—(1) An employed seafarer may present a complaint to an employment tribunal that the seafarer's employer—

(a) has refused to permit the exercise of any right that the seafarer has under regulation 12(1) or (2); or

(b) has failed to pay the seafarer the whole or any part of any amount due to the seafarer under regulation 12(1) or (2).

(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 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 period of annual leave or additional 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 months.

(2A) Regulation 22A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2)(a).

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) must make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the seafarer.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the seafarer to exercise the seafarer's right, and

(b) any loss sustained by the seafarer which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a seafarer in accordance with regulation 12(1) or (2), it must order the employer to pay to the seafarer the amount which it finds to be due to the seafarer."

14. The **2002 Regulations** have since been replaced by **The Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018**, but it is the **2002 Regulations** (as amended in 2014) that applied to the claimants in this case.

The Claimants' Terms and Conditions and Work Patterns

15. The terms and conditions of ratings, such as the claimants, were contained, from time to time, in a suite of collective agreements reached between the respondent and the recognised trade union, RMT. The focus of argument on this appeal was on the terms which applied to them both from 2015 onwards.

16. As of 17 March 2014 Ms Hayford was working 12 hour shifts. The Tribunal described her as working, on a part-time basis, half the hours required under the respondent's then current "1800 Hours Contractual Terms and Conditions for Onboard Services Ratings." A schedule to her contract identified her annual salary as an amount which was half that applicable to a full-time rating, her Hours of Work as 900 per year, and her Annual paid leave as 12.5 days per leave year (I have reproduced the capitalisations in the original).

17. A new suite of collective agreements reached in 2014 ushered in a shift to what the Tribunal referred to as "2022-hours contracts". In the following passage, referring to Ms Hayford's employment, the Tribunal set out various provisions of Agreement C as follows.

> **"20. Ms Hayford commenced maternity leave on 1 January 2015. In early 2015, she became employed under the terms of Agreement C which provides, among other things:**
>
> **Schedule 1**
>
> **Pay Scales**
>
> **As effective up to & including 31 December 2017**
>
> **Where the Ratings continuous service date is before 1 January 2015**
>
> **Assistant Steward £19,994.53**

(a) The salaries shown above cover the total work content of the job to which they apply including Paid Annual Leave, except where additional payments are specifically mentioned in the Terms and Conditions of Employment or this Schedule.

21. Schedule 2 provides:

10. Annual Duties and Hours of Work

a. The Rating is required to work flexibly in accordance with operational requirements in accordance with his/her Roster for the time being or as required in accordance with these terms and conditions of employment and to fulfil his/her Annual Hours commitment.

b. The Year for accounting of the Annual Hours is the calendar year 01 January to 31 December.

c. The Rating's Annual Hours balance will flow through from one Year to the next.

d. …

e. Positive annual hours balances

(i) Ratings who accumulate on ongoing positive annual hours balance may elect to cash them in at the Ancillary Rate.

(ii) The request to cash in Annual Hours should be made to the Head of Department.

(iii)Where the positive annual hours balance exceeds 100 hours any hour in excess of 100 hours will automatically be paid out through the payroll system at the Ancillary Rate.

f. Negative Annual Hours balances

(i) A Ratings with a negative Annual Hours balances is expected to work this off and may be rostered for additional Hours of Work to achieve this.

11. Working System

a. In the Working Year the Rating is required to work 2022 Annual Hours (which equates to 168½ twelve hour duties) an has an entitlement to 336 hours Paid Annual Leave (28 twelve hour days). For Ratings working less than a full time equivalent these hours will be adjusted pro rata.

b. A record will be kept of Annual Hours worked and Paid Annual Leave taken.

(i) The Master is responsible for ensuring that monthly timesheets are correctly completed and submitted. An Officer to whom s/he has delegated the task will ensure that the Rating has an appropriate opportunity to check his/her personal entries on it.

16. Pay

a. During employment:
i The Rating will be paid the Salary

ii The Salary is all-inclusive. There are no additional payments unless expressly provided for in these Terms.

iii Salary is paid in equal monthly instalments in arrears by direct credit transfer …

iv Salary is inclusive of pay for Paid Annual Leave and Bank Holidays

b. On termination of employment:

i General

1. Where the number of hours worked or credited exceeds the pro rata accrual up to the effective date of termination of employment the salary equivalent of the excess will be paid.

2. Where the number of hours worked or credited falls short of the pro rata accrual up to the effective date of termination of employment the salary equivalent of the shortfall will be owed or reimbursed by the Rating and may be recovered by the Employer in whole or in part by deduction from salary.

3. Hours balances paid or recovered will be at the Ancillary Rate.

4. Any compensation for the statutory minimum paid annual leave which has accrued but not taken as Paid Annual Leave will [be] in accordance with applicable legislation.

21. Training, meetings or other Company/Employer work Training

b. S/he will be required to participate in onboard training programmes as required and may be required to attend training courses away from his/her Vessel.

c. When a Rating attends a training course on a day that would otherwise have been a planned working day then s/he will be credited with Annual Hours in accordance with his/her Roster.

d. When a Rating attends a training course on any day that would otherwise have been Time Off s/he will be paid for the hours spent undergoing training at the Training Rate subject to a minimum of 4 hours up to a maximum of 10 hours per day.

22. Paid Annual Leave

a. The Salary covers all work undertaken by the Rating and also Paid Annual Leave and Bank Holidays.

b. Rostered Paid Annual Leave

i Ratings are entitled to 336 hours (28 x12 hour days) Paid Annual Leave per Year. Case Nos: 2303623/2017 2300945/2018

ii One days Paid Annual Leave will equal 12 hours paid at the Hourly Rate. Part days Paid Annual Leave are not permitted.

ii The Head of Department will be responsible to ensure that the Paid Annual Leave is Rostered and taken within the Year.

iii Ratings' Rosters will be compiled equitably to ensure that, so far as is possible, there is a reasonably even distribution of Paid Annual Leave throughout the Year.

iv On days allocated as Paid Annual Leave the Rating shall not, save in cases of extreme emergency and with the Rating's consent, be liable for Recall, nor shall s/he be liable to attend for training nor to undertake any other duties or other employment obligations.

v To ensure that Paid Annual Leave is fully utilised in each Year, shore management reserve the right [to] designate days as the Rating's Paid Annual Leave. In such cases, not less than seven Calendar days before the commencement of the Paid Annual Leave period the Rating will be informed [of] the proposed designation and have the opportunity to identify any personal preference.

46. Pro rata working

a. Where a rating is contracted to work part time on these Terms entitlements will be pro-rated according to the Rating's contracted Annual Hours on the formula
Pro rata entitlement = Full time entitlement x Ratings Contracted Annual Hours 2022

22. Appendix A to the agreement includes the following definitions:

Annual Hours See clause 11.a

Hours of Rest The time in a Duty Period outside Hours of Work, but excluding Short Breaks

Paid Annual Leave See clause 22.b

Hourly Rate Salary ÷ 2,358

Time Off Any time not working on behalf of the business of the Vessel but excluding Paid Annual Leave

Year The calendar year 1 January to 31 December."

18. As to what happened upon Ms Hayford's return to work, the Tribunal said:

"23. Upon her return to work from maternity leave on 5 August 2015, although employed under the terms of Agreement C, Ms Hayford continued to work on a part-time basis with the same contractual requirement to work 900 hours per annum and with the same contractual paid annual leave entitlement of 12.5 days.

24. Seafarers working under Agreement C are known as "travellers" meaning that they would usually come on and off the vessels on a daily basis rather than live on board. This was the case with Ms Hayford. As to the times when she would work, Ms Hayford discussed with her On-Board Services Manager the hours she was prepared to work and, subject to the Respondent's operational requirements, she was rostered accordingly. This gave Ms Hayford a great deal of flexibility as to when she worked. She found it convenient that she could arrange her working time around child-care commitments. She describes these favourable working arrangements as working under a "mum's contract". If the Respondent requested Ms Hayford to work when not rostered to do so, she would do her best to accommodate the Respondent but understood she could refuse to do so. On occasions, Ms Hayford might be asked to attend product sales training when not rostered to work for which she would be paid; Ms Hayford understood however that she could not be required to attend training during periods when she was not rostered to work. The Tribunal finds that such requests made of the Claimant to attend training courses were likely to have been infrequent. Ms Hayford was able to take rest from her duties when she was not otherwise rostered to work and did not feel her health and safety was affected by these working arrangements.

25. Ms Hayford accepts that she was paid her contractual entitlement to leave within her salary.

26. A selection of Ms Hayford's pay slips referable to her service under Agreement C show that she had used up some of her annual leave entitlement. The entitlement of 150 hours (12.5 days x 12 hours) was reduced to show a residual entitlement. The Tribunal accepts Ms Hayford's evidence that she had not requested annual leave on those occasions and did not know why the reductions had been applied. The Tribunal finds it more likely than not that the Respondent made notional reductions to Ms Hayford's annual leave entitlement to record a reduction to the entitlement. This is consistent with the Respondent's position that Agreement C was, insofar as it applied to Ms Hayford, such that annual leave would be taken during periods when she was not otherwise working."

