HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 31

on appeal from:[2005] EWCA Civ 441

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Her Majesty's Revenue and Customs (Respondents) *v* Stringer and others (Appellants)

Appellate Committee

Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

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Respondents:
John Cavanagh QC
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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury. I agree with them, and for the reasons they give I would allow the appeals, set aside the order of the Court of Appeal and restore the order of the Employment Appeal Tribunal.

LORD RODGER OF EARLSFERRY

My Lords,

2. The appellant, Mr Keith Ainsworth, complains that his former employers, Her Majesty's Revenue and Customs ("the Revenue"), wrongly made a deduction from his wages. Workers have been making complaints of this kind for centuries. More surprisingly, perhaps, for centuries also, the legislature used the Truck Acts to try to prevent employers from making arbitrary deductions - for example, for errors or misconduct - which would deprive the workers of the substance of their earnings. The case law on the subject was not always consistent and eventually Parliament passed the Truck Act 1896 which prescribed what deductions were permissible and in what circumstances. The long history of the legislation is conveniently set out in the speech of Lord Ackner in *Bristow v City Petroleum* [1987] 1 WLR 529, 532-535.

3. *Bristow* was the last case to be heard by this House under the Truck Acts for, by the second half of the twentieth century, it was widely recognised that the legislation needed to be updated. The existing Acts were therefore repealed and replaced by Part I of the Wages Act 1986. In 1996 Part I was re-enacted as Part II of the Employment Rights Act 1996 ("the 1996 Act"). The 1996 Act was a consolidation Act, which was passed on 22 May 1996 and came into force three months later.

4. Although the current legislation is modern, Parliament remains concerned to regulate the deductions which employers are entitled to make from an employee's wages. Section 13(1) of the 1996 Act accordingly provides:

> "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."

Subsection (3) then goes on to explain what can count as a deduction from wages:

> "(3) Where the total amount of wages paid on any occasion 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 on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

By subsection (4), subsection (3) does not apply to a deficiency which is simply due to an error in computing the gross amount of the wages properly payable. Subject to subsection (4), any failure by an employer to pay any amount of wages properly payable to an employee amounts to a deduction from his wages for the purposes of section 13(1):

Delaney v Staples [1991] IRLR 112, 113-115, paras 1-15, per Nicholls LJ.

5. If a worker considers that his employer has made a deduction from his wages in contravention of section 13, he is entitled to complain to an employment tribunal: section 23(1)(a). Section 23(2) contains a time-limit of three months for presenting such a complaint. But subsection (4) allows the tribunal to consider a complaint presented within a reasonable time after that period if it is satisfied that it had not been reasonably practicable for the complaint to be presented within the three-month period. In addition, section 23(3) allows a complaint in respect of a series of alleged deductions to be made within three months of the last deduction in the series.

6. For reasons which will be fully explained in the speech of my noble and learned friend, Lord Walker of Gestingthorpe, Mr Ainsworth complains that the total amount of wages paid by the Revenue to him in November 2002 was less than the total amount of the wages properly payable to him at that time. He argues that, because he was paid less than he was due, the Revenue was in breach of section 13(1). He therefore made an application to his local employment tribunal on 9 January 2003, one stated basis for his complaint being "unlawful deduction from wages". That was an application in terms of section 23(1)(a) and it was brought within the three-month period allowed by section 23(2). Mr Ainsworth also specified another basis for his application. I must come back to that.

7. Section 13(1) of the 1996 Act applies only to deductions from "wages". The contention for the Revenue is that the sum in question – which concerns holiday pay – does not count as "wages". More particularly, they argue that it does not fall within the definition of "wages" in section 27(1) and (2) of the 1996 Act:

> "(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
> (b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,
(ca) statutory paternity pay under Part 12ZA of that Act,
(cb) statutory adoption pay under Part 12ZB of that Act,
(d) a guarantee payment (under section 28 of this Act),
(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),
(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,
(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,
(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and
(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),
(b) any payment in respect of expenses incurred by the worker in carrying out his employment,
(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,
(d) any payment referable to the worker's redundancy, and
(e) any payment to the worker otherwise than in his capacity as a worker."

