EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Williams	**v**	**The Commissioner of the Police of the Metropolis**

Heard at: London Central (by video)

On: 21 and 22 July 2022

Before: Employment Judge P Klimov

Representation:

For the Claimant: Mr James Williams (of Counsel)

For the Respondent: Mr Christopher Edwards (of Counsel)

RESERVED JUDGMENT

1. The Claimant's claim for a payment in lieu of leave under Regulation 14(2) of the Working Time Regulations 1998 was presented in time and shall proceed to be determined at a final hearing to be listed by the Tribunal.

2. The Tribunal does not have jurisdiction to consider the Claimant's claim for unauthorised deduction from wages under Part II of the Employment Rights Act 1996.

REASONS

Background and Issues

1. This was an open preliminary hearing ordered by Employment Judge Norris on 8 March 2022 to consider the issues set out in the agreed List of Issues (see Appendix).

2. Mr Williams appeared for the Claimant and Mr Edwards for the Respondent. Both Counsel prepared skeleton arguments. I am grateful to both Counsel for their detailed and very helpful submissions.

3. I was referred to various documents in the 153-page bundle of documents, as well as an email exchange between the parties' solicitors dated 18 July 2022. I was also referred to various authorities in the 664-page authorities', as well as an additional two authorities sent to me by the parties during the hearing. There were no witnesses.

4. The parties were not in dispute on the basic factual background, which was sufficient for the purposes of the issues I needed to determine. Accordingly, I did not need to make any findings of fact.

Factual and Procedural background

5. I adopt the background set out in Mr William's skeleton, for which I am grateful. "**C**" obviously means the Claimant and "**R**" means the Respondent. The numbers in square brackets refer to the relevant page in the hearing bundle.

> *C was an officer serving with R from 26 August 1997 until 21 April 2021, when he was compulsorily retired on ill health grounds. On 8 October 2014 C was suspended by R (and, as it turned out, never returned to work). He was remanded in custody from 8 – 28 October 2014. He was then kept on an electronically monitored curfew from 28 October 2014 – 1 November 2019. Thereafter he was on unconditional bail, but he suffered from various serious mental health conditions (diagnosed between April 2015 and February 2017).*
>
> *During this period C was involved in protracted and complex litigation. In particular, C was prosecuted in 2014 for various criminal offences, although C was never convicted. The trial was finally listed for May 2021, but in March 2021 the Court ruled that the Claimant had no case to answer on the main charge against him. The CPS offered no evidence on the remaining charges and the prosecution collapsed. C retired on health grounds on 21 April 2021.*
>
> *Mr Williams was paid his full salary throughout this period but did not take any holiday at any point. Before the termination of his employment, C wrote to R, claiming payment for untaken holiday for the whole period from his suspension in 2014. On 21 April 2021, R responded, setting out its position*

that C was entitled to 54 hours of holiday pay [66]. This was calculated as 14 hours for the final, incomplete leave year from 1 April 2021, plus 40 hours for leave carried over from the previous leave year.

Following some further correspondence, on 7 May 2021 R agreed to pay C 174 hours of holiday pay: 160 hours for each of the two complete leave years from 1 April 2019 – 31 March 2020 and 1 April 2020 – 31 March, plus 14 hours for the period 1 – 21 April 2021 [102]. The sums due for these periods were paid to the Claimant on 20 May 2021 (£1,172.74 gross) [151-2] and 21 June 2021 (£5,782.05 gross) [153].

C contacted ACAS on 29 July 2021 and the certificate was issued on 1 September [19]. The ET1 with attached Grounds of Complaint was lodged in the London Central Employment Tribunal on 28 September 2021 [1]. R lodged its ET3 with attached Grounds of Resistance on 25 November [20].

There was a case management hearing before EJ Norris on 8 March 2022 [34]. She set the matter down for a two-day PH to consider certain matters relevant to the Tribunal's jurisdiction, by reference to an agreed list of six issues [38]. [..].

6. The Claimant brought a claim for accrued holiday pay under the Working Time Regulations 1998 ("**the WTR**"); and, in the alternative, under Section 13 of the Employment Rights Act 1996 ("**the ERA**"), and for breach of his rights under Article 7 of the Working Time Directive 2003/88/EC ("**the Directive**").

7. The Respondent's position is that the claims under the WTR and the ERA are time barred and the Tribunal does not have jurisdiction to consider them.

8. The Respondent further contends that the Claimant does not have standing to bring his claim under the ERA because, as a former police constable, he was not a worker within the meaning of the ERA.

9. Finally, the Respondent argues that there is no free-standing claim for breach of the Directive which the Claimant could bring, and in any event any such claim would be out of time.

10. I shall deal with each issue in turn, setting out the relevant law, the parties' submissions, and my conclusions, starting with Issue 1.

Issue 1: Time Limit under the WTR

The Law

11. Regs 14(1) and 14(2) WTR provide that when a worker's employment is terminated during the course of his leave year, and on the termination date the worker has taken a lesser proportion of his annual entitlement than the proportion to which he is entitled under Regs 13 and 13A, the employer shall make a

payment in lieu of accrued but untaken leave, calculated in accordance with the formula in Reg 14(3).

12. Reg 30 WTR states (*emphasis added*):

> *(1) A worker may present a complaint to an employment tribunal that his employer—*
> *(a) has refused to permit him to exercise any right he has under—*
> *[(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]*
> *(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; . . .*
> *[(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or*
> *(iv) regulation 25(3), 27A(4)(b) or 27(2); or]*
> *(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).*
>
> *(2) [Subject to [[regulation] 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—*
> *(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months*

13. By virtue of Reg 41(1) WTR, police constables are treated as "workers" for the purposes of the WTR.

14. There is no direct authority known to the Tribunal (and the parties were unable to find any such authority) which determines from what date time starts to run for the purposes of Reg 30 WTR, when the employment relationship has ended but the final reconciliation payment is calculated and made after the termination date.

15. In ***Smith v Pimlico Plumbers Ltd*** **[2022] EWCA Civ 70**, Simler LJ said at [87] (*my emphasis*):

> *"87 Contrary to the reasons relied on by the Employment Appeal Tribunal [2021] ICR 1194, at para 92, this interpretation does not make the time limits for claims under regulations 13 and 16 ineffective. Whatever the position might be in other cases (for example, when a worker is paid in part for annual leave, or is underpaid) a worker can only carry over and accumulate a claim for payment in lieu on termination when the worker is prevented from exercising the right to paid annual leave, and does not take some or all of the leave entitlement, or takes unpaid leave, for reasons beyond his control,*

> *because the employer refuses to recognise the right and to remunerate annual leave. The principles which justify treating these two cases differently from other cases derive from King (and the subsequent cases), as explained above. The three-month time limit for making a claim, which runs from the termination of employment, applies in either case. Provided a claim for payment in respect of the breach of these rights is made within a period of three months beginning with the date of termination, it will be in time*."

Submissions and Conclusion

16. It was common ground that if the starting point for calculating time was (a) or (b) (see Appendix), as contended by the Respondent, the claim was out of time. It was conceded by the Claimant that it was reasonably practicable to present the claim in time, and therefore the Tribunal would not have jurisdiction to hear it. If, however, the correct starting point is (c), either 7 May 2021 or 21 June 2021, the claim would be in time.

Submissions on Issue 1(a)

17. Mr Williams argued that the Respondent's primary position that time started to run from *"each time the Claimant did not receive the holiday or holiday pay he is now claiming [..]"* was misconceived, because the right to receive a payment in lieu of accrued but untaken holiday only arises upon termination of the worker's employment and not before. Thus, if the Respondent's position were to be accepted, it would mean that the worker's right to payment in lieu under Reg 14 would have been extinguished before it even came into existence.

18. Mr Edwards submitted in his written skeleton that Reg 30 did not introduce the possibility of "*a series of deductions*", unlike s.23(3) ERA, and there was no equivalent of the "*continuing act*" concept found in discrimination cases.

19. He accepted that "*the obligation to pay in lieu for untaken holiday crystallise[d] on dismissal*". However, relaying on ***Plumb v Duncan Print Group Ltd*** **[2016] ICR 125**, and ***KHS AG v Schulte*** **(C-214/10) [2012] IRLR 156** (ECJ) he argued that the Claimant could only carry over 18 months of accrued annual leave under the WTR. As he was paid for such leave on termination, any payment in lieu claim he might have had, but for the time bar, had been extinguished by that payment.