19. Mr Biddle's position from March 2015 onwards was found to be as follows.

> **"32. From about 17 March 2015, Mr Biddle commenced a pattern of working 12 hour shifts while living on board the ship for one week followed by one week off the ship, although he would work extra days on occasions as and when it was requested. The Tribunal was told that this arrangement was more akin to employment under Agreements A and B, the provisions of which do not concern the Tribunal in this case.**
>
> **33. Because Mr Biddle was now working on a week on/week off basis, he was treated as part of the core team on the Spirit of Britain. He was given his work rota in advance detailing his shifts for the rest of the year. If he wished to book specific leave for that year, he would submit a leave chit at the end of the preceding year. Because Mr Biddle was being treated as a Rating working under Agreement A or Agreement B, he was permitted to take 14 days of his 28 days' contractual annual paid leave entitlement during rostered time, the remainder during times when he was not rostered. Mr Biddle thus worked on the ship for 24 weeks each year with additional days as requested.**
>
> **34. Mr Biddle accepts that he was paid for annual leave in accordance with his contract. He also accepts that was granted paid annual leave for two weeks in each leave year when leave was rostered."**

20. I interpose that, as the Tribunal noted at [24], ratings working under Agreement C would normally come on and off the vessel on a daily basis. It was explained to me (and I did not understand this to be factually controversial) that this therefore ordinarily applied to someone working Mr Biddle's standard one-week on, one week off, pattern. But, for particular reasons that were personal to him, he stayed on the vessel during his weeks on; and this was why he was allocated 14 days of his entitlement to annual paid leave during those weeks.

Two Authorities

21. In view of what is to follow, it is helpful at this point to consider two particular authorities. In **Russell v Transocean International Resources Limited** [2012] ICR 185 the claimants worked on offshore installations. Their work patterns typically involved alternating two or three weeks on the installation with two or three weeks' shore leave. The issue was whether they could be required to take the paid annual leave to which they were entitled under the **WTR** during periods when they were on shore. The Supreme Court (Lord Hope of Craighead DPSC, the other Justices agreeing) held that a rest period did not have to meet any qualitative requirement over and above that it not be working time [21]; the contractual relationship persisted throughout the

year and the working pattern was a product of it [34]; a period when the appellants were onshore therefore counted as a rest period [36]; and the employer was therefore entitled to insist that they take their leave during onshore breaks [38].

22. **Brazel v Harpur Trust** [2020] ICR 584 was decided by the Court of Appeal after the Tribunal gave its decision in this case. As we shall see, the Tribunal did not regard the decision of the EAT in **Brazel** as pertinent. However, I am bound by the decision of the Court of Appeal, to the extent that it appears to me to be pertinent and not properly distinguishable. I was told that an appeal in **Brazel** is to be heard by the Supreme Court in November 2021, but neither side sought a stay of the appeal before me in the meantime. Mr Glyn also appeared for the employer in **Brazel**, and relied upon a sequence of decisions of the CJEU that he also relied upon before the Tribunal, and before me, in the present case. Most helpfully for my purposes, these are summarised and analysed in the Court of Appeal's decision.

23. Ms Brazel was a clarinet and saxophone teacher employed by a school. The number of hours that she worked depended on the varying level of demand for her to give pupils instrumental lessons during term times. She had no duties in the school holidays. However, she was not a casual worker, as her contract was permanent and continuing year-round. Underhill LJ dubbed her, instead, a "part-year worker". She was paid monthly at an hourly rate for the lessons given in the previous month. As to leave, Underhill LJ explained, at [3]:

> **"Since [Ms Brazel] is a worker within the meaning of the Working Time Regulations 1998 ("the WTR") she is entitled (subject to the issues considered below) to 5.6 weeks paid annual leave. Her contract of employment likewise says "you will be entitled to 5.6 weeks paid holiday". Since the school holidays are far longer than that neither she nor the Trust have thought it necessary explicitly to designate any particular parts of them as statutory leave; but, by agreement, the Trust makes three equal payments in respect of her leave at the end of April, August and December."**

24. The appeal concerned the calculation of those payments. The Trust had adopted the methodology found in the ACAS Guidance Booklet for calculating the leave entitlement of casual workers (notwithstanding, Underhill LJ observed, that this booklet was probably aimed at workers who are not employed between periods of actual work). This involved reckoning that someone who works year-round, works 46.4 weeks and takes 5.6 weeks of leave in a 52-week year. So their leave entitlement is equivalent to 12.07% of their overall hours worked. The same percentage is then applied to hours worked by the "casual" worker. Applying that approach, the Trust paid Ms Brazel, at the end of each term, by way of holiday pay, one third of 12.07% of what it had paid her for her hours worked in that past term. Ms Brazel, however, claimed that she should receive 5.6 times a week's pay, calculated under the provisions of the **Employment Rights Act 1996** (the "1996 Act") to which the **WTR** refers.

25. At [30] Underhill LJ summed up the rival cases in this way.

> **"In short, therefore, the essential difference between the parties is whether the calculation of the Claimant's holiday entitlement or holiday pay should be pro-rated to that of a full-year worker in order to reflect the fact that she does not work throughout the year."**

26. Underhill LJ considered the pertinent CJEU authorities in the following passage.

> **"38. Mr Glyn referred us to six decisions of the CJEU. The first was *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* C-486/08, [2010] IRLR 631. That concerned the compatibility of Austrian legislation with the PTWD. So far as relevant to our purposes, the legislation provided that where a full-time worker moved to part-time working any entitlement to paid annual leave that they had accrued but not yet taken should be reduced proportionately to the reduction in hours. The Court held at paras. 32-33 of its judgment (pp. 635-6) that the principle of *pro rata temporis* in clause 4.2 of the Framework Agreement applied so as to reduce the entitlement to annual leave, though that could not operate as regards entitlement already accrued. As it put it at para. 33:**
>
> **"… [I]t is indeed appropriate to apply the principle of pro rata temporis, set out in Clause 4.2 of the framework agreement on part-time work, to the grant of annual leave for a period of employment on a part-time basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds. However, that principle cannot be applied ex post to a right to annual leave accumulated during a period of full-time work."**
>
> **That ruling was applied as regards substantially identical German legislation in *Brandes v Land Niedersachsen* C-415/12.**
>
> **39. In *Heimann v Kaiser GmbH* C-229/11, [2013] IRLR 48, the Court applied its decision in the *Land Tirol* case by analogy in a case concerning the WTD. The claimant**

was laid off for some months (the actual phrase used is "zero hours short-time working") and eventually dismissed. He brought a claim for a payment in lieu of untaken holiday during the period he was laid off. His employer contended that he had accrued no entitlement to annual leave during the period when he had not been working. The Court accepted that contention. It said that his situation was comparable to that of a part-time worker (see paras. 32-33); that the principles of the PTWD, and specifically "the rule of *pro rata temporis*", should be applied (see para. 34); and accordingly that he had accrued no holiday entitlement during the period that he was not working. Its conclusion, at para. 36 was:

"It follows … that the answer to the first question must be that Article 31(2) of the Charter and Article 7(1) of Directive 2003/88 must be interpreted as meaning that they do not preclude national legislation or practice … under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*."

40. That decision, as Mr Glyn put it, set the direction of travel as regards the Court's approach to the calculation of holiday entitlement, but the case on which he primarily relied is *Greenfield v The Care Bureau Ltd* C-219/14, [2016] ICR 161. The claimant was employed as a carer on a zero-hours contract under which her working patterns varied from time to time. Her leave year ran from 15 June. Her employment terminated on 28 May 2013. At the start of her final leave year, i.e. on 15 June 2012, she was working one day a week, but as from August she began to work full-time. At the end of June and beginning of July, i.e. while she was still working the old pattern, she took seven days of paid leave. In November 2012 she requested a week of paid leave. Her employers told her that, since her leave entitlement was calculated at the point that leave was taken, the seven days that she had taken in June/July, when she was still working only one day a week, had exhausted her entitlement. It was her case, as summarised at para. 22 of the judgment of the CJEU (p. 166 C-D), that:

"… [N]ational law, read in conjunction with EU law, requires that leave already accrued and taken should be retroactively recalculated and adjusted following an increase in working hours, for example, following a move from part-time to full-time work, so as to be proportional to the new number of working hours and not the hours worked at the time leave was taken."

The questions referred to the Court arising out of that submission were paraphrased by it at para. 25 of its judgment (p. 167 C-D) as follows:

"… whether clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 on the organisation of working time must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are obliged to provide, or are prohibited from providing, that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated, if necessary retroactively, according to that worker's new work pattern and, if a recalculation must be performed, whether that relates only to the period during which the working time of the worker has increased, or to the whole leave year."

41. The Court began its consideration of those points by making some preliminary observations. Mr Glyn asked us to note in particular para. 29, which reads:

"Furthermore, it is not disputed that the purpose of the entitlement to paid annual leave is to enable the worker to rest from carrying out the work he is required to do under his contract of employment (judgment in *KHS*, C-214/10, EU:C:2011:761, paragraph 31). *Consequently, the entitlement to paid annual leave accrues and must be calculated with regard to the work pattern specified in the contract* [emphasis supplied]."

The Court's substantive answer to the question then proceeds by three stages.

42. First, at paras. 30-32, it holds that the unit of time on the basis of which the calculation of entitlement to paid annual leave accrues should be "the days, hours and/or fractions of days or hours worked and specified in the contract of employment". In setting out the facts of Ms Greenfield's case the Court used hours (or fractions of hours) as the definitive unit: see, e.g., para. 14, where it sets out the total number of hours worked in her final leave year (1,729.5) and the number of hours of paid leave (62.84).