8. If the Revenue's contention is correct, Mr Ainsworth has no remedy under the 1996 Act. That does not mean, of course, that he or any worker in a similar position is without a remedy. It just means that his remedy must be found elsewhere, viz under the Working Time Regulations 1998 ("the 1998 Regulations") which confer the statutory right to holiday pay that Mr Ainsworth is claiming.

9. The origin of the 1998 Regulations lies in Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time. The directive, the policy of which was opposed by the British Government, was adopted under article 118a of the Treaty establishing the European Community. That article provided that Member States are to pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers. Measures under it could be adopted by Qualified Majority Voting under article 189c. The then Government considered that the directive did not fall within the scope of article 118a. It should have been adopted, the Government contended, on the basis of article 100 or article 235 - both of which required a unanimous vote of the Council. The challenge to the validity of the directive on this, and certain other, grounds, failed, except in one minor respect. The European Court of Justice gave judgment upholding the directive on 12 November 1996: *United Kingdom v Council of the European Union* (Case C-84/94) [1997] ICR 443. The time for transposing the directive into national law expired ten days later, on 23 November 1996. In fact, the 1998 Regulations, which effected the transposition, did not come into force until 1 October 1998. The 1993 directive was replaced by Council Directive 2003/88/EC of 4 November 2003, concerning certain aspects of the organisation of working time, but that change has no practical importance for the present dispute.

10. Article 7 of the 1993 Directive, which is identical to article 7 of the 2003 Directive, provided:

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

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

11. Article 7(1) was transposed into the law of Great Britain in regulations 13 and 16 of the 1998 Regulations, while article 7(2) was transposed in regulations 13(9)(b) and 14. Article 7(1) is designed to ensure that every worker is entitled to at least four weeks' annual leave (regulation 13) and that he is paid while he is on leave (regulation 14). Article 7(2) first makes it plain that, ordinarily, an employer cannot avoid the obligation to give his workers paid annual leave by paying them an allowance in lieu of leave (regulation 13(9)(b)). This reflects the underlying philosophy of the directive, that it is necessary for the health and safety of workers that they should have a minimum entitlement to leave and that they should be paid so that they are in a position to take it. See, for instance, *Robinson-Steele v RD Retail Services Ltd* (Cases C-131 and 257/04) [2006] ICR 932, 958, paras 48-50, and p 959, para 58.

12. Article 7(2) makes an exception, however, and permits, indeed requires, an allowance in lieu of annual leave to be paid where the worker's employment comes to an end at a stage when he has not taken his leave, or part of his leave, for that year. Since the worker is no longer employed, he cannot, of course, take the annual leave in question, but article 7(2) gives him a right to an allowance in lieu of the leave. The directive left it to Member States to give effect to that right in a way that fitted the scheme of their employment legislation. But the Court of Justice spelled out the basic requirements of article 7(2) in its decision on the reference in these proceedings: *Schultz-Hoff v Deutsche Rentenversicherung Bund; Stringer v Her Majesty's Revenue and Customs* (Cases C-350/06 and C-520-06), paras 60 and 61:

> "60 According to the case-law of the Court, Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work (see *Robinson-Steele and Others*, paragraph 58).
>
> 61 It follows that, with regard to 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, the allowance in lieu to which he is entitled 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. It follows that the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship."

13. The aspect of article 7(2) which gives a worker an entitlement to an allowance in lieu of leave at the end of his employment was transposed into British law as regulation 14 of the 1998 Regulations:

"(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

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

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

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—A is the period of leave to which the worker is entitled under regulation 13(1);
B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise."

The formula in regulation 14(3) is straightforward: in effect, the worker receives a proportion of the total amount of pay relating to his annual leave that corresponds to the proportion of the leave year for which the worker has been employed at the time his employment comes to an end. So, if he has worked for three months without taking leave, he gets a quarter of the total pay relating to his annual leave; if he has worked for six months, he gets half etc. Where the worker has already taken some leave, the payment in lieu is reduced accordingly. No criticism is made of the transposition.