20. To bring a claim for the period pre-dating 31 March 2019, Mr Edwards submitted, the Claimant would have needed to bring a claim within three months of 31 March 2019, which he had not done. Even then, had he brought such a claim, he would only have been able to claim for holiday pay accrued for the year before the 18-month period pre-dating March 2019, and would have needed to bring even earlier claims to cover various periods back to October 2014.

Conclusion on Issue 1(a)

21. I find Mr Edwards' argument is misconceived. It conflates two different concepts: how much of annual leave a worker could carry over into the next leave year and when the limitation period to bring a claim for accrued but untaken leave starts to run.

22. The Claimant could not have brought a claim under Reg 14(2) within three months of 31 March 2019 or at any earlier date for the simple reason that he did not have any such claim in law. Reg 14 "bites" only "*where a worker's employment is terminated during the course of his leave year*". The Claimant's employment was terminated on 21 April 2021. Therefore, that was the earliest date when the Respondent's obligation to make a payment in lieu (and the Claimant's corresponding right to receive such a payment) has arisen, or to borrow Mr Edwards expression "*crystallised*".

23. There is nothing in Reg 13 or 13A to suggest that a payment in lieu could be made at the end of the relevant leave year, or at the end of the relevant carry over period. On the contrary, Reg 13(9)(b) states that leave "*may not be replaced by a payment in lieu except where the worker's employment is terminated*". This accords with Article 7(2) of the Directive, which provides that "*[t]he minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated*".

24. Had the Claimant actually taken annual leave in leave years preceding 31 March 2019 and not been paid by the Respondent for such period, he would have had to bring his claim under Reg 16 within 3 months beginning on the date when such corresponding payment should have been made. However, that was not the situation on the agreed facts.

25. For obvious reasons, following his termination the Claimant could not have asked for paid annual leave, and therefore could not have sought compensation for failure to allow him paid annual leave under Regs 13, 13A and 16 WTR. The only right that he had upon the termination was to a payment in lieu under Reg 14 WTR, subject to the below observations on the effect of the judgment in ***Smith*** (see paragraphs [45-49] below).

26. Therefore, I find the Respondent's primary position is wrong in law and the answer to Issue 1(a) is "No, it was not".

Submissions on Issue 1(b)

27. Turning to the Respondent's fallback position that the claim should have been lodged within three months of the termination of the Claimant's employment, which "*crystallised*" his right to a payment in lieu.

28. In his written skeleton, Mr Edwards refers to the Court of Appeal judgment in ***NHS Leeds v Larner*** **[2012] ICR 1389** per Mummery LJ at [64], quoting the EAT

at [17]. This, however, deals with a different issue, namely the EAT rejecting the respondent's submission that the entitlement of the claimant depended on the claimant's submitting a request for that annual leave before the leave year ended and that, in the absence of a request, she had forfeited her entitlement.

29. Paragraph [17] of the EAT decision quoted by Mummery LJ contains a sentence reading: "*The right to be paid for that annual leave crystallised on the termination of her employment, as it happens, only a few days after the end of the pay year*". This, however, does not say anything about when the limitation period under Reg 30(2) starts to run.

30. In his oral submissions, Mr Edwards argued that the phrase in Reg 30(2)(a) "*the payment should have been made*" must be read as meaning the date when the entitlement arises, i.e., the termination date of the worker's employment. He argued that it would be the only logical date, as otherwise there would be no identifiable limitation period, as the start date would be "*shifting*" depending on when "*it is alleged*" the payment should have been made. He argued that the Claimant could not extend the limitation period indefinitely by keep querying non-payment in lieu of accrued leave.

31. Mr Edwards submitted that this approach was favoured in ***Smith*** at [87] and that was binding *ratio*, which this Tribunal must follow.

32. Furthermore, Mr Edwards argued, the position that time must start running on the date when the obligation to make the payment "crystallised" and the payment was not made, would be consistent with the position under s.23(2)(a) ERA, as clarified by the EAT in the case of ***Arora v Rockwell Automation Ltd*** **UKEAT/0097/06/ZT**, where it was held at [12] that (*my emphasis*):

> *Accordingly, the position appears to be as follows: where there has been an actual deduction in breach of contract, the time for the complaint to start to run is the date when that deduction is made, or the payment from which the deduction is made has been tendered. Where all that happens is that the employer pays too little and there is a shortfall the same principle applies, time starts to run from the moment when the reduced payment is made. However, where there is no payment, time may start to run in effect at an earlier date; it will start to run at the time when the contractual obligation to make a payment arose.*

33. Mr Williams argued that Simler LJ's statement in ***Smith*** at [87] was *obiter*. That paragraph must be read in the context of paragraphs [62] and [63] of the judgment, which summarised the EAT's conclusion on the applicability of the principles in ***King v Sash Window Workshop Ltd*** **(C-214/16) [2018] ICR 693** (ECJ) to the situation in ***Smith***. The statement was influenced by ***King*** and was not dealing specifically with the limitation point. The paragraph does not address or purport to address whether time starts to run on termination or after that. In ***Smith*** the holiday pay claim was "*incidental*", as it was brought together with sex discrimination claim. There is no reference to Reg 30 WTR in that passage. Therefore, Mr Williams argued, put in that context, paragraph [87] cannot be read

as saying that for the purposes of Reg 30(2)(a) time starts to run from the date of termination.

34. In the alternative, Mr Williams submitted, even if Reg 30(2)(a) were to be read in that way (i.e., that time starts running on the date of termination), the Tribunal should transpose the words into Reg 30(2)(a) from s.23(3) ERA as was done by The Court of Appeal in Northern Ireland in the case of ***Chief Constable of Northern Ireland v Agnew*** **[2019] IRLR 782** (NICA), where the Court said that the underlined words should be added to both reg 30(2)(a) and 43(2)(a):

> "*An industrial 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 payment should have been made or if presented in respect of a series of payments of wages from which deductions were made, before the end of the period of three months beginning with the date on which it is alleged that the last in the series of such payments was made; or (b)* […]."

35. Mr Williams argued that adding such words to Reg 30(2)(a) would be consistent with the wording in Reg 30(2)(a) because: it would be logical and convenient for all parties and employment tribunals as it would align both legislative provisions under which holiday pay claims are usually brought; it would be practical, as the final payslip would make it clear for both sides where they stood; it would be consistent with EU law and would avoid the problem with the equivalence and effectiveness principles; and it would avoid mismatching limitations period running concurrently.

Conclusion on Issue 1(b)

36. I find that the words in Reg 30(2)(a) are clear as is, and do not require any addition or transposition of the words from s.23(2) ERA. A complaint must be brought "*before the end of the period of three months […] beginning with the date on which it is alleged that [..] the payment should have been made".*

37. On a fair reading, this means the date on which it is claimed the worker's employer should have made the payment in question. In the circumstances when the worker's employment has been terminated but his final pay is yet to be processed, it will be the date when the worker receives or should have received his final pay. Typically, such final pay should be accompanied by a written itemised pay statement, which under s.8 ERA must be given to the worker "*at or before the time at which [the] payment […] is made*".

38. Depending on payment arrangements operated by the employer, this could be the next regular or additional payroll run, or if the worker is paid at the end of each week or day or shift, that payment date.

39. The termination date simply triggers the employer's obligation to make a payment in lieu of accrued but untaken leave. However, there is nothing in Reg 14 which suggests that the payment must be made on the termination date. In many cases it would be impracticable, and in some cases (for instance, when an employee resigns with no notice) impossible to achieve such immediate payment. Since the date of performance of the obligation under Reg 14(2) is not fixed by reference to the termination date, I do not see on what basis it could be said that the limitation period should start running before the performance due date.

40. The fact that the right to receive a payment in lieu "*crystallises*" on the termination date does not mean that the payment must be made on that same date, absent any contractual stipulation to that effect.

41. In fact, the word "*crystallises*" is somewhat misleading, as it suggests that the right exists before the termination date, albeit in some "*liquid*" form. There is no such right until and unless (i) the worker's employment is terminated during the course of his leave year; and (ii) the worker has taken less leave proportionally than what he was entitled to.

42. Therefore, it would be more correct to say that the right "*arises*" on the termination date, in the same way as the right to receive wages on the commencement of employment. However, a worker cannot bring a claim for deductions from wages before the deduction in question was made, that is before "*the total amount of wages paid <u>on any occasion</u> by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker <u>on that occasion</u>*" (see s.13(3) ERA).

43. For the same reasons, I find that ***Arora*** does not assist the Respondent. The contractual obligation to make a payment must be performed on the pay day and not earlier. In any event, that case concerns a claim for unauthorised deduction from wages under s.13 ERA and not for a payment in lieu under Reg 14 and the time limit under Reg 30(2)(a) WTR.