43. Secondly, at paras. 33-41 it holds that the accrual of entitlement to paid annual leave must be calculated according to the working pattern from time to time. The Court refers at paras. 33 and 34 to *Land Tirol* and *Brandes* and concludes at para. 35:

"It follows that, as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately."

Mr Glyn relies on that paragraph as fundamental to his submissions, because it clearly prescribes an approach under which entitlement to paid annual leave accrues with each unit of time worked: usually, he said, the appropriate unit would be an hour.

44. The Court then goes on to explain how that conclusion fits with the "*pro rata temporis*" principle in the PTWD. It says that although that principle applies to the accrual of annual leave for part-time workers it cannot apply retroactively: that is of course consistent with the period-by-period approach enjoined in para. 35 and with what it had already held in *Heimann*. I should, however, note that at paras. 38 and 39 it says that there is nothing to prevent member states in their domestic legislation adopting a more favourable approach and allowing retrospective recalculation of annual leave entitlement when workers change to a working pattern with more hours.

45. Third, at paras. 42-43 the Court applies its previous conclusions to Ms Greenfield's case (or, more precisely, respecting the generalised character of a reference, to a case "such as" hers). It followed from para. 35 that no such recalculation as she was contending for was required.

46. The Court's formal answer to the questions referred, at para. 44 reads:

"Having regard to all the above considerations, the answer to Questions 1 to 3 is that clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker's new work pattern. A new calculation must, however, be performed for the period during which working time increased."

47. The next case in point of time to which we were referred is *Tribunalul Botosani v Dicu* C-12/17, [2018] IRLR 1175; but its conclusions sufficiently appear from the final case, *Hein v Albert Holzkamm GmbH & Co. KG* C-385/17.

48. In *Hein* the claimant had a long period of short-time working. Under the collective agreement which governed entitlement to paid annual leave, his entitlement was calculated by reference to average earnings during the thirteen weeks immediately prior to the start of the leave; that average was then converted into an annual figure, of which the employee was entitled to 14.25% (representing a figure of 11.4% required by German law plus a negotiated 25% uplift). The period of short-time working in the reference period depressed the amount paid to Mr Hein in respect of annual leave. He contended that that was contrary to the requirements of the WTD.

49. In addressing that contention the Court at para. 25 of its judgment said that it was necessary to consider separately (1) the period of annual leave to which the claimant was entitled, and (2) the payment that he should receive in respect of that period.

50. As to (1), the essence of the Court's conclusion is at para. 27 of its judgment, where it says, citing *Dicu*:

"entitlement to paid annual leave must, in principle, be calculated by reference to the periods of actual work completed under the employment contract."

That of course reflects *Greenfield*. Accordingly, the employer had been entitled to calculate the claimant's leave entitlement by reference to the reduced periods of work. However, at para. 30 it again made the point that nothing in the WTD prevented member states from according more favourable rights."

27. At [66] Underhill LJ was "prepared to accept" that these authorities establish that the **WTD** "requires only that workers should accrue paid annual leave in proportion to the time that they work". However, at [68] he noted that article 15 expressly permitted Member States to accord workers more favourable entitlements than those required by the Directive. There was therefore no justification for deploying the **Marleasing** [1990] ECR I-4135 principle to construe the domestic legislation so as to conform to the accrual approach.

28. Turning to what he called the domestic-law argument, Underhill LJ thought it was important to appreciate that part-year workers are on permanent contracts. It was not obviously unprincipled or unfair that their holiday pay would amount to a higher proportion of their annual earnings than that of their colleagues who worked steadily year-round. There would also, potentially, be various problems with applying the accrual approach to the calculation of their holiday pay in some cases. Not applying the accrual approach might produce odd results in extreme cases, but any general rule might produce anomalies when applied to atypical cases; and workers who only worked a very few weeks a year might more normally be expected to be engaged on a truly freelance, rather than permanent, basis. He concluded that it was not necessary to construe the domestic provisions as incorporating the accrual approach. On any natural construction the **WTR** made no provision for that approach to apply. Accordingly the EAT had been right to decide the issue in Ms Brazel's favour. (See [70] – [73]).

The Employment Tribunal's reasoning and conclusions in this case

29. The Tribunal set out relevant provisions of the **MLC**, the **Seafarers Directive** and the **2002 Regulations**, and listed the authorities to which it was referred.

30. As well as the substantive issues, there was an issue as to whether Ms Hayford's claim as originally presented, related only to the year 2017, and, if so, whether she should be permitted to amend it to go back to 17 March 2014. There was also, in relation to both claimants, an issue as to whether the claims were in part out of time. This turned on what I will, for shorthand, call the "carry over" point. The Tribunal considered these issues first.

31. On the amendment point, the Tribunal set out the full procedural history. I can do so briefly. Having presented her claim on 7 December 2017, Ms Hayford's solicitors wrote on 22 January 2018 indicating that she was claiming in respect of the period from 17 March 2014. They stated that this was by way of clarification, but, if necessary, they applied to amend. At a later case management hearing it was decided that this should be considered at the full merits hearing. Following that, a specific proposed amendment and amended response were tabled.

32. Having directed itself in accordance with familiar authorities concerning applications to amend, the Tribunal considered the balance of hardship in this case. It then concluded:

> **"48. Taking into account all the circumstances, and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, the Tribunal exercises it discretion to allow Ms Hayford's amendment.**
>
> **49 The Tribunal has considered Ms Hayford's application to amend her claim for good order. However, for the reasons set out below, the Tribunal reaches no conclusion as to whether or not entitlement to paid annual leave under the Regulations carries over from one leave year to the next or, if it does, whether a time limit applies to any period of carry over."**

33. In the next paragraph, regarding the time point, the Tribunal said:

> **"50. As to time limits/limitation, similarly the Tribunal has no need to consider the issue. Even if the Claimants were entitled to carry over accrued leave from one year to the next, and the entirety of their claims presented within the statutory time limit, the claims would not succeed for the reasons set out below."**

34. I will set out the Tribunal's reasoning and conclusions on the substantive issues in full.

> **"The Respondent's primary submission**

51 The Respondent submits that the Claimants' working patterns meant they had full opportunity to take leave when they were not working. The Claimants, like millions of other workers in the UK, were paid annual salaries in equal portions whether or not they were at work. The Respondent relies on Russell and Coleman. The Respondent submits that it has complied with its obligations under the Regulations and the enquiry should stop there.

When can annual leave be taken?

52 In Russell the Supreme Court held that the employer of offshore gas and oil workers working a pattern of two week offshore/two week onshore was entitled to require its workers to take their leave under the WTR when they were onshore when, for the most part, the workers were free from work-related obligations. The Supreme Court declined to accept the submission that the right to paid annual leave had a qualitative dimension: while it is true that the health and safety of workers lies at the heart of the WTD, there is no indication that it is concerned with the quality of the minimum periods of rest.

53 Under article 2 of the WTD: "working time" means any time during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice; "rest period" means any period which is not working time. In Russell, the Supreme Court noted that definitions in article 2 distinguishes between working time and rest periods and held that the meaning of "leave" in the WTR, in context, is a period, like rest, which is not working time.

54 As paragraph 18 of the recital makes clear, Directive 2009/13/EC complies with the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union and in particular Article 31 thereof which provides that all workers have the right to healthy, safe and dignified working conditions, to a limit on their maximum working time and to weekly and daily rest periods and an annual period of paid leave. The Tribunal accepts the Respondent's submission that the Regulations were "drawn from the same well" as the WTR, namely the Charter of Fundamental Rights, and has no hesitation in concluding that the Regulations should be interpreted in accordance with the general principles enunciated in the jurisprudence of the ECJ/CJEU.

55 The definitions of hours of work and hours of rest in the WTD and those in the Regulations, and the MLC and the Directives from which they derive, bear a similarity (with the necessary changes to apply to work in the sea transport sector).

56 The Claimants in this case were, for the most part, free from work-related obligations when they were not working on board the Spirit of Britain. They were genuinely provided with a break from work. The Claimants submit that the Tribunal must consider the logic of the Respondent's submission that non-rostered time can be considered annual leave because it would mean that a sea-farer at sea for a full year working a week on/week off pattern would still not be entitled to the full 38 days annual leave. However, this is not a case where the Claimants were at sea for a full year working a week on, week off pattern. As their evidence to the Tribunal confirms, their working patterns had no adverse effect on their health and safety. They were genuinely off work and away from the workplace. The Tribunal notes that Guideline B2.4.2 of the MLC recognises that seafarers have the right to take annual leave in the place in which they have substantial connection and this is the case here. Unless the Claimants' submissions persuade the Tribunal otherwise, the Tribunal concludes that it is bound by the ruling in Russell, the circumstances being analogous and the Regulations having been "drawn from the same well".

57 The Claimants submit that periods when they were not rostered for work were "justified absences from work" under Regulation 12(4) and cannot be considered annual leave. Regulation 12(5) sets out the types of absences which will be justified absences from work. On the one hand, it is tolerably clear that maternity leave, for example, will be an absence authorised by an enactment (and support for this conclusion can be seen in paragraph 4(b) of Guideline B2.4.1 of the MLC). On the other hand, it is less clear how "an absence authorised by contract between the seafarer's employer and the seafarer" is to be interpreted: it would be absurd to interpret this as a reference to annual leave authorised by the contract of employment.