14. If a worker considers that his employer has failed to pay him any sum due under regulation 14(2), he can make an application to an employment tribunal under regulation 30(1)(b) of the Regulations:

"A worker may present a complaint to an employment tribunal that his employer –

…

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1)."

15. Regulation 30(2) provides, however, that an employment tribunal is not to consider such a complaint unless it is presented within three months beginning with the date on which it is alleged that the exercise of the right should have been permitted, or 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 the period of three months. These limits correspond to the limits in section 23(2) of the 1996 Act. But regulation 30 does not contain an equivalent of section 23(3), extending the time-limit where there has been a series of deductions.

16. Mr Ainsworth was employed by the Revenue from 1976 until 4 November 2002 when his employment was terminated. From December 2000 he was absent from work due to sickness. His leave year ran from 1 November until 31 October and so, when his employment ended, he was just four days into his 2002-2003 leave year. He had not taken any leave during those four days. Mr Ainsworth therefore contended that, when his employment was terminated, under regulation 14(2) he was entitled to a payment in lieu of leave calculated by reference to those four days, in accordance with regulation 14(3).

17. The Revenue declined to pay Mr Ainsworth any sum under regulation 14 because he had been off sick during the four days of the leave year. Therefore, in his application to the employment tribunal he included a complaint of a breach of the "Working Time Regulations". (He also complained of matters relating to earlier periods of employment, but those complaints are no longer live and are not relevant for present purposes.)

18. The employment tribunal found in favour of Mr Ainsworth. The relevant part of their decision was that the Revenue "made an unauthorised deduction from the wages of the applicant by failing to make a payment representing holiday accrued and untaken upon the termination of his employment and the respondents are directed to pay the applicant the sum of £16.14." This was plainly a decision upholding Mr Ainsworth's complaint, under section 23 of the 1996 Act, of an unauthorised deduction from his wages, contrary to section 13(1).

19. The Revenue now accept that, in the light of the ruling of the European Court of Justice, they were obliged by regulation 14(2) of the 1998 Regulations to pay Mr Ainsworth the sum in question. So, as they accept, he would have been entitled to succeed in his complaint brought under regulation 30 of the 1998 Regulations.

20. The Revenue contend, however, that Mr Ainsworth was not entitled to make a complaint to the employment tribunal under section 23 of the 1996 Act and so the tribunal had no jurisdiction to make the order that they did. The Revenue argue that a payment under regulation 14 does not fall within the definition of "wages" in section 27 of the 1996 Act and so, even if an employer fails to pay such a sum, he does not make a deduction from "wages", contrary to section 13(1) of the Act. So Mr Ainsworth's only remedy was under regulation 30 of the 1998 Regulations. The Court of Appeal not only held that Mr

Ainsworth was not entitled to any payment under regulation 14, but also upheld the contention for the Revenue that his only remedy for an alleged breach of regulation 14 was a complaint under regulation 30: [2005] ICR 1149, 1158-1159, paras 21-24. Mr Ainsworth appeals to this House.

21. As already explained, the Revenue accept that Mr Ainsworth's appeal on his entitlement to a payment under regulation 14 must be allowed. And, actually, he himself gained nothing by presenting his complaint relating to the period from 1 to 4 November 2002 under section 23 of the 1996 Act as well as under regulation 30 of the 1998 Regulations. Not only was Mr Ainsworth's application in respect of that complaint lodged in time, but, in addition, it relates to a single deduction, rather than to a series of deductions – so he had no occasion to invoke any extended time-limit under section 23(3) for presenting his application. But the appellant's counsel, Mr Jeans QC, told the House that the decision of the Court of Appeal - that no complaint about a deduction of holiday pay due under the 1998 Regulations could be brought under section 23 of the 1996 Act - had led to successive applications being made to employment tribunals to avoid the time-limit in regulation 30, in relation to a series of deductions of payments allegedly due under regulation 16. The applicants were incurring unnecessary expense and the tribunal system was being cluttered up with unnecessary applications. But for the Court of Appeal's decision, the applicants in question could have relied on the extended time-limit in section 23(3) and made one application within three months of the last deduction in the series. On that narrative I accept that the point is one of practical importance which the House should decide.