44. I do not accept Mr Edwards' submissions that paragraph 87 in ***Smith*** must be read that the limitation period under Reg 30(2)(a) starts to run on the termination date.

45. First, in ***Smith*** the claim was not for a payment in lieu under Reg 14, but for failure to pay for leave periods under Regs 13 and 16 (see [55–57]). Therefore, to the extent paragraph [87] sets a rule on the computation of the limitation period, which is binding on this Tribunal, it sets it in respect of claims under Regs 13 and 13A (read in the context of Reg 16) in the two specific scenarios, as in ***King*** and ***Smith***. That is to say, when a "*worker is prevented from exercising the right to paid annual leave*" (irrespective of if he/she actually takes no leave (as in ***King***) or takes unpaid leave (as in ***Smith***)) the right to paid annual leave does not lapse, and instead the worker is entitled to bring a claim for compensation for that

right being denied to him/her by lodging a complaint within a period of three months beginning with the date of termination.

46. On my reading of paragraph [87], it is to those two scenarios that Simler LJ referred when she said that "*[t]he three-month time limit for making a claim, which runs from the termination of employment, applies in either case*" (*my emphasis*).

47. That might appear inconsistent with the wording of Reg 30(2)(a), which says that claims under Reg 13, 13A and 16 must be made "*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 rest period or leave extending over more than one day, the date on which it should have been permitted to begin".* That difficulty was picked up by EAT in ***Smith*** at [92], where Mr Justice Choudhry (the President, as he then was) said (*my emphasis*):

> *92. I have not found the task of interpreting the effect of the CJEU's decision in King an easy one. However, I am fortified in my conclusion that Ms Williams' interpretation is not correct by the following three matters:*
>
> *a. First, Ms Williams' interpretation, if correct in cases of leave that is taken but unpaid, would render the time limits for claims under regulations 13 and 16 ineffective. The worker who (as in the Claimant's case) exercised his contractual right to take unpaid leave over a number of years (and who can thereby be reasonably be assumed not to have been deterred from taking such leave) would be able to accumulate a claim for payment for such leave to be made at the conclusion of termination without regard to those time limits. However, there is nothing in the **King** judgment that suggests that the CJEU had any difficulty with those time limits, which are well within the scope of the procedural autonomy afforded to Member States in respect of rights under European law. On the contrary, as I have already mentioned, the separation in the WTR between the enforcement of the right to leave and the right to be paid for that leave was mentioned by the CJEU in **King** without demur.*
>
> *b. Second, it would give rise to an inconsistency of approach as between cases of unpaid leave and those where a worker receives partial or incomplete payment for the leave taken in respect of leave years other than in the year of termination. Ordinarily, a worker in the latter case would be required to make a claim for the balance of his entitlement within three months of the date on which part-payment is made. Ms Williams did not suggest that the time limit should be disapplied in a part-payment case or that any right of carry-over could apply in respect of the shortfall in each leave year. However, that would mean (if the Claimant is correct) that the carry-over right would apply where no payment is made for leave taken, but would not apply where there was partial payment. I could see no principled basis for such a difference. The relevant time limits ought to apply whether the shortfall is partial or complete. It was suggested that there was a difference between an employer who refuses to provide any remuneration for leave (and who would thereby be denying the worker rights in respect of*

> *paid annual leave) and one who accepts that payment is due but makes an incorrect payment. However, it seems to me that the employer who underpays for annual leave is also denying the worker their right to paid annual leave and there is no distinction in principle.*
>
> *c. The Claimant's approach would create a new right for the payment upon termination for carried over rights in respect of annual leave that goes beyond that sanctioned by article 7(2), WTD*.

48. However, the Court of Appeal specifically found that the carry over provisions did not render the time limit under Regs 13 and 16 ineffective, and in doing so it seems to have created the right to make a claim for such carried over leave within three months of the termination date, which right appears to be in addition to the right under Reg 14.

49. In any event, whatever the rights and wrongs of that, it is not an issue I need to decide. For the purposes of the case in front of me, I am satisfied that paragraph [87] of the Court of Appeal's judgment in ***Smith*** does not deal with the issue of when time starts to run under Reg 30(2)(a) for the purposes of bringing a complaint under Reg 14.

50. For these reasons I find that the answer to the Issue 1(b) is also "No, it was not".

Overall conclusion on Issue 1

51. The correct answer, in my judgment, is 20 May 2021, the date when the Respondent has paid to the Claimant what Claimant alleges was only part of his entitlement for accrued but untaken leave, which therefore is the date on which the Claimant alleges the full payment should have been made. It follows that the Claimant's claim was brought in time and the Tribunal does have jurisdiction to consider it.

52. I find that 7 May 2021 is not the correct date for the purposes of computing the time limit, as it was not the date when the Respondent made any payment to the Claimant, but the date when the Respondent wrote to the Claimant stating what payment it would be making to him. The Claimant does not allege that the payment should have been made on that same date. Therefore, it was not the date on which it is alleged the payment should have been made.

53. I also find that 21 June 2021 is not the correct date, because by that time, on 20 May 2021, the Respondent had already made what is alleged to be a partial payment in lieu under Reg 14, and the limitation period had already started to run. Therefore, it cannot be right that the following partial payment, made on 21 June 2021, should have the effect of resetting the limitation clock back to zero. As Mr Edwards correctly points out, there is no concept of "a series of deductions" under Reg 30. Also, the Claimant should not be able to unilaterally extend the time limit by challenging subsequent partial payments.

54. That deals with the main issue, and the Claimant can proceed with having his case heard on the merits under the WTR. He, however, should consider my conclusion on the "lookback period" issue below.

Claim under the ERA

55. I shall now turn to deal with issue 3, namely the question whether the Tribunal has jurisdiction to hear the Claimant's unlawful deductions from wages claim under the ERA, when the Claimant is a former police constable and not a worker within the meaning of s.230 ERA.

The Law

56. s.13(1) Part II ERA states:

> "*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction*".

57. Under s.27(1)(a), holiday pay is included within the definition of "wages" for the purposes of Part II ERA.

58. S.23(1)(a) ERA states:

> "*(1) A worker may present a complaint to an employment tribunal—*
> *(a) that his employer has made a deduction from his wages in contravention of section 13 [..].*"

59. Section 230 ERA states:

> *"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
> *(a) a contract of employment, or*

> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly*.

60. s. 200(1) ERA provides that certain sections of the Act *"do not apply to employment under a contract of employment in police service or to persons engaged in such employment"*. This disapplies most of the employee protections in ERA, but notably not Part II.

61. *"Police service"* is defined in s.200(2) as:

> "*(a) service as a member of a constabulary maintained by virtue of an enactment, or*
> *(b) subject to section 126 of the Criminal Justice and Public Order Act 1994 (prison staff not to be regarded as in police service), service in any other capacity by virtue of which a person has the powers or privileges of a constable.*"

62. In ***Commissioner of Police of the Metropolis v Lowrey Nesbitt*** **[1999] ICR 401,** the EAT held at [403H-404B] and [408 B-G] (*my emphasis*)

> *"The position in law is that service as a member of a constabulary maintained by virtue of an enactment is apt to include service in one of the four statutory police forces not maintained by Home Office grant, namely British Transport Police, Ministry of Defence Police, Royal Parks Constabulary and United Kingdom [Atomic] Energy Authority Police. As a matter of law, an officer engaged in the British Transport Police is employed by the British Railways Board, under a contract of service. Such a police officer would, but for the exclusion contained in section 200, have been entitled to the excluded rights.*
> [...]
> *In summary, therefore, a constable is an office holder. The terms on which he serves are governed by statute and statutory instrument. Section 50(1) of the Police Act 1996 empowers the Secretary of State to make "regulations as to the government, administration and conditions of service of police forces." Section 50(2) entitles the Secretary of State, without prejudice to the generality of his powers, to make provision in relation to all the terms and conditions of service that might otherwise have been contained in a written contract of employment, including his hours of duty, pay and allowances and disciplinary procedure. The provisions of the Sex Discrimination Act 1975 and Race Relations Act 1976 have subjected police constables to their protection; the Disability Discrimination Act 1995 has not. The general employment protection afforded to civilians working under contracts of employment is not afforded to police officers. As a matter of public policy police constables must not be constrained in the exercise of their functions by their "employers" asserting private rights. As a matter of public policy,*

> *their relationship with the police service is governed and only governed by statute. In performing their duties they must abide by their oath of office. In these circumstances we are quite satisfied that there is no room for the implication of a contract of employment. Apart from which, in the case of the Metropolitan Police there would be a problem as to the identity of the employer having regard to the role of the receiver. But that is a minor point by comparison with the more important considerations to which we have referred*.
> […]
> *The appeal will be allowed and a declaration made that the applicant is not a worker within the meaning of the Employment Rights Act 1996*."