In the Tribunal's view, a justified absence from work must relate to an absence from periods when a seafarer might ordinarily be expected to be at work, such as when rostered to do so but otherwise absent for a justified reason. It will not relate to periods when not rostered to work at all.

58 The Claimants submit that that they had not been provided with full entitlement to paid annual leave because the provisions in their contracts in relation to the taking of paid annual leave had not been followed by the Respondent. In particular, the Claimants refer to the fact that annual leave had not always been recorded or designated by the Respondent as set out in the contract. The Tribunal is unable to accept that submission. The question is not whether the Respondent kept full records or designated periods of leave under the contract; the question is whether the Respondent refused to permit the exercise of the right to annual and additional leave under Regulation 12 and/or failed to pay for accrued but untaken annual leave upon the termination of employment. Poor record keeping on the Respondent's part does not lead to the conclusion that the Respondent failed to comply with its obligations under the Regulations.

59 The Claimants also point to Appendix A of Agreement C which states that time off is to be defined as any time not working but excluding paid annual leave. Whatever contractual construction might be adopted in the relation to this provision, it does not detract from the fundamental questions the Tribunal must consider. The provisions of the agreement are otherwise clear in that it sets out the hours to be worked, the annual paid leave entitlement, and the all-inclusive salary.

60 In the Tribunal's view, the Claimants' arguments do not undermine the Respondent's submission that the ruling in Russell should be followed. By analogy with Russell, and for the reasons set out above, the Tribunal finds that the Respondent provided entitlement for annual leave during periods when the Claimants were not rostered to work.

Did the periods when the Claimants were not rostered to work provide sufficient annual leave to comply with the Regulations?

61 The Tribunal accepts that ordinarily (and subject to the pro rata principle discussed below) the Regulations provide an entitlement to 38 days' paid annual leave (2 ½ x 12 + 8) and that the Respondent provided Mr Biddle with 28 days and Ms Hayford 12.5 days. (The Tribunal notes here that no argument was advanced on Mr Biddle's behalf that the zero hours contracts under which he worked did not "roll up" paid annual entitlement within his hourly rate).

62 Given the Claimants' working patterns, it is clear that the number of days when they were not rostered to work greatly exceeded their leave entitlement under the Regulations, howsoever calculated. Both Claimants were off the work roster far in excess of 38 days in each leave year (noting that Ms Hayford was on maternity leave for just over seven months during 2015).

63 The Tribunal concludes that the Respondent did not fail to permit the Claimants to exercise the right to annual and additional leave under Regulation 12.

Has the Respondent failed to pay the Claimants for accrued but untaken annual leave upon the termination of their employment?

64 The Respondent further seeks to persuade the Tribunal that it has discharged its obligation to pay the Claimants for annual leave because they received salaries paid in equal monthly instalments. The Respondent refers to Coleman in which the EAT held that workers on a complicated shift system were properly paid for annual leave in circumstances in which they were paid the same amount each week whether or not they were at work. The Tribunal recognises the merits of submission.

65 However, the Tribunal does not accept that the enquiry should stop there. The Tribunal accepts the Claimants' submission that the circumstances in Coleman were different to the circumstances in the present case. In the present case, the Claimants' salaries were expressly calculated by reference to the number of hours they worked and the number of hours' and days' annual leave to which they were contractually entitled. That set of facts does not feature in Coleman.

66 As the ECJ has made clear, entitlement to annual leave and payment for that leave under the WTD are two aspects of the same right; see, for example: Heimann at paragraph 24; and Williams at paragraph 26.

67 The Tribunal concludes that it is necessary to consider the Claimants' entitlement to leave under the Regulations and then go on to consider whether they were paid in respect of that leave. What was the Claimants' annual leave entitlement under the Regulations?

68 The Claimants argue that they were entitled to 38 days' paid annual leave regardless of the hours they worked in a leave year; the application of a pro rata entitlement to paid annual leave does not arise because there is nothing in the Regulations or the MLC to suggest that it should.

69 The Respondent referred to the Tribunal to a number of authorities to the effect that the pro rata principle applies to the entitlement to paid annual leave under the Part-time Workers Directive (which makes express provision for the application of the pro rata principle) and, regardless of the application of the pro rata principle under the Part-time Workers Directive, under the WTD.

70 In Greenfield the CJEU set out the purpose of leave as leave from work and that work therefore dictates the pattern of leave; that the calculation of paid annual leave which has accrued must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment. As the Respondent submits, if an employee is not working a full number of days, then he/she should not have the same amount of rest. In Land Tirol the CJEU stated: … it is indeed appropriate to apply the principle of pro rata temporis, set out in clause 4.2 of the framework agreement on part-time work, to the grant of annual leave for a period of employment on a parttime basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds

71 The principle was re-stated in Brandes. The CJEU also applied the pro rata principle in Heimann. In Maschek, the CJEU held that there was no entitlement to holiday pay as it was not earned by being at work. In Dicu, the CJEU restated that annual leave is leave from work and that: entitlement to paid annual leave must, in principle, be determined is determined by reference to the periods of actual work completed under the employment contract

72 The Tribunal was also referred to Hein in which the same principles were restated.

73 The Respondent also pointed out the absurdities that would result if the pro rata principle were not to apply: a seafarer contracted to work just one day each month, 12 days in a year, would be entitled to 38 days' paid annual leave. The Claimants referred the Tribunal to Brazel, a case concerned with the computation of holiday pay under the Working Time Regulations 1998 and the associated provisions of the Employment Rights Act 1996 which provide a methodology for calculating a week's pay. The EAT held that entitlement to holiday pay for part-time employees working on zero hours contracts should be calculated in accordance with the statutory methodology and should not calculated by including a pro rata percentage rolled up in the rate of pay. As for the unfairness that might result, the EAT stated that the Part-time Workers Regulations have as their overriding principle the concept that part-time workers are not to be treated less favourably that full-time workers but that there is no principle to the opposite effect.

74 The decision in Brazel does not assist the Tribunal in this case. Brazel was concerned with the way in which holiday pay was to be calculated, not to the amount of holiday to which the employee was entitled with which the Tribunal is concerned at this stage of its reasoning. The EAT's comment about the Part-time Workers Regulations was made because of the anomalies that may arise as a result of the application of the computation provisions in the Employment Rights Act 1996 and has no relevance in the present case.

75 The Claimants also point to Guideline B2.4.1 of the MLC which states that service "off articles" is to be counted as part of the period of service. The evidence before the Tribunal was that "on articles" referred to a seafarer signing a crew agreement with the ship owner but that such crew agreements were no longer in use. There was no

evidence before the Tribunal to suggest that the Claimants were at any time on or off articles such that the Guideline had any relevance to the circumstances of this case. This Guideline, which makes reference to the "period of service", does not in any event assist the Tribunal in determining working time from which entitlement to annual leave can be calculated.

76 The Tribunal concludes that the pro rata principle set out in the jurisprudence of the ECJ/CJEU (and said to be applicable in MSN 1842) should apply in order to calculate entitlement to leave under the Regulations. It cannot be the purpose of the legislation to give rise to absurd outcomes.

77 The provision for paid annual leave set out in Directive 1999/63/EC, as amended, is to be calculated on the basis of a minimum of 2.5 calendar days' per month. Clause 4 of the same Directive provides that the normal working hours of a seafarer is, in principle based on an eight-hour day with one day of rest per week and rest on public holidays. Thus, accepting the Respondent's submission, it can be assumed that a full-time seafarer will work 274 days each year (6 x 52 – 38).

77.1 Mr Biddle worked 168.5 days each year which is 61.5% of the number of days envisaged by the Directive. 61.5% of 38 days is 23.4 days. He was contractually entitled to 28 days, paid at the daily rate for a 12 hour day.

77.2 Ms Hayford worked 75 days each year which is 27.4% of the number of days envisaged by the Directive. 27.4% of 38 days is 10.4 days. She was contractually entitled to 12.5 days, paid at the daily rate for a 12 hour day.

78 The Claimants' contractual entitlements to annual leave accordingly exceeded their pro rata entitlements under the Regulations.

Were the Claimants paid in respect of their entitlement to leave under the Regulations?

79 The Claimants concede that they were paid in respect of their respective contractual entitlements to annual leave. The Respondent provided paid annual leave to the Claimants at their normal level of remuneration and in accordance with the Regulations. Payment for leave put the Claimants in the same position with regards to remuneration as during periods of work.

80 The Claimants exercised their rights to paid leave under their contracts of employment which provided at least the minimum entitlement under the Regulations. Under Regulation 13 they were entitled to take advantage of that those more favourable rights. The question of set-off, in a strict sense, does not arise.

81 The Claimants' claims accordingly fail."

Grounds of Appeal, Answer and Cross Appeal

35. There are two grounds of appeal and two grounds of cross appeal. The Answer also advanced an alternative basis for upholding the Tribunal's decision. The pleadings developed the respective grounds, and these were, in the usual way, further developed in skeleton and oral arguments. To start with I will just set out the headlines or gist of the pleadings.