22. Since the time-limit was said to give rise to the practical issue behind this aspect of the appeal, counsel tended to come back to that aspect in their submissions. Naturally, Mr Jeans emphasised the inconvenience of the successive applications. For his part, Mr Cavanagh QC suggested that Parliament might have chosen not to include any sums due under regulation 14 or 16 in the definition of "wages" in section 27 of the 1996 Act in order to make sure that all complaints relating to holiday pay were brought promptly. I consider that it would be unwise, however, to concentrate on the time-limits. The real issue is much broader: whether a failure to pay sums due under regulations 14 and 16 of the 1998 Regulations is properly regarded as the kind of impermissible deduction from wages that Parliament wanted to prevent by enacting section 13 of the 1996 Act. If it is, then employees have the benefit of the system provided by the 1996 Act, which includes the extended time-limit in section 23(3). But if a failure

to pay the sums is not properly regarded as this kind of impermissible deduction from wages, then employees have to content themselves with the provisions of the 1998 Regulations - including the shorter time-limit in regulation 30(2). The time-limits do not dictate the interpretation of the definition of "wages" in section 27; rather, the correct interpretation of "wages" determines which statutory régimes apply and, hence, which time-limits apply. So the case turns on the interpretation and application of section 27.

23. Before turning to that section, a minor point which surfaced in the judgment of the Court of Appeal can be disposed of quickly. Section 205(2) of the 1996 Act provides that the remedy of a worker in respect of a contravention of section 13 is by way of a complaint under section 23 "and not otherwise". In something of a throwaway line, Maurice Kay LJ suggested, [2005] ICR 1149, 1159, para 24, that, if the failure to pay the sum due under regulation 14 could indeed be treated as a violation of section 13 of the 1996 Act, then the effect of section 205(2) would be that the only remedy for that failure would be under section 23. In other words, thus interpreted, the provision would prevent the worker from raising proceedings under regulation 30 of the 1998 Regulations. For the Revenue, Mr Cavanagh rightly accepted that the argument was fallacious. Section 205(2) simply prescribes that a complaint of a violation of section 13(1) must be made to an employment tribunal under section 23 – and not, for example, by proceedings in the ordinary civil courts. But if the aggrieved employee wishes to present his complaint simply as a failure by his employer to pay a sum due under regulation 14, nothing in section 205(2) prevents him from making that complaint under regulation 30. Section 205(2) is accordingly irrelevant for present purposes.

24. Section 27 came before this House in *Delaney v Staples* [1992] 1 AC 687 where it was held that payments in lieu of notice, being payments relating to the termination of employment rather than to the provision of services by the employee, were not "wages" within the meaning of what is now section 27. Lord Browne-Wilkinson, who gave the only substantive speech, said, at p 692A-C, that it was important to approach the definition of "wages" in the section:

> "bearing in mind the normal meaning of that word. I agree with the Court of Appeal that the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the

> employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word 'wages'. It follows that if an employer terminates the employment (whether lawfully or not) any payment of wages in respect of the period after the date of such termination is not a payment of wages (in the ordinary meaning of that word) since the employee is not under obligation to render services during that period."

Applying that approach, it seems to me that payment in respect of annual leave, as envisaged by regulation 16, is plainly part of the consideration which the employee receives in return for the work done, or to be done, under his contract of employment. So, leaving aside the express inclusions and exclusions, payment in respect of statutory annual leave falls to be regarded as coming within the normal meaning of the word "wages" in section 27.