63. In ***Fenoll v Centre d'aide par le travail 'La Jouvenne'* (C-316/13) [2016] IRLR 67** (ECJ), the ECJ held:

> "*25. It follows that, as regards the application of Directive 2003/88, the concept of a 'worker' may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law…*
>
> *26. [T]hat finding applies also with regard to the interpretation of the term 'worker' within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter, in order that the uniform scope of the right of workers to paid leave rationae personae may be ensured.*
>
> *27. In that context, it should be recalled that, according to the settled case law of the Court, the term 'worker' within the meaning of Directive 2003/88 must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. So, any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."*

64. In ***Chief Constable of Northern Ireland v Agnew* [2019] IRLR 782** (NICA), the Northern Ireland Court of Appeal held at [34] that: "*that police officers are workers within the meaning of Community law*."

65. The so-called *Marleasing* principle requires the UK courts and tribunals to interpret EU-derived domestic law in conformity with EU law. In ***Dominguez v Centre Informatique du Centre Ouest Atlantique* (C-282/10) [2012] IRLR 321** (ECJ), the ECJ summarised the principle as follows (*my emphasis*):

> *"23.* […]. *[T]he question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible.*
>
> *24. In that regard, the Court has consistently held that when national courts apply domestic law they are bound to interpret it, so far as possible, in the*

> *light of the wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them...*
>
> *25. It is true that this principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national court to refer to the content of a Directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem.*
>
> […]
>
> *27. […] [I]t should be noted that the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the Directive in question is fully effective and achieving an outcome consistent with the objective pursued by it* […]."

66. In ***Lock v British Gas Trading Ltd*** **[2017] ICR 1** at [103], the Court of Appeal said:

> "[…] *When faced with the question of whether a conforming interpretation can be adopted, the courts of the United Kingdom do not confine themselves to a consideration of the literal meaning of the language that may appear to stand in their way; they approach the task by reference to the broader considerations of whether a conforming interpretation will be in line with the grain or underlying thrust of the legislation. That is an approach that ought, I would think, to attract nothing but commendation by the Court of Justice*".

67. In ***Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu*** **(C-684/16) [2019] 1 CMLR 35 (ECJ)**, the ECJ held at [60]:

> "*As has also been held by the Court, that requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 17 April 2018, Egenberger, C-414/16, EU:C:2018:257, paragraphs 72 and 73 and the case-law cited).*"

68. The EU (Withdrawal) Act 2018 ("**the EU(W)A**") repealed the European Communities Act 1972 ("**the ECA**") on the day the United Kingdom left the

European Union (**the "IP completion date**"). One of the four functions of the EU(W)A is to convert EU law as it stood at the moment of exit into domestic law before the UK left the EU and to preserve laws made in the UK to implement EU obligations. ss.2, 3 and 4 EU(W)A deal with the continuation of EU-derived domestic legislation, incorporation of direct EU legislation into domestic law, and continuation of any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before the IP completion date had direct effect by virtue of s.2(1) ECA.

69. s.5(2) EU(W)A states that:

> "*[..], the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day*".

70. s.6(3) EU(W)A states that:

> "*Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—*
> *(a) in accordance with any retained case law and any retained general principles of EU law, and*
> *(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences*".

71. s.6(7) EU(W)A states:

> *"(7) In this Act—*
> *'retained case law' means—*
> *(a) retained domestic case law, and*
> *(b) retained EU case law;*
> *'retained domestic case law' means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP*
> *completion day and so far as they—*
> *(a) relate to anything to which section 2, 3 or 4 applies, and*
> *(b) are not excluded by section 5 or Schedule 1,*
> *(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);*
> *'retained EU case law' means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—*
> *(a) relate to anything to which section 2, 3 or 4 applies, and*
> *(b) are not excluded by section 5 or Schedule 1,*
> *(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);*
> *'retained EU law' means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4*

> *or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);*
> *'retained general principles of EU law' means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—*
> *(a) relate to anything to which section 2, 3 or 4 applies, and*
> *(b) are not excluded by section 5 or Schedule 1,*
> *(as those principles are modified by or under this Act or by other domestic law from time to time)*."

72. IP completion date is January 31, 2020, at 23:00 (see European Union Withdrawal Agreement) Act 2020 c. 1 Pt 4 s.26(1)(a)).

73. Paragraph 3 of Schedule 1 EU(W)A states:

> "*(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.*
> *(2) No court or tribunal or other public authority may, on or after IP completion day —*
> *(a) disapply or quash any enactment or other rule of law, or*
> *(b) quash any conduct or otherwise decide that it is unlawful,*
> *because it is incompatible with any of the general principles of EU law.*"

74. However, paragraph 3 of Schedule 1 is subject to the transitional provisions in paragraphs 39(5) and (6) of Schedule 8, as follows:

> "*(5) Paragraph 3 of Schedule 1 does not apply in relation to any proceedings begun within the period of three years beginning with IP completion day so far as—*
> *(a) the proceedings involve a challenge to anything which occurred before IP completion day, and*
> *(b) the challenge is not for the disapplication or quashing of—*
> *(i) an Act of Parliament or a rule of law which is not an enactment, or*
> *(ii) any enactment, or anything else, not falling within sub-paragraph (i) which, as a result of anything falling within that sub-paragraph, could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph.*
>
> *(6) Paragraph 3(2) of Schedule 1 does not apply in relation to any decision of a court or tribunal, or other public authority, on or after IP completion day which is a necessary consequence of any decision of a court or tribunal made before IP completion day or made on or after that day by virtue of this paragraph.*"

Submissions and Conclusion

75. Mr Williams accepts that under domestic law the Claimant was not "an employee" or "a worker" within the meaning of s.230 ERA, because he did not work under a contract of any description. Therefore, on the face of it, the Claimant cannot bring

a claim for unauthorised deduction from wages under Part II ERA. However, under EU law the Claimant was "a worker", because unlike domestic law, under EU law no contract is required to acquire a worker status. Mr Williams relies on the NICA's ruling at [34] in ***Agnew***.

76. Mr Williams argued that the Tribunal must interpret s.230(3) ERA in a way that conforms with EU law by reading in a new subsection 3A as follows:

> *"(3A) For the purposes of Part II of this Act, the holding of the office of constable shall be treated as employment—*
> *(a) by the chief officer of police as respects any act done by him in relation to a constable or that office;*
> *(b) by the police authority as respects any act done by them in relation to a constable or that office."*

77. He submitted such interpretation would be consistent with *"the grain or underlying thrust of the litigation"*, particularly when (as is required) the relevant provisions of the ERA were read in the context of *"the whole body of domestic law into consideration"*. In support of that contention, Mr Williams highlighted the following considerations:
    a. Since police officers are specifically included in the WTR, there is no suggestion that Parliament had any intention to exclude them from the rights in the Directive to paid annual leave, nor from any of the remedies that go with it;
    b. There are provisions in the ERA which have been specifically extended to include police officers;
    c. There is no express prohibition in the ERA on police officers having the rights under Part II ERA; and
    d. It seems that those police officers who do work under a contract of employment <u>are</u> within the scope of Part II ERA. There is no obvious reason why the majority of police officers, who are not so employed, should not also be included.

78. Mr Williams further argued that the suggested interpretation was not only possible, but the Tribunal was obliged to adopt it based on the ECJ decision in ***Shimizu***.

79. For the Respondent, Mr Edwards argued that ***Lowrey Nesbit*** expressly held that a Metropolitan Police Constable was not able to bring a claim for unauthorised deductions for wages under s.13 ERA, and this Tribunal was bound by that decision.

80. Mr Edwards further argued that any reliance on s.200 ERA did not advance the Claimant's case any further. He referred me to the Court of Appeal decision in ***Redbridge LBC v Dhinsa*** **[2014] ICR 834**, where the Court of Appeal approving ***Lowrey Nesbitt*****,** confirmed that police constables were office holders who did not have contracts of employment. The Court also unanimously decided that

although it could not find any rational policy reason why the legislation treated different police forces in a different way with respect to the right not to be unfairly dismissed under the ERA, "*it [was] not, however, possible for this court, under the guise of interpretation, to rewrite section 200 in order to remedy what appears to be an injustice*".