36. The headline grounds of appeal, abbreviated by me, are as follows:

> **"Ground 1: The Employment Tribunal erred in concluding that the "pro rata principle" in the jurisprudence of the ECJ/CJEU relating to the Working Time Directive 2003/88/EC ("the WTD") should apply to the calculation of entitlement to paid annual leave under regulation 12(1) and (2) of the [2002 Regulations]."**
>
> **"Ground 2: Even assuming [that the Tribunal did not err as asserted in Ground 1], it erred in accepting the Respondent's calculation of the pro rata entitlement in respect, materially, of the Second Appellant."**

37. I interpose that Mr Segal applied before me to amend ground 2, to apply it also to the first claimant. Mr Glyn told me he was not in a position to agree to that, but also that he had no submission to make opposing it. The point is one of pure law, and Mr Glyn was able to, and did, address it as relating to both claimants, and so I allow the amendment.

38. The Answer relied upon the Tribunal's reasons as correct, as well as setting out further arguments in support of its conclusions. These included the following proposition:

> **"Alternatively the claim could have been dismissed on the grounds that each Claimant received more than 38 'days' of paid leave in a year."**

39. Ground 1 of the cross appeal challenges the Tribunal's decision to permit Ms Hayford to amend her claim. It contends that, as it had found as a fact at [25] that she had taken all her leave, the Tribunal should have concluded that the proposed extended claim was hopeless. Further, it contends that, while correctly directing itself that time limit issues should be weighed in the balance, the Tribunal wrongly decided to permit the amendment at [49], without considering the time limits issue in this case. Had it done so, it would have been bound to conclude that the proposed amended claim was out of time.

40. The headline of ground 2 of the cross-appeal is as follows:

> **"The Respondent cross appeals from the Tribunal's decision that the Claimants' cases were not Salary Cases and their full entitlement was paid (at [64] and [65])."**

41. To spell it out more clearly, this ground contends that the claimants were paid an annual salary, monthly, which was always the same, whether they were working or not. Ms Hayford was "not working for the vast majority of the year" and Mr Biddle was "not working for most of the year." So they had both comfortably been accorded their statutory rights to paid leave.

Argument

42. The arguments were developed in immense detail in the pleadings, written skeleton arguments and over two days of full oral argument. There was some shifting of ground. I have reflected on it all. I will set out at this point only a broad overview or summary of what seem to me to have been the principal contentions on each side.

Claimants

43. The Notice of Appeal developed the following points in relation to ground 1. First, leave entitlement *accrues* under regulation 12 by reference to months and years *of employment*, not by reference to hours or days *worked*.

44. Secondly, the Tribunal erred in drawing upon the Community-law authorities concerned with the provisions of the **WTD**, to depart from the natural meaning of the words of regulation 12 in this regard. That was said to be an error for a number of reasons.

45. First, the parent of regulation 12 was not the **WTD** but the **Seafarers Directive**, which in turn derived from the **MLC**. Neither of these instruments provides for accrual of leave according to hours or days worked. Secondly, regulation 12(2) was an entirely domestic provision, which therefore had no connection to the EU law jurisprudence. Thirdly, in any event, there was nothing

in the **WTD**, or the associated authorities, to prevent the adoption of a more favourable domestic regime. This had been confirmed in CJEU authorities, and by the Court of Appeal in **Brazel**.

46. The Tribunal was also wrong, at [75], to dismiss the guidance in the MLC with regard to service "off articles" as irrelevant in this case. This aspect of the guidance reinforced the point that annual leave entitlement accrues throughout the period of employment – both periods in which the employee is working on a vessel, and periods in which they are not – and such accrual is not dependent on the number of hours or days actually worked.

47. The Tribunal's approach was also unworkable. The calculation it had performed at [77] took no account of the potential for the claimants to work a greater number of hours than their contractual minima, which would then entitle them to additional paid annual leave. On that approach their entitlement to paid annual leave could not be determined until the year was out.

48. Mr Segal's skeleton and oral arguments developed his case in a number of ways. Again, I summarise and highlight those strands which seemed to me to be most significant.

49. First, the CJEU authorities on the **WTD** referred to in **Brazel** were largely concerned with particular scenarios generally involving the impact of a change in the employee's working pattern as between that applicable in the period when the leave accrued and that applicable in the period when it came to be taken. In so far as they articulated a principle of accrual by reference to time worked, these cases only showed, as Underhill LJ put it in **Brazel** "how the principle applies in the particular situations there considered."

A

50. Secondly, the language and mechanisms of the provisions of the **Seafarers Directive** and the **2002 Regulations** were fundamentally different from those of the **WTD** and the **WTR**. This difference reflected the practical reality of the different nature of the seafaring working environment, which often necessitated seafarers spending weeks or months aboard a vessel and/or away from home. That was why their rights were catered for separately and formulated in a different way. Accordingly, it was not possible, and wrong, to read across the jurisprudence from authorities concerned with the **WTD**, when considering the interpretation and application of the legislation relating to seafarers.

B

C

51. The Tribunal was also wrong to rely on its conclusion, at [73] – [75], that to apply a principle of accrual by reference to the period of employment, rather than the period of work, would lead to "absurd outcomes". In **Brazel** the Court of Appeal recognised that this approach could produce extreme results in some atypical scenarios, but that was not sufficient reason to require the application of accrual by reference to the work period generally. The same point applied in this case, with even greater force, as the working pattern of the hypothetical seafarer referred to by the Tribunal at [73] was wholly fanciful. For another illustration of the same type of reasoning, see **Hartley v King Edward VI College** [2017] 1 WLR 2110 at [30] - [31].

D

E

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52. Mr Segal drew on the discussion in **Brazel** for two further points in support. First, the fact that regulations 12(1) and (2) do provide for accrual pro rata for incomplete months or years, reinforced the conclusion that, if any other form of pro-rating was to be applied, it would have been explicitly so stated. Secondly, Mr Biddle's one week on, one week off working pattern was not that different from that of the offshore workers in **Russell**. That sort of example was one in relation to which the Court of Appeal suggested in **Brazel**, that the application of the principle of accrual by reference to time worked would be "unattractive".

G

H

53. In relation to ground 2, even if (contrary to ground 1) the claimants' entitlements should have been treated as accruing by reference to time worked, the way that the Tribunal went about calculating this was wrong. In particular, the Tribunal had overlooked the fact that the claimants both worked 12-hour days, not the standard assumed 8-hour day; and it had overlooked its own (correct) finding (at [65]) that "the Claimants' salaries were expressly calculated by reference to the number of hours they worked and the number of hours' and days' annual leave to which they were contractually entitled."

54. In relation to the cross-appeal ground 1, the original particulars of claim did not restrict the claim to any period over which it was asserted that annual leave had accrued but not been taken. The letter of 22 January 2018 provided further particulars of an existing claim, to which no amendment was required. Alternatively, in so far as Ms Hayford required permission to amend her claim, the Tribunal properly directed itself on the law, and took proper account of "all the circumstances" including, it must be inferred, the existence of a time point. There was no basis for the EAT to interfere with its exercise of its discretion. The suggestion that the Tribunal should have considered that the proposed complaint was bound to fail was also misconceived. While Ms Hayford had conceded that she had been paid her *contractual* entitlement to holiday pay, this claim was concerned with her *statutory* entitlement.

55. Ground 2 of the cross-appeal was misconceived. The Tribunal correctly set out the position at [65] regarding the calculation of the claimants' pay. The provisions in their contracts to the effect that their annual salary payments covered all elements of pay, including holiday pay, to which they were entitled, did not assist in determining how much of that salary represented holiday pay. Ms Hayford's contract provided that she was entitled to 12.5 days' paid leave, and

Mr Biddle's that he was entitled to 28 days' leave, in both cases based on a 12-hour day. Accordingly, neither had been paid in respect of their full regulation 12 entitlement. **Coleman v Polestar UK Print Limited**, UKEAT/0376/14 was rightly distinguished by the Tribunal, because (a) it was not suggested in **Coleman** that the workers had not been permitted to take their full leave entitlement; and (b) that was a case concerning the **WTR** entitlement to a week's pay for each week of leave, which the workers in that case were paid.

Respondent

56. Mr Glyn referred to what he called "the principle that leave conforms to work", or the "conformity principle", which I understood to be synonymous with the proposition that entitlement to leave accrues by reference to the period of time worked, rather than the period of employment elapsed. Or, as he also put it: "Units of leave are accrued by units of work." The Tribunal had rightly applied that principle. In particular he made the following points.

57. First, the language of the **WTD** did not expressly make provision for the application of the conformity principle, but a line of authorities of the CJEU held beyond doubt that it was to be interpreted and applied in that way. In **Brazel** the Court of Appeal had accepted that this conclusion flowed from that line of authorities.

58. Secondly, the Tribunal in this case was correct to take the same approach to the meaning and application of the **Seafarers' Directive**. Both the **WTD** and the **Seafarers Directive** arose out of the same EC Treaty Articles, both drew on the approach of the ILO, and both were health and safety measures. The **Seafarers' Directive** plugged the gap in the coverage of the **WTD**. Both regulated similar aspects of working time, such as maximum hours, minimum rest periods,

night work and paid annual leave. The detailed substantive provisions were different, but the underlying guiding principles and approach were the same.

59. Thirdly, regulation 12 was made in order to implement the **Seafarers' Directive**, and the wording of regulation 12(1) was precisely the same as the relevant wording found in clause 16 of the social partners' Agreement adopted by that Directive. As the language was precisely the same, regulation 12 had *not* conferred a right that was more favourable than the European right. The two provisions were in the same terms and indistinguishable in their scope.

60. Accordingly, the right conferred by regulation 12 is an "accrual right", that is, one which accrues according to service (that is, work). The approach of the CJEU jurisprudence considered in **Brazel** applies to it. The present case was like **Hein**. Mr Hein did not accrue leave entitlement in the 26 weeks during which he was not working. This was in accordance with the health and safety purpose of the legislation, the purpose of leave being to provide rest *from work*. Similarly, in Ms Hayford's case, she worked fewer days than her full-time colleagues, and so she did not need to accrue as many rest days as they did.

61. This approach is also consistent with the guidance issued by the Maritime and Coastguard Agency ("**MCA**") in MSN 1842, which, at paragraph 9.4, states: "Part time employed seafarers will also receive pro-rated leave entitlements under general principles".

62. The **WTR** had been amended in 2007 to add an extra 8 days to the four weeks' entitlement that they conferred on workers to which they applied. That had been done to address the practice of domestic workers covered by the **WTR** being required to take some of their four weeks' paid annual leave on bank holidays. The amendment did not require bank holidays to be designated

leave days; but it ensured that full-time workers would get four weeks plus bank holidays, or an equivalent number of days. As the explanatory memorandum explained, those eight days were intended to be pro-rated for part-time workers. The same approach should apply to the additional eight days' entitlement for seafarers provided for by regulation 12(2) of the **2002 Regulations** from 2014.

63. As for the "off articles" point, the Tribunal made a proper finding of fact at [75] that there was no evidence that these particular claimants were ever on or off articles. They were purely subject to contracts of employment. That finding was not perverse and could not be challenged. In any event, the claimants' argument could not be right, as, if it were, there would be no need for the **MLC** guidance to include, as it did, provision for periods of absence for training, illness or maternity to count as part of the period of service.

64. In relation to ground 2, the Tribunal was right, when applying pro-rating, to work in units of days, not hours. The **Seafarers' Directive** assumed a six-day working week, with one day of rest per week, therefore 312 working days per year, subject to leave. As regulation 12 provided for 38 days' leave, a full-time seafarer was assumed to be actually working 274 days. The Tribunal was then right to take the approach that it did, in its calculations at [77], applying pro-rating by reference to days as the unit of both work and leave. The 12 hour days worked by the claimants were permitted by the Directive, which allowed for the 8-hour day standard to which it referred to be varied by a collective agreement (as in this case); and this was within the **Directive**'s limits on hours of work and hours of rest. A given day's leave would be leave from working however many hours in that day the worker would otherwise have been working.

65. Alternatively, the appeal should be dismissed on the basis that, in order to calculate the appropriate rate of pay for each day of leave, an average annualised daily rate should have been applied. The **2002 Regulations**, as amended, contain no provision regarding the calculation of payment (unlike the **WTR**, which adopt, with adaptations, the definition of a week's pay in the **Employment Rights Act 1996**). The position is similar to that obtaining in **British Airways v Williams** [2012] CMLR 23. The right approach, as described by the Advocate General in that case, would be to calculate average earnings over an appropriate reference period.

66. Adopting that approach in this case, one should, for each claimant, divide the number of hours they worked, by the number of working days in a full time year, to produce an average number of daily hours, and then multiply that by 38 days. In each case that produced a lower figure for the number of average leave hours for which they should be paid, than the number of leave hours that each was allocated for the purposes of working out their total salary. By this route one again reached the conclusion that each of them therefore received more than their entitlement to annual holiday pay.

67. Turning to the cross appeal, Mr Glyn submitted that ground 2 articulated his primary case as to the basis upon which the Tribunal could and should have simply dismissed these claims. He argued as follows.

68. The Tribunal found, at [60], that both claimants were provided with leave in periods when they were not rostered to work, permissibly, in line with **Russell**. It also found, at [62] that their non-rostered days greatly exceeded their leave entitlements. They were both off roster far in excess of 38 days in each leave year. They also both received their annual salaries in equal monthly instalments. Their contracts contained multiple provisions to the effect that such salaries

covered *all* the payment to which they were each entitled, for all work undertaken by them, including paid annual leave and bank holidays. They had therefore received their full entitlement to paid holidays.

69. The only additional payments that would arise under these contracts would be if additional hours, above the standard annual hours, were worked, and either "cashed in" or paid out on termination. But the primary obligation of the respondent was to pay one salary in even monthly instalments throughout the year, which covered the right to be paid both for working and for time spent on annual leave. In the typology used by the EAT in **Marshalls Clay** [2004] ICR 36, these were category 5 contracts (see also **Lyddon**, UKEAT/0301/07). Pay was maintained at the same normal rate whether the claimants were working or not. Mr Biddle worked only 24 weeks of the year. Ms Hayford worked only 75 days a year. The Tribunal was wrong to distinguish **Coleman**, which was analogous to this case. Although, in the present case, clause 22 of contract C set out a more prescriptive calculation of annual leave, that was subject to the overarching provisions that all leave and work were covered by the annual salary.

70. As to ground 1 of the cross appeal, the original claim presented by Ms Hayford was in respect, only, of leave which arose in 2017. She then applied to add claims in respect of earlier years on the basis that untaken leave from those years could be carried over and should have been paid out on termination. That was a new claim which required an application to amend.

71. Given its conclusion, at [61]-[63], that Ms Hayford was able to take all of her accrued leave, the Tribunal should not have permitted her to add a claim that was bound to fail. While, at [47.4], the Tribunal identified that the impact of time limits was a factor to be considered, it failed in fact to consider this, before concluding, at [48], that the amendment was allowed. It was

only at [50] that it began to consider the time limits issue. Any claim for pay in respect of leave that had been taken, had to be brought within the usual time limits. See: **Smith v Pimlico Plumbers**, UKEAT/0211/19, 17 March 2021. Ms Biddle did not advance any argument that, in the absence of a carry-over right, it was not reasonably practicable to claim within the usual time limit. Had the Tribunal properly engaged with the time point, it would therefore have been bound to conclude that this aspect of the proposed amended claim was bound to fail as well.

Discussion and Conclusions

72. I start with the question of how the claimants' rights to statutory paid leave *accrued*. This is the issue raised by ground 1 of the appeal. It raises a pure question of law as to the correct interpretation of regulation 12 of the **2002 Regulations**. In short, there are two competing interpretations. For the claimants it is contended that entitlement accrues by reference to the period of *employment*, regardless of whether, or when, the seafarer is actually working during a given period of employment. For the respondent it is contended that entitlement accrues only during the period or periods in which the worker is *working*.

73. In my judgment, the ordinary, natural construction of the words of regulation 12, read by itself, points to accrual occurring by reference to the period of employment, rather than only during the period or periods of work. Regulation 12(1) states, in terms, that the leave to which the worker is "entitled" is to be calculated on the basis of two and a half days "for each month of employment in the leave year". The express reference is to each month "of employment", not to "each month worked" or anything of that sort. The natural meaning of the reference to "pro rata for incomplete months" is that it is there to address the position in relation to a leave year in which the worker was not *employed* for a complete whole number of months.

74. I note that regulation 12(2) does not repeat the words "of employment"; but regulation 12(2) follows on from regulation 12(1), identifying an entitlement supplemental to that conferred by regulation 12(1), and completing the overall picture of the total annual paid leave to which a seafarer is entitled. It is to be inferred, therefore, that it takes the same approach as regulation 12(1), of accrual being by reference to the period of employment, albeit that the eight days is reckoned to accrue over the whole leave year, rather than month by month. In any event, in my judgment this is the natural implied meaning, in the absence of express provision that accrual occurs by reference to the period worked.

75. Is there any reason why the words of regulation 12 should, nevertheless, be accorded something other than their natural and ordinary meaning?

76. It seems to me that the difference of approach between the parties is, conceptually, precisely the same as the difference of approach between the parties in **Brazel**, as captured by Underhill LJ at [30]. While the specific issue in that case was whether Ms Brazel had received the correct holiday *pay*, the answer to that question turned on the correct approach to the mechanism by which her holiday *entitlement* accrued under the **WTR**. The employer had been wrong to treat that entitlement as only *accruing* during the term times, when she was working, and not also during the school holidays, when she was not working, but was still employed. Rather, she was entitled to a full 5.6 weeks' entitlement, accrued over the whole year, and *hence* to 5.6 weeks' holiday *pay* calculated in accordance with the statutory formula.

77. Just as the Court of Appeal in **Brazel** concluded in relation to the language of the **WTR**, I have concluded that the natural meaning of the language of regulation 12 of the **2002 Regulations** is that it provides for accrual by reference to the period of employment, not the

A period worked. I am then faced with essentially the same type of overall two-part exercise that the Court undertook in **Brazel**, involving a consideration of whether there is any reason, either arising from Community law, or alternatively in domestic law, for construing the words of the domestic instrument differently. I turn first to Community law.

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78. Standard A2.4 of the **MLC** refers to the "minimum standards for annual leave"; and Article 2 of the **Seafarers' Directive**, headed "minimum requirements", expressly permits Member States to introduce more favourable provisions that those which it lays down. So, it might be thought, even if it were the case that the Community-law standard that applies to seafarers would, or might be, satisfied, by domestic legislation which provided for accrual by reference to the period worked, domestic legislation which is more generous is also permissible, and there is no reason to strive to construe it as providing only for that minimum entitlement.