81. He further submitted that the Claimant was deemed to have the rights of a worker within the meaning of the Directive by virtue of Reg 41 WTR, and his retained EU rights were not abrogated and there was no issue of incompatibility. He said that ***Fenoll*** could not be used to support the argument that the Claimant was a worker in the context of purely domestic law such as the ERA.

82. Finally, Mr Edwards argued that to interpret s.13 ERA by adding additional words as suggested by Mr Williams on the basis that it would be necessary under the principles of equivalence and effectiveness would be contrary to s.3 Schedule 1 EU(W)A, because that would involve challenging something which occurred after the IP completion date, namely the alleged failure to make a payment for accrued but untaken holiday, and therefore the exception in paragraph 39(5) of Schedule 8 EU(W)A did not apply.

83. In reply, Mr Williams argued that even if the principle of equivalence and effectiveness did cease to apply on the present facts, it was not relevant, as the EU definition of "*worker*" comes from the EU substantive law and EU case law.

84. Mr Williams also pointed out that the Claimant was not seeking to imply a contract of employment, but to enforce his statutory right. Therefore, the passage at [408B-G] in ***Lowrey Nesbitt*** could not be read as precluding that. Further, he argued, s.200 ERA did not exclude "*mainstream*" police officers from the protection afforded by Part II ERA, the exclusion came from common law.

85. Finally, with respect to ***Redbridge LBC*** case, Mr Williams submitted that it dealt with the right not to be unfairly dismissed, which is of a purely domestic law origin.

86. While I can see some force in Mr Williams' arguments, I find that they all fall at the same hurdle, namely the existence of the WTR, which provide an effective and equivalent enforcement mechanism of EU-derived rights in relation to annual leave, and of which the Claimant, as a former police officer, can avail himself.

87. The fact that other "*parallel*" enforcement mechanisms (such as s.13 ERA, or a claim for breach of contract), which exist in domestic law for employees and "*workers*" (as defined in domestic law), are not available to the Claimant as a worker under EU law, in my judgment, does not mean that the UK domestic law is not in conformity with EU law.

88. As was stated by the ECJ in ***Dominguez***, in deciding whether domestic law is in conformity with EU law, the court must (*my emphasis*)

> "*tak[e] the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the Directive in question is fully effective and achieving an outcome consistent with the objective pursued by it."*

89. "*The whole body of domestic law*" includes the WTR, which provide for an effective mechanism to achieve an outcome consistent with the objective pursued by the Directive. It is the WTR and not the ERA that implemented the Directive.

90. Interpreting s.13 ERA by adding a new subsection in the form suggested by Mr Williams would go far above and beyond what would be necessary to achieve a consistent outcome pursued by the Directive. This would effectively expand all rights and remedies under Part II ERA (including of a purely domestic origin) to all police officers, which at present they do not have. This is a matter for Parliament and not this Tribunal.

91. The fact that police officers were specifically included in the WTR is not enough to conclude that Parliament intended that they could enforce they rights through the Part II ERA route as well. On the contrary, given the specific provisions of ss. 43KA, 49A and 134A ERA, which extend certain rights under ERA (essentially relating to health and safety issues and protected disclosures) to police officers as if they were employees, and in light of the well-established position in common law that police officers are not employees or workers, the absence of similar extending provisions in relation to Part II suggests that the intention of the legislature was not to include them within the scope of Part II. The fact that police officers are not specifically excluded from Part II cannot be taken as the intention of Parliament to include them within that Part II.

92. Equally, the fact that certain types of police forces are covered by limited provisions of the ERA by virtue of s.200 ERA, which appears to include Part II ERA, does not mean that the same rights should be extended to all police officers through a creative interpretative technique, even if it appears to the Tribunal that there is no obvious reason why s.200 was limited in that way. In my view, such interpretation would be *contra legem*.

93. I also find that applying the interpretation sought by Mr Williams would be impermissible under paragraph 3(2) of Schedule 1 EU(W)A. That is because, by inserting subsection 3A in the form suggested by Mr Williams, the Tribunal would effectively be disapplying "[an]*other rule of law*", namely the position in common law that police officers are not employees or workers under UK domestic law.

94. The transitional provisions at paragraph 39(5) of Schedule 8 EU(W)A do not assist the Claimant because his claim involves something that occurred after the IP completion date, namely the alleged failure by the Respondent to make a

payment for accrued but untaken annual leave. The fact that leave, in relation to which the claim is made, has accrued before the IP completion date is irrelevant. The Claimant's challenge is not for paid leave under Regs 13, 13A and 16, but for a payment in lieu of leave under Reg 14. That right has only arisen on his termination date, which was after the IP completion date. In any event, the challenge will be for the disapplication of a rule of law, and therefore fall foul of the condition at paragraph 39(5)(b)(i).

95. For these reasons, I find that the Tribunal does not have jurisdiction to consider the Claimant's claim for unlawful deductions under the ERA. The claim stands to be dismissed for lack of jurisdiction.

Issues 4 and 5

96. In light of my judgment on the third issue, strictly there is no need for me to deal with issues 4 and 5. However, since both counsel presented detailed arguments on those points, and in case my decision on Issue 3 is not the last word on the matter, I shall allow myself to make the following observations. All my observations below are, of course, only relevant if the Claimant has the right to bring such a claim under s.13 ERA, which I have found he does not.

97. I accept Mr Williams' submissions that the decision in ***Bear Scotland Ltd v Fulton*** **[2015] ICR 221** is irrelevant to this case. The Claimant's claim is for a single payment for accrued but untaken leave. There is simply no "*gap*" of any kind between the payments. The only payment that is relevant is the one that the Claimant received on 20 May 2021, which he alleges was not the full payment in lieu he claims he is entitled to, and therefore it is on "*that occasion*" he received "*less than the total amount of the wages properly payable"* (see s. 13(3) ERA).

98. I do not accept Mr Edwards' submission that the matter could only be determined at a final hearing because there might be different reasons for the Claimant not taking annual leave in different periods. The reason why the Claimant did not take his annual leave is not relevant for the purposes of the time limit for the reasons explained above (see paragraphs [21-24] above). The same rationale applies to the time limit under s.23(2) ERA.

99. For the same reasons, I agree with Mr Williams' submission that s23(4A) ERA does not apply for a payment in lieu on termination. As explained above "*the date of payment of the wages from which the deduction was made*" was on 20 May 2021, which less than two years of the date of presentation of the complaint.

Do ETs have jurisdiction to declare secondary legislation ultra vires?

100. I will now deal with the issue of whether the Deduction from Wages (Limitation) Regulations SI 2014/3322 ("**the 2014 Regulations**"), which inserted S.23(4A) into the ERA, is *ultra vires* and incompatible with EU law. Given my decision on Issues 3 and 5, this question is of little, if any, practical value to the Claimant's claim. I, however, will allow myself to make a few observations on the point in case the matter proceeds further.

101. The parties were in agreement that I must not deal with *ultra vires* point in substance at the OPH, and if the issue remained relevant (which it did not), I should ask the Secretary of State to make submissions first. The authority for that is the Court of Appeal judgment in ***Secretary of State for Business, Energy and Industrial Strategy v Parry*** **[2018] ICR 1807** where at [22] the Court said:

> *"It is a serious step to declare a statutory instrument such as a court or tribunal rule invalid (especially when neither party is arguing that it is) without requiring notice to be given to the Attorney General or the appropriate Secretary of State through the Government Legal Service, so that the relevant department has the opportunity to apply to intervene, or at least to make written submissions, in defence of the validity of the statutory instrument"*.

102. However, the parties invited me to decide as a preliminary point whether an employment tribunal ("**ET**") had the power to declare a statutory instrument, such as the 2014 Regulations, *ultra vires*.

103. Mr Williams argued that tribunals did have such a power despite having only limited statutory jurisdiction. He referred me to two cases concerning the First-tier Tribunal ***Oxfam v HMRC*** **[2009] EWHC 3078 (Ch)** and ***Beadle v HMRC*** **[2020] 1 WLR 3028** (CoA), in support of the proposition that although the First-tier Tribunal ("**FTT**") does not have inherent jurisdiction, nor judicial review jurisdiction, it can still determine public law questions.