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79. Mr Glyn's argument boils down, I think, to the following chain of reasoning. The case-law of the CJEU establishes that the "conformity principle" applies to the **WTD**. As the **Seafarers' Directive** springs from the same sources, that case-law reads across, and that principle applies equally to it. But the conclusion, in **Brazel**, that the domestic instrument made more generous provision, does *not* read across. The language of the **WTR** is different from that of the **WTD**, and more generous in its ambit. But the words of regulation 12 are materially the same as those of the **Seafarers' Directive**, and so they must be interpreted in the same way.

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80. Mr Glyn submitted that whilst **Land Tirol** and **Brandeis** focussed on the pro rata principle derived from the **Part-Time Workers' Directive (97/81/EC) ("PTWD")**, **Heimann** embraced a distinct articulation of the conformity principle; and **Greenfield** reflected what he called a mature articulation of the latter, independent of any principle derived from the **PTWD**.

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A The same, he said, was true of **Dicu** and **Hein**. He highlighted, among other passages, what the Court said in **Greenfield** at [29]:

> **"Furthermore, it is not disputed that the purpose of the entitlement to paid annual leave is to enable the worker to rest from carrying out the work he is required to do under his contract of employment (judgment in *KHS*, C-214/10, EU:C:2011:761, paragraph 31). Consequently, the entitlement to paid annual leave accrues and must be calculated with regard to the work pattern specified in the contract."**

B and in **Dicu** at [28]:

> **"That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is based on the premiss that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes that the worker has been engaged in activities which justify, for the protection of his safety and health, as provided for in Directive 2003/88, his being given a period of rest, relaxation and leisure. Accordingly, entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract (see, to that effect, judgment of 11 November 2015, Greenfield, C-219/14, EU:C:2015:745, paragraph 29)."**

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81. In his discussion Underhill LJ, at [63] considered a worker who was part time, in the sense that they only worked for part of each week, say, three days per week. Such a worker would be "accorded" their basic entitlement to four weeks' leave "by being given four weeks in which they are not required to work at all, though of course all that are actually relieved from having to work is the particular days in those weeks that they would have worked otherwise … three days."

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82. But that did not provide the answer in relation to part-year workers. In relation to them, at [66], from which I have already made some citation, he concluded:

> **"So far as EU law is concerned, I am prepared to accept that the CJEU authorities which Mr Glyn cites appear to establish that the WTD requires only that workers should accrue entitlement to paid annual leave in proportion to the time that they work. I will refer to this as "the accrual approach", but it is the justification also for what Mr Glyn calls the pro rata principle. The result is that employees who do not work a full year are not entitled to the full four weeks' annual leave provided for in article 7. That is perhaps a little surprising, given the explicit language of the Directive. The case-law has so far only shown how the principle applies in the particular situations thee considered: there may be difficulties in fleshing it out as a workable approach to be applied generally. Nevertheless I can understand the reasoning behind an accrual approach, and it seems that Germany at least has followed such a model in its domestic legislation: see para. 48 above."**

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83. What I would draw out from the discussion in **Brazel** is the following. First, there is a difference in principle, between the question of how entitlement to leave *accrues*, and how that entitlement, when it is taken, is *given effect*. What tends to be referred to as the pro-rata principle in relation to part-time workers, is really a principle about how leave rights are to be *given effect*, or, in the word used by Underhill LJ, "accorded". The principle that, if the worker has *accrued*, say, a week's leave, that is then *given effect* by relieving them from having to work to the extent that they would otherwise have had to do so in a week, does not, as such, tell us anything about the principle by reference to which the entitlement accrued in the first place.

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84. This means, I think, that passages in which the CJEU refers to the period or pattern that a worker has "worked" need to be read with care, to ascertain whether the Court is concerned at that point with the principle according to which entitlement accrues, or the way in which an accrued entitlement is given effect. Passages in which the Court is in fact concerned with the latter should be not be relied upon as indicative of the approach to be taken to the former.

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85. Secondly, some of these authorities are concerned with the peculiar problems that are thrown up when there is a change in a worker's contractual working pattern, from one period to another: in **Land Tirol**, concerning how leave accrued during a period of full-time working, falls to be treated when it comes to be taken during a period of part-time working; and in **Greenfield** concerning how leave accrued and taken during a period of part-time working is to be reckoned when assessing outstanding leave entitlement during a period of full-time working.

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86. The facts of **Heimann** are so strikingly unusual that it may be dangerous to extrapolate from it. The Court, I note, concluded, at [32], that, although the workers in that case had "from a formal point of view, a full-time employment contract" their situation during what amounted to

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a lay-off period was to be regarded as "*de facto* comparable to that of part-time workers". Accordingly, it was permissible for their paid annual leave entitlement to be calculated according to the principle of *pro rata temporis* applied to part-time workers.

87. I note also Underhill LJ's choice of words. He was "prepared to accept" that the CJEU authorities "appear to establish" that the **WTD** only requires accrual of entitlement to leave by workers in proportion to the time that they work; and that he understood this "also" to be the justification for "what Mr Glyn calls the pro rata principle" (that is, what, before me, he called the "conforming principle"), and that the result, that a worker who did not work the full year, was not entitled to the full four weeks' leave provided for by in Article 7 was "perhaps a little surprising, given the explicit language of the Directive." I read that guarded language as indicating that he was prepared to *assume* the general point in the Trust's favour, but no more; and also as flagging up that this principle should not be assumed to be easily universalizable.

88. I do agree with Mr Glyn that, at a high social policy level, the **WTD** and the **Seafarers' Directive** spring from the same well (or wells), and are animated by the same broad objectives. But I do not think that assists a consideration of whether these objectives are necessarily to be achieved by application of the same specific mechanisms when it comes to paid holidays. Rather, I agree with Mr Segal, that, at the level of implementation, it is more significant that a separate Directive, itself deriving from a distinct Convention and social partners' agreement, applies to seafarers, and that these instruments have self-evidently been framed (albeit inevitably generally) with seafarers' peculiar working environment, and work patterns, in mind.

89. It also appears to me that Underhill LJ's guarded observations are even more apposite when it comes to what the CJEU authorities may tell us about the correct interpretation and

application of the **Seafarers Directive**. In this regard, the element of similarity between the working environment, and consequent working patterns, of offshore installation workers and seafarers, make the following passage in **Brazel** (at [77], referring to submissions made by Ms Brazel's counsel, Michael Ford QC) particularly pertinent to my mind:

> **"Secondly, he pointed out that the logic of the Trust's case was that in *Russell* (see para. 57 above) the claimants should have been entitled to only (about) half of the statutory entitlement since they only worked 26 weeks a year. That seems unattractive, given the special characteristics of offshore oil rig work which underlie that working pattern, and the case proceeded in both the Inner House and the Supreme Court on the basis that they were entitled to the full statutory holiday (and thus the appropriate pay): the only question was when it could be taken. Not much weight can be attached to the fact that a Court does not take a point not raised by the parties. But the case does at least illustrate that the circumstances of part-year workers may vary very widely and that a pro rata principle that is said to make sense in the case of the cricket coach or the visiting music teacher must also make sense across the whole spectrum of working arrangements."**

90. Further, Standard A2.4 of the MLC at paragraph 2 expressly refers to a minimum leave entitlement of 2.5 calendar days "per month of employment". Further, the accompanying Guideline, at paragraph 3, refers to pro-rating of entitlement to leave for seafarers "employed for periods shorter than one year." Similarly, clause 16 of the social partners' agreement adopted by the Directive refers to the minimum entitlement per month "of employment". This language is strongly indicative of accrual, in relation to seafarers, occurring by reference to the period of employment, and not being confined to the period working on board the vessel.

91. As to the significance of the CJEU's approach when construing the **WTD**, Underhill LJ observed in **Brazel** at [69]: "The fact that the CJEU has endorsed an accrual approach remains, in principle, relevant to the construction of the domestic provisions but there is no need to strive to reach the same result and no justification for the deployment of **Marleasing**." I note also that the ultimate conclusion in that case was reached as a matter of the natural construction of the words of the domestic legislation. An accrual system could not be built in by an exercise in construction, even were it available, of the **Marleasing** type. (See [73]).

92. I am therefore not persuaded that, as a matter of Community law, the **Seafarers' Directive** should be interpreted as incorporating Mr Glyn's conformity principle. But even if I am wrong about that, it allows for domestic law to make more generous provision, and I do not think that there is any applicable canon of interpretation that requires, or permits, the domestic regulations to be interpreted, contrary to their natural meaning, as incorporating such a principle.

93. For those reasons, ground 1 of the appeal succeeds. Ground 2, accordingly, falls away. But that does not necessarily mean that the Tribunal was wrong to dismiss these claims. So far I have decided that leave entitlement under regulation 22 accrues according to length of employment, not the number of days worked, so that each claimant accrued an entitlement to a full 38 days' leave in each full leave year of their employment. Ground 2 of the cross appeal then raises the question of whether the correct conclusion in law, on the facts found by the Tribunal, was still that they were both afforded the entitlement that they had accrued, in full. If so, the Tribunal was right to dismiss their claims, even if it did so in part for the wrong reasons.

94. That, itself, potentially breaks down into two questions. Were the claimants afforded (at least) the 38 days' leave in each year that they had accrued? If so, were they both fully paid in respect of that leave? As to the first of these, there was an issue before the Tribunal as to whether weeks when the claimants were not rostered on the vessel could be counted towards the statutory leave entitlement. As we have seen, in light of **Russell** the Tribunal concluded that the shore days could generally all be counted as leave days. While, as I was shown, only some of these days were designated as leave days (up to the maximum contractual leave entitlement in each case) the Tribunal concluded that all shore days could in fact be treated as leave days, in the

Russell sense, as the claimants were able to rest from work on them. Those conclusions were not challenged on appeal, and, in my judgment, were plainly right.

95. As Mr Segal stressed at a number of points during argument, the bedrock of the claimants' case before the EAT was about pay: it being said that they had not been fully *paid* in respect of their statutory entitlement. That issue can now be put in this way. On the footing that (as I have found) the Tribunal should have concluded that they both, in each full leave year *accrued* the full entitlement conferred by regulation 12, *and* (*per* **Russell** and unchallenged on appeal), that they had both been *accorded* that entitlement (because the number of days in each leave year that they were not required to work far exceeded that entitlement), should the Tribunal nevertheless have concluded that they were not fully *paid* for all of those days?

96. Counsel on both sides contended that the answer to that question requires an analysis of the relevant contractual terms; but they disagreed as to the conclusion to which a consideration of those terms pointed. The Tribunal made findings of fact about which terms applied, which were not, as such controversial. In particular, from 2015 onwards both were employed on the terms of Agreement C. The Tribunal set out a number of its provisions, and I also had extracts in my bundle. The correct construction of those terms, and what their significance is for the question of whether, on the facts found, the claimants received the pay to which they were entitled, under regulation 12, are pure questions of law.

97. Agreement C describes itself as an agreement to establish pay scales and terms and conditions for on-board ratings in the short-sea sector. Clause 5 identifies that the pay scales are in schedule 1 and will be reviewed annually. Clause 6 provides that terms and conditions of

ratings are in schedule 2 and that each rating is to be provided with a copy thereof with their personal contract of employment.

98. Appendix A sets out definitions of expressions used in schedule 2. The Tribunal referred to certain of those definitions at [22]. I also note that "Salary" means the "annual salary" appropriate to the rank, agreed from time to time with the Union. Under "Payment Rates", "Hourly Rate" (as the Tribunal noted) is derived from the Salary; and the "Ancillary Rate" and "Training Rate" are, in turn, derived from the Hourly Rate. As to "Paid Annual Leave", as the Tribunal set out, reference is made to clause 22b.

99. Turning to the terms and conditions themselves (see the Tribunal's decision at [21]), clauses 10 and 11 set out the annual obligation on ratings to work, by defining the "Annual hours commitment". They also provide that excess hours worked may be cashed in at the Ancillary rate and for the entitlement to Paid Annual Leave of 28 twelve-hour days. Clause 16 concerns "Pay", including (as the Tribunal noted) provisions: that "the Salary is all-inclusive. There are no additional payments unless expressly provided for in these Terms"; that Salary "is paid in equal monthly instalments" and that "Salary is inclusive of pay for Paid Annual Leave and Bank Holidays." Clause 22(a) provides that "The Salary covers all work undertaken by the Rating and also Paid Annual Leave and Bank Holidays." Clause 22 then contains the further provisions relating to "Paid Annual Leave" which the Tribunal set out.

100. The Pay Scales set out in Schedule 1 (see the Tribunal's decision at [20]) provide for an annual salary, and stipulate that "The salaries shown above cover the total work content of the job to which they apply including Paid Annual Leave, expect where additional payments are specifically mentioned in the Terms and Conditions of Employment or in this Schedule."

101. Some reference was made in argument before me, to a free-standing one-page summary of the main provisions of Agreement C, issued by the respondent, and to certain provisions of Mr Biddle's personal contract; but I do not think any of these could be properly construed as varying in any relevant way, the terms of Agreement C itself.

102. The core of Mr Segal's argument was that the salary of each claimant broke down into a contractual entitlement to hourly pay for hours of work and hours of annual leave. He relied in particular on the provisions of clauses 10(a), (c), (e)(i), (f) and 11(a), and the definition of "Hourly Rate" in Appendix A, referring in turn to the 2022 working hours and 336 hours of Paid Annual Leave. Those were in turn set out more fully in clause 22 and corresponded only to the 28 days' leave conferred by these terms, not to the 38 days conferred by regulation 12.

103. The core of Mr Glyn's argument was that the claimants received an annual salary, in equal monthly instalments, regardless of whether they were working, or on leave, and which was expressly stated as covering all entitlements, subject only to limited exceptions. Those limited additional rights: to "cash in" additional hours worked above the standard annual hours commitment at hourly rates, and to certain further payments on termination, did not affect that. The claimants were, in this respect, no different to the employees in **Coleman**, a case which the Tribunal was wrong to distinguish. Mr Glyn relied in particular on the definition of "Salary" in Appendix A, the provisions of clause 16 of the schedule 2 terms, which stated its all-inclusive nature, and the similar provision in schedule 1(a) setting out the annual salary rates.

104. My conclusions on this aspect are as follows. The starting point is that I am solely now concerned with whether the Tribunal correctly concluded, on the facts found, that the claimants

had received their statutory entitlement to holiday pay, in respect of 38 days' statutory leave per annum, which they had both *accrued* and been *accorded*. As to that, their contracts provided for them to receive an annual salary, paid in equal monthly instalments. Their contracts also stipulated that that annual salary was "all inclusive" and that there was no entitlement to additional payments except where expressly provided for in their terms.

105. If these were the only provisions relating to salary, pay or payments, it would, I think, be clear that, notwithstanding their working patterns, the claimants were no different from any other worker who is paid a salary in equal monthly instalments, year round, and regardless of whether, from time to time, they are working or not. Such workers are not entitled to any further payment in respect of periods when they are on annual leave. They were, or were equivalent to, **Marshalls Clay** category five workers, and not in any materially different position from the workers in **Coleman**.

106. Do the additional provisions in relation to pay and payments in Agreement C make any difference to that analysis? I do not think so. The provisions relating to the calculation of Hourly Rate, Ancillary Rate and Training Rate in schedule 2 are purely definitional, and, notably, are also all derived from the starting point of the annual salary. They are then used to work out the calculation of certain additional payments which may be claimed in the circumstances set out in the terms and conditions. Whilst the method of calculation of the hourly rate divides up the salary by reference to the standard annual hours, and contractual holiday entitlement, that does not provide a basis for saying that workers in the position of the claimants were in fact entitled to more statutory holiday pay. It is merely the mechanism which was adopted for deciding the rate at which additional payments would be paid, to any rating who had in fact earned them under the relevant contractual provisions. The reference, at clause 22(b)((ii), to annual leave being paid at

A the hourly rate does not override the repeated provision, at 22(a) and elsewhere, that the annual salary covers paid annual leave.

B 107. Nor does the fact that the contract provided for a lesser holiday entitlement, in number of days, than the statutory entitlement, make any difference, as such. What matters is whether, despite that, the claimants were actually accorded their statutory entitlements. As to that, to repeat, the Tribunal rejected the claimants' arguments that some or all of the periods when they C were not rostered for work could not be counted towards their annual leave entitlement. Rightly, in light of **Russell**, such arguments were not pursued on appeal. The true basis of these appeals was that they did not receive their full statutory entitlement to holiday *pay*.

D 108. I therefore uphold ground 2 of the cross appeal.

E 109. Standing back, the correct conclusions, applying the law to the undisputed facts found, are that (a) the claimants had a statutory entitlement to accrue leave, year round, by reference to their periods of employment, not merely the periods in which they were working: (b) they were accorded their entitlements to take accrued leave in full; and (c) they received their full statutory F holiday pay in respect of that leave. The overall effect of my having upheld both ground 1 of the appeal and ground 2 of the cross appeal, is that, although the Tribunal did not do so by the right route, it reached the only legally correct conclusion, applying the law to these facts.

G 110. This means that the alternative ground advanced by the respondent for upholding the Tribunal's decision, and ground 1 of the cross-appeal, both fall away. However, I will briefly set out my conclusions on the latter.

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111. First, the Tribunal was right to conclude that Ms Hayford's claim, as originally presented, only applied to 2017. That is the natural reading of the short particulars as a whole, which repeatedly refer to that year specifically. Secondly, the Tribunal's conclusion on the substantive issue in fact rendered the amendment point irrelevant (as does mine); but it was not in principle wrong to decide the amendment point first, as would have occurred had it not been left over to the final hearing. Thirdly, though it could have been better expressed, reading the relevant paragraphs of its decision as a whole, the Tribunal took into account that there was a time limit point, when deciding whether to grant the amendment, and did so subject to it. It was entitled to do so: **Reuters Limited v Cole**, UKEAT/0258/17. Finally, given that the Tribunal rightly found that the claimants had fully taken their accrued rights to leave, even had it found, and found correctly, that they had not been fully paid in respect of that leave, those claims would have been out of time for years prior to 2017, in accordance with **Pimlico Plumbers**.

Outcome

112. While I have partially upheld both the appeal and the cross appeal, the only correct conclusion, applying the law to the found facts, is that the claimants' enjoyed their full entitlements to statutory leave, and received their full statutory entitlements to be paid in respect of that leave. The only legally correct outcome was, therefore, to dismiss their claims, and the Tribunal's judgment doing so therefore stands.