104. Mr Williams also referred to examples of the EAT considering public-law arguments, and in particular the case of ***Trustees of the William Jones's Schools Foundation v Parry*** **[2016] ICR 1140**. In that case, Laing J (as she then was), sitting as the sole judge found that Rule 12(1)(b) of the ET Rules of Procedure 2013 (as amended by Reg 8 of the ETs (Constitution and Rules of Procedure) (Amendment) Regulations SI 2014/271) was *ultra vires* the enabling legislation (the Employment Tribunals Act 1996). The decision was overturned on appeal (at [2018] ICR 1807), however there was no suggestion that she did not have the jurisdiction to consider the point.

105. Mr Edwards argued that employment tribunals did not have the jurisdiction to declare secondary legislation *ultra vires* because there is nothing in the Employment Tribunals Act 1996 which suggests that the tribunals' limited

jurisdiction contain such a power, and the parties were not aware of any authority where it was decided that an employment tribunal had that jurisdiction.

106. It appears the issue is far more complex, and if becomes relevant, will require a great deal more of research and analysis by the parties than what was presented by them at the OPH, for it to be properly argued before an ET. For now, I can only offer a preliminary view based on my own analysis of the issue.

107. It is a long-recognised principle that a challenge to the lawfulness of a public law act/decision must proceed by way of judicial review, the so-called "exclusivity principle" (see ***O'Reilly v Mackman*** **[1983] 2 A.C. 237** at [285]).

108. The exclusivity principle is, however, subject to certain exceptions, "*notably [..] where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights*" (see ***Boddington v British Transport Police*** **[1999] 2 A.C. 143** per Lord Steyn at [172E-173B].

109. Accordingly:

> "*65. [...]. The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient."* (see ***Richards v Worcestershire CC [2017]*** **EWCA Civ 1998** per Jackson LJ at [65]).

110. It is well established that statutory tribunals derive their jurisdiction from statute. See, for example, ***Irwell Insurance Co Ltd v Watson*** **[2021] EWCA Civ 67** at [17], and ***Jhuti v Royal Mail Group Ltd*** **[2018] I.C.R. 1077 (EAT)** at [15].

111. It is also apparent from authorities that FTTs and ETs do not have the power of judicial review, and in particular to quash secondary legislation (see ***Dong v National Crime Agency*** **[2014] UKFTT 369 (TC)** per Mosedale J at [10], citing various other authorities on the point).

112. In ***Oxfam*** at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, as fora which do not have a judicial review jurisdiction.

113. However, this does not mean that tribunals cannot consider public law questions insofar as they are relevant in determining private law issues that fall within their statutory jurisdiction (see ***Oxfam*** at [67]-[68]).

114. Therefore, the issue is whether the statute which confers specific jurisdiction on a Tribunal either explicitly or more often implicitly excluded the possibility of hearing public law arguments in connection with that jurisdiction (see ***Birkett (t/a Orchards Residential Home) v Revenue and Customs Commissioners*** **[2017] UKUT 89 (TCC)** at [30])

115. Many cases post-***Oxfam*** have taken a narrow approach to this interpretative exercise. They have repeatedly held that the statute in question excludes the possibility of the Tribunal considering a given public law issue, even if that issue could in a broad sense be said to relate to a private law matter which the Tribunal has statutory jurisdiction to determine. (see: ***Hoey v Revenue and Customs Commissioners*** **[2022] EWCA Civ 656** at [131-132]; ***Trustees of the BT Pension Scheme v Revenue and Customs Commissioners*** **[2015] EWCA Civ 713** at [141-143]; ***Beadle v Revenue and Customs Commissioners*** **[2020] EWCA Civ 562; [2020] 1 W.L.R. 3028** at [55]; ***Metropolitan International Schools Ltd v Revenue and Customs Commissioners*** **[2019] EWCA Civ 156; [2019] 1 W.L.R. 5473** at [20-25]).

116. However, these cases were not concerned with *vires* of subordinate legislation. This distinction was noted in ***Shanklin Conservative and Unionist Club v Revenue and Customs Commissioners*** (at [88]).

117. In ***Foster v Chief Adjudication Officer*** **[1993] AC 754**, the House of Lords held that the Tribunal had jurisdiction to consider the *vires* of the Income Support (General) Regulations 1987:

> *"My conclusion is that the commissioners have undoubted jurisdiction to determine any challenge to the vires of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law." (****Chief Adjudication Officer v Foster*** **[1993] A.C. 754** per Lord Bridge at [766G-H])

118. In ***EN (Serbia) v Secretary of State for the Home Department*** **[2009] EWCA Civ 630; [2010] Q.B. 633** the Court of Appeal held at [84]-[86]:

> "*84. [...] Does it follow that the Tribunal, in the case of EN, erred in law? The conventional view used to be that a subordinate judicial body, and especially an administrative tribunal, did not have jurisdiction to question the validity of delegated legislation. [...].*
> *[...]*
> *86. [...]. It seems to me that both the decision of the House of Lords in Boddington, as well as that in Foster, point powerfully to the conclusion that a Tribunal decision that depends on the lawfulness of ultra vires subordinate legislation is "not in accordance with the law", and is liable to be set aside on appeal or reconsideration. The consequences of an adverse decision of the AIT for the individual may be greater than the consequences of the conviction for a summary criminal offence that was the subject of the appeal in Boddington. The practical difficulties of a finding by a tribunal that a statutory instrument is unlawful are no greater than those of such a finding by an inferior criminal court, such as the magistrates' court in Boddington.*"

119. In ***Dong*** at [27]-[35] Mosedale J said:

"27. The dicta of EN (Serbia) is clearly that a first instance tribunal, such as the FTT, would be wrong in law to apply unlawful secondary legislation. Therefore, I consider that when Parliament enacted s 11 TCEA it must have intended the FTT to act lawfully when making a decision whether or not to grant permission to appeal. Therefore, it therefore must have intended the Tribunal to consider the vires of secondary legislation and refuse to apply any which was unlawful. Indeed, it would be a bizarre position if the FTT were, on the basis of an Order which Parliament had not authorised to be made, to refuse to recognise a right of appeal granted by Parliament by statute.

[...]

31. First instance tribunals would be wrong in law to apply ultra vires secondary legislation. Whether or not the Upper Tribunal has power to actually quash unlawful secondary legislation on an appeal from the FTT is a matter for that tribunal to decide."

[...]

34. [...] While it is entirely true that this tribunal, having no inherent jurisdiction cannot quash legislation, that does not mean, as Burnton LJ explained, that we are bound to apply unlawful secondary legislation. Indeed, applying unlawful secondary legislation would wrong in law. Therefore, neither this Tribunal nor a government official, can apply unlawful secondary legislation when making their decisions.

35. Parliament must have intended the first tier tribunal to have jurisdiction to determine the vires of secondary legislation: to do otherwise would require the Tribunal to apply 'laws' which Parliament has not authorised."

120. The reasoning in ***Dong*** was followed in ***Garrod v Revenue and Customs Commissioners*** **[2015] UKFTT 353 (TC)** by Mosedale J at [68-87] and ***Paul v Revenue and Customs Commissioners*** **[2020] UKFTT 415 (TC)** by Hyde J at [172-176] and in several other Upper Tribunal's decisions.

121. Accordingly, the *vires* of any subordinate legislation may be considered by statutory tribunals insofar as such a consideration is necessary to determine matters over which they have statutory jurisdiction. In contrast to the public law questions at issue in the ***Hoey, Beadle, Metropolitan International, BT Pension Scheme*** cases, such consideration is highly unlikely to be excluded by general words of the statute conferring jurisdiction upon the tribunal. This is because, as was said succinctly in ***Shanklin Conservative and Unionist Club v Revenue and Customs Commissioners*** at [88] (summing up the line of authority from *Foster*), it "*is implied that when considering the lawfulness of a matter, Parliament must have intended the unlawfulness of any subordinate legislation to be taken into account*."

122. In addition to the already quoted ***Parry*** and ***Jhuti***, there are several other cases in which the EAT considered the issue of *ultra vires*. See, for example, ***Pothecary Witham Weld v Bullimore* [2010] I.C.R. 1008, *United States v Nolan* [2015] UKSC 63; [2016] A.C. 463, *Puthenveettil v Alexander* UKEAT/0165/17/DM, *Addison v Denholm Ship Management (UK) Ltd* [1997] I.C.R. 770 (EAT), *Perth and Kinross Council v Donaldson* [2004] I.C.R. 667 (EAT)**.

123. In ***Puthenveettil*** Simler J (as she then was) said at [30]:

> "*30. First, the Employment Tribunal was wrong to hold that the Tribunal has no jurisdiction to dis-apply Regulation 2(2) of the NMWR 1999. It is settled law and beyond argument that the Employment Tribunal does have jurisdiction to dis-apply that Regulation; see for example, Biggs v Somerset County Council [1996] IRLR 203 CA.*"

124. Therefore, my view, the correct position is that ETs have the power, and indeed if the issue is raised, must consider *vires* of the secondary legislation when dealing with a question that falls within its jurisdiction. In fact, if it fails to do so, it appears an ET itself would be acting *ultra vires*, as it would be deciding the case outside the area of jurisdiction granted by Parliament.

125. In ***R v Lord President of the Privy Council Ex p. Page* [1993] A.C. 682** at [700-702] Lord Browne-Wilkinson said (*my emphasis*):

> *"In my judgment the decision in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires*.
> [...]
> *First, as I have sought to explain, the constitutional basis of the courts' power to quash is that the decision of the inferior tribunal is unlawful on the grounds that it is ultra vires. In the ordinary case, the law applicable to a decision made by such a body is the general law of the land. Therefore, a tribunal or inferior court acts ultra vires if it reaches its conclusion on a basis erroneous under the general law*."

126. In short, ETs must apply "good law", not the law which it finds is "bad" by reason of procedural flaws in bringing it on the statute books.

127. However, the ET's jurisdiction to consider *ultra vires* issues within its statutory jurisdiction does not appear to extend to ETs having the power to quash the secondary legislation by declaring it *ultra vires*. ETs powers are limited in that respect. In such a situation, a course of action an ET could adopt is either not to

apply the rule that it considers *ultra vires,* or to stay the proceedings until the matter is determined through the Administrative Court (see ***Dong*** at [25]-[26]).

128. The latter option, of course, means more delay and more costs to the parties, and as such is arguably not in accordance with the overriding objective. After all, ETs are meant to be a "one-stop shop" for workers and employers to resolve their dispute in a cost-effective and timely manner.

129. Furthermore, it might be argued that by refusing to apply a piece of secondary legislation because the ET finds it *ultra vires*, the ET *de-facto* quashes it*,* and therefore, the distinction is without a difference. Nevertheless, on the present state of authorities it seems that the ET would be crossing the boundaries of its limited jurisdiction in taking the actual step of declaring secondary legislation *ultra vires*.

130. This position also appears to be in line with a well-recognised principle that an ET can hold secondary legislation incompatible with EU law and disapply such restrictions in domestic law as it finds incompatible with EU law (see, for example, ***Manson v Ministry of Defence* [2005] EWCA Civ 1678**). However, this does not mean that ETs can then proceed to declare the legislation unlawful. Such step, in my view, would offend the exclusivity principle.

Compatibility with EU law

131. On the issue of s.23(4A) being incompatible with EU Law, I find that the Claimant's case would have run into the same difficulty as explained in paragraphs [93-94] above. In this case it would have required the Tribunal to disapply an enactment, which is prohibited under paragraph 3 of Schedule 1 EU(W)A.

European Law

132. It was accepted by Mr Williams that Issue 6 did not arise if domestic law provided the Claimant with a means of bringing his claim in the Tribunal and the matter was permitted to proceed to a final hearing.

133. Given my decision on Issue 1, there is no need for me to deal with Issue 6.

Lookback period

134. I am grateful to counsels for their detailed submissions and arguments on the issue of whether it is permissible to limit carry over of accrued annual leave and if so, in what circumstances. That was referred at the hearing as a "lookback period".

135. While strictly this was not an issue on the List of Issues, given that both parties presented detailed arguments and considering my decision on Issue 1, I find that it would be appropriate for me to give my decision on this issue, as it might assist the parties with resolving the dispute without the need to return to the Tribunal.

136. In dealing with this issue, I acknowledge that the question of whether the Claimant was prevented from taking his annual leave during the relevant period for reasons beyond his control is disputed by the Respondent. This question will be for a tribunal hearing the claim on its merits to resolve.

137. However, it appears to me that this issue might become a moot point in light of my decision on the "lookback period" issue.

Submissions

138. The parties' respective positions on the issue can be summarised as follows. Mr Williams argued that ***King*** and ***Shimizu*** established the rule that there could be no carry over limit when the worker is prevented from taking annual leave due to "a fault" of his employer, including where the worker's long-terms sickness was caused or contributed by his employer.

139. He argued that: (i) ***King*** "*trumped*" anything in ***Plumb***, which in any event was inconsistent with EU law and wrongly decided (in support of that he pointed out that the ETA in ***Plumb*** had given leave to appeal to the Court of Appeal), (ii) ***Schulte*** did not introduce any default "lookback period" that Member States must have in place, (iii) the UK domestic law did not say that untaken leave cannot be carried over to the next leave year, and (iv) in any event, the Claimant's case was different to the circumstances in ***Schulte*** and ***Plumb*** because the Claimant's inability to take annual leave was in some periods for different reasons than ill-health and because his ill-health was caused by the Respondent.

140. Mr Edwards argued that ***Plumb*** and ***Schulte*** remained good law, and that any claim that the Claimant might have had for accrued but untaken leave had been extinguished by the Respondent's payment for carried over 4 weeks' statutory leave from 2019/20 and from 2020/21 leave years.

141. Mr Edwards submitted that the principle distinction between ***Plumb*** and ***Schulte*** vs. ***King*** and ***Shimizu*** lies in the fact that in the former cases the claimants were not working due to being on long-term sick leave (and it was held that it was permissible to have a national limit on carry-over of unused annual leave), where in the latter cases (and that also the situation in ***Smith***) the worker was working but was prevented by his employer from taking paid annual leave.

142. He argued that because the purpose of annual leave was to provide rest and relaxation from work, employers who prevent their workers who are working from

taking paid time off work to rest and relax "*must bear the consequences*" (see ***King*** at [63]). However, when the worker is on a long-term sick leave, the purpose of taking time off work for rest and relaxation is not present, and therefore it cannot be said that the worker was prevented by his employer from taking time off work for rest and relaxation. Accordingly, a limit on carry-over accrued holiday is permissible.

143. Mr Edwards further argued that the Claimant's "employer's fault" approach was wrong as this would essentially require employment tribunals to deal with personal injury claims, for which they lack jurisdiction.

144. Finally, he reminded that the issue must be looked at by reference to the Claimant's pleaded claim as to why he was unable to take annual leave (p.14 of the hearing bundle).

Conclusion

145. In my judgment, the issue must be approached in the following way. The starting point should be the primary legislation, namely Reg 13(9) WTR which states:

> *"(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–*
> *(a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and*
> *(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.*"

146. Paragraphs [10] and [11] are not relevant for the present purposes, as the Claimant has been paid for his carried-over leave from 2019/20 and 2020/21 leave years.

147. In ***Plumb***, the EAT held at [45]:

> *"45. In my judgment, it is clear that in cases where a worker is absent from work on sick leave, the provisions of article 7 of Directive 2003/88 requiring member states to take the measures necessary to ensure that a worker is entitled to four weeks' annual leave are satisfied if, as a minimum, annual leave can be taken within 18 months of the end of the leave year in which it accrued. Indeed, as appears from KHS AG v Schulte itself, it is possible that a shorter period (there 15 months after the end of the leave year) may be justified. In interpreting regulation 13(9) of the 1998 Regulations, therefore, it is not necessary for a national court to go further than ensuring that the exception that has to be read into that regulation permits annual leave to be taken in sickness cases for a period of 18 months after the end of the year in which the annual leave accrues. The required result can be achieved by a modest alteration to the words that the Court of Appeal considered needed to be read into regulation 13(9) so that it reads (with the exception read in by the Court of Appeal in italics and the additional words reflecting the extent*

of the exception underlined):

> "(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but— (a) it may only be taken in the leave year in respect of which it is due, *save* that it may be taken within 18 months of the end of that year *where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave*."

148. Therefore, the "*default*" position is that where a worker was unable or unwilling to take annual leave because he was on sick leave and as a consequence did not exercise his right to annual leave, the carry over period should be extended by 18 months following the end of the leave year in which the worker was unable or unwilling to take his annual leave. It appears that is what the Respondent has done in this case.

149. I do not accept Mr Williams' argument that the 18-months limit must be dis-applied when the sick leave was caused or contributed by the employer. I do not read ***King***, ***Smith*** or ***Shimizu*** as containing any such proposition. The first two cases deal with a situation when the workers were working but their employers did not provide them with their statutory entitlement to paid annual leave by wrongly mischaracterising their employment status. In ***Shimizu***, the issue was whether national laws could provide for a worker losing his carry over/pay in lieu entitlement when he did not ask to take annual leave during the relevant reference period.

150. The courts' judgments in those cases must be read in that context. None of them say that ***Schulte*** or ***Plumb*** are no longer good law, nor do they suggest that the permissibility of a carry-over limit depends on the underlying cause of the worker's illness.

151. Furthermore, in ***Shimizu***, the ECJ specifically acknowledged (at [48]) that:

> "*any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable authorised reference or carry-over periods in order to increase his remuneration upon the termination of the employment relationship is, as is apparent from paragraph 42 of the present judgment, incompatible with the objectives pursued by the introduction of the right to paid annual leave*".

152. At [54] the ECJ said: (*my emphasis*)

> "*In that context, it should, finally, be recalled that limitations may be imposed on the fundamental right to annual paid leave affirmed in Article 31(2) of the Charter only in compliance with the strict conditions laid down in Article 52(1) thereof and, in particular, the essential content of that right. Thus, Member States may not derogate from the principle flowing from Article 7 of Directive*

> *2003/88 read in the light of Article 31(2) of the Charter, that the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave (see, to that effect, judgment of 29 November 2017, King, C-214/16, EU:C:2017:914, paragraph 56).*"

153. In ***King*** the ECJ (at [63]) specifically distinguished: "*a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer who does not allow a worker to exercise his right to paid annual leave must bear the consequences*", in relation to the former situation citing the decision in ***Schulte*** (see [53] – [56]), in particular (at [55]) (*my emphasis*):

> "*Thus, in the specific circumstances in which a worker is unfit for work for several consecutive holiday years, the court has held that, having regard not only to the protection of workers as pursued by Directive 2003/88, but also the protection of employers faced with the risk that a worker will accumulate periods of absence of too great a length and the difficulties in the organisation of work which such periods might entail, article 7 of that Directive must be interpreted as not precluding national provisions or practices limiting, by a carry-over period of 15 months at the end of which the right to paid annual leave is lost, the accumulation of entitlements to such leave by a worker who has been unfit for work for several consecutive holiday years: KHS AG v Schulte, paras 38, 39 and 44*".

154. In answering the referred question at [65] the ECJ said (*my emphasis*):

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

155. This answer does not say or suggest that Article 7 must be interpreted as precluding national provisions or practices limiting the accumulation of annual leave entitlement by limiting carry-over periods in the circumstances where the worker was unable or unwilling to take annual leave due to being on long-term sick leave or other circumstances beyond his control but where the employer did not refuse to provide the worker with paid annual leave if he had asked for it.

156. The Claimant's case is that he was unable to take annual leave between 8 October 2018 and 21 April 2021 because:

> *"(a) The restrictive terms of his curfew (following his period remanded in custody) up to it being ended on I November 2019. The Claimant will contend that such a deprivation of liberty is incompatible with the ability to take annual leave;*

(b) His ill health from April 2015 until the termination of his employment, which was substantially caused or contributed to by the Respondent's treatment of him. The Claimant will contend that if he had not been suspended from work he would have been off work on long-term sick leave;

(c) The additional and all-consuming demands on his time from the deeply stressful litigation he was experiencing as a result of the criminal proceedings against him until the charges against him were dismissed on or around 8 March 2021; and

(d) For the period from 26 March 2020, it was not reasonably practicable for him to take annual leave as a result of the effects of coronavirus (within the meaning of regulation 13(10) WTR)."

157. Ground (d) is of no relevance because he has been allowed to carry over his 2019/20 and 2020/21 leave and was paid for it.

158. None of the cited reasons suggest that the Respondent refused to recognise the Claimant's entitlement to paid annual leave or otherwise prevented him from taking it.

159. As stated above (see paragraph [149]) I reject Mr Williams' submission that the Respondent's alleged "*fault*" in causing or contributing to the Claimant's illness could be said to be tantamount to the Respondent preventing, not permitting or not "*exercise[ing] all due diligence in order to enable the [Claimant] actually to take the paid annual leave to which he is entitled*" (see ***Shimizu*** at [46]).

160. First, there is nothing in the cases cited to me by the parties from which such conclusion could be safely drawn. Secondly, if that proposition were to be accepted, the Tribunal would have to deal with a quasi-personal injury/negligence claim, by deciding what caused the claimant's ill-health. There are obvious jurisdictional and evidential difficulties with that, especially in the case like the present, when the alleged injury was caused many years ago. Thirdly, it is difficult to see how that position could be reconciled with the essential function of paid annual leave, that is to provide rest and relaxation from work. Finally, imposing such liability on the employer would be akin to making it liable through the backdoor for a consequential loss (accrued annual leave) caused or contributed by the employer's "*fault*".

161. Mr Williams, although citing other reasons for the Claimant's inability to take annual leave as distinguishing his case from ***Plumb*** and ***Schulte***, did not argue that such other reasons beyond the Claimant's control (notably (a) and (c)) justify no or a longer "*lookback period*" than if the only reason was the Claimant's ill-health.

162. Finally, it is to be noted that the Claimant was suspended until his termination on full pay. In ***King*** at [52] the ECJ said (*my emphasis*):

> "*Moreover, it is clear from the court's case law that a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu under article 7(2) of Directive 2003/88. The amount of that payment must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship: Stringer, para 61*."

163. In the Claimant's circumstances, awarding compensation for the full "*lookback period*" going back to 8 October 2014 would mean putting him in a position far better than he would have been in had he exercised his right to take annual leave in those reference periods.

164. For these reasons, I find that the Claimant is unlikely to be assisted by ***King***, ***Shimizu*** and ***Smith*** in so far as he seeks a payment in lieu under Reg 14 WTR with respect to a "lookback period" longer than 18 months of the date of his termination.

165. It follows, that while I am not determining the Claimant's claim for holiday pay on the merits, it appears to me that if it is not disputed that the Respondent has made a payment in lieu based of the 18-months' "lookback period", that payment would have had effect of satisfying any holiday pay claim the Claimant might have in law.

Further Directions

166. Unless withdrawn by the Claimant, the Claimant's claim shall proceed to be determined at a final hearing before an Employment Judge, sitting alone, on a date to be listed by the Tribunal.

167. Within 14 days of the date this Judgment is sent to the parties, the parties must write to the Tribunal giving their dates to avoid from November 2022 to May 2023 and suggesting further directions.

Employment Judge Klimov

27 August 2022

Sent to the parties on:30/08/2022

For the Tribunals Office

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Appendix

Agreed List of Issues

JURISDICTION

Working Time Regulations 1998 ("WTR")

1. When did time start to run for the purposed of a claim under Reg.30 WTR in respect of holiday pay alleged to be due for the period between 8 October 2014 and 31 March 2019? Was it from:
   a) each time the Claimant did not receive the holiday or holiday pay he is now claiming (as is maintained by the Respondent) i.e., at the latest 31 March 2019 (there being no 'series of deduction' provisions in Reg 30); or

   b) the termination of the Claimant's service as a police officer 20 April 2021 (the Respondent's alternative position); or

   c) from 21 June 2021 or (alternatively) 7 May 2021 as maintained by the Claimant?
2. If time started to run from the times mentioned in (a) or (b) above, is the claim in respect of holiday between 8 October 2014 and 31 March 2019 out of time given that the date of receipt by Acas of the early conciliation notification was 29 July 2021 and the claim was presented on 28 September 2021?

Employment Rights Act 1996 (ERA)

3. Does the Tribunal have jurisdiction to hear the Claimant's unlawful deductions claim under the ERA when the Claimant is a former police officer and not a worker as defined under s.230 Employment Rights Act 1996? If so,
4. Is the Claimant's claim of unlawful deduction of wages in respect of holiday pay alleged to be due for the period between 8 October 2014 and 31 March 2019 out of time as:
   a) the gaps of more than three months' duration between deductions renders the claim in respect of in respect of holiday pay alleged to be due for the period between 8 October 2014 and 31 March out of time in accordance with *Bear Scotland v Fulton [2015] ICR 221*; and/or
   b) the claim was brought more than three months after the date of termination?
5. In any event, does the claim for unlawful deduction of wages fall within s23(4A) ERA such that the Tribunal does not have jurisdiction to consider it as the alleged deductions for the period between 8 October 2014 and 31 March 2019 fell more than two years before the date of the presentation of the claim on 28 September 2021?

European law

6. If the Tribunal has no jurisdiction to consider the Claimant's claims under the WTR and/or the ERA, does the Claimant have a free-standing right to claim for breach of the Working Time Directive 2003/88/EC and if so, are any claims he is entitled to bring under the Directive out of time?