25. The payment which is due under regulation 14 is, at first sight at least, slightly different. The payment is described as a "payment in lieu of leave" and therefore has something of the flavour of compensation for leave not taken – the compensation taking the form of a liquidated sum calculated according to the formula in regulation 14(3). But, as the passage from the judgment of the European Court in these proceedings, quoted at para 12 above, suggests, the purpose of the payment is, in effect, to make sure that the worker whose employment is terminated and who cannot take the period of leave in question, at least receives the pay which he is due in respect of that leave. True enough, the right to the payment accrues only when the worker's employment has been terminated and, in *Delaney v Staples* [1992] 1 AC 687, 697E-F, Lord Browne-Wilkinson said that the basic concept of wages excludes "all payments in respect of the termination of the contract save to the extent that such latter payments are expressly included in the definition in section 7(1) [of the Wages Act 1986]". But he was there contrasting payments in respect of termination of the employment (such as payments in lieu of notice) with "payments in respect of the rendering of services during the employment". As the method of calculation adopted in regulation 14(3) makes plain, the payment in lieu of leave is one which the worker has earned by working for the relevant proportion of the leave year. So, even though he receives it only when his employment has been terminated, just like any other final payment of wages, it is part of the consideration for the services which he has previously performed under his contract of employment. The payment

therefore falls within the normal meaning of the word "wages" and the interpretation of section 27 must be approached on that basis.

26. Although counsel concentrated on section 27(1), the definition of "wages" extends over subsections (1) and (2) – with further clarification being given in subsection (3). Presumably to avoid subsection (1) becoming overloaded, the draftsman has split the definition into two subsections. But both the express inclusions in subsection (1) and the express exclusions in subsection (2) have to be considered. Given that the definition contains both, in *Delaney v Staples* [1992] 1 AC 687, 695B, Lord Browne-Wilkinson held that "there is no room for an argument that by expressly excluding certain items the draftsman was indicating that such items would otherwise be payments 'in connection with' the employment." Reversing the point, given the specific exclusions as well as inclusions, I am not disposed to attach any considerable weight to the Revenue's argument that the inclusion of payments under certain specific statutory provisions implies that payments under the 1998 Regulations, which are not listed, are excluded from the scope of "wages". If they were intended to be excluded, why were they not added to subsection (2) by an appropriate amendment? With this caveat, I turn to look more closely at subsection (1).

27. Counsel for Mr Ainsworth argued that sections 88 and 89 contained examples of payments under a statutory provision which would fall within the scope of the term "wages" in section 27, even though they were not expressly included in subsection (1). But the payments under those sections are payments which an employee is entitled to receive during the period of notice of termination of his employment, provided only that he is ready and willing to work (section 88(1)(a) and section 89(2)) or is unable to work for some legitimate reason (section 88(1)(b)-(c) and section 89(3)). In other words, they are not actually payments in consideration of services which the employee performs under his contract of employment. Following the reasoning of the House in *Delaney v Staples* [1992] 1 AC 687, 697E-F, they may therefore more properly fall to be regarded as payments in connection with the termination of employment and so as not amounting to "wages". It is unnecessary to decide the point; it is enough to say that the draftsman of section 27(1) may have taken that view. It would accordingly be rash to affirm positively either that payments under section 88 and 89 are impliedly included in an employee's wages for the purpose of section 27 or that the omission of any reference to these sections must have been due to an oversight on the part of the draftsman. Indeed since, as I go on to explain, the draftsman of the 1996 Act was

alive to the need to make appropriate cross-references, an oversight on his part is not, perhaps, a plausible explanation.

28. The House is, of course, concerned with a possible failure to amend section 27(1) when the 1998 Regulations were drafted. If Homer nodded, doubtless Solon did too. So there is always the possibility of a simple error. And, in fact, there happens to be positive evidence of a slip by Parliamentary counsel in updating the predecessor of section 27(1), section 7(1) of the Wages Act 1986. The 1996 Act began life as a consolidation Bill in the 1994-1995 Session. At that stage it was considered by the Joint Select Committee on Consolidation Bills under the chairmanship of Lord Lloyd of Berwick. The draftsman of the consolidation Bill explained to the committee that, when para 10 of Schedule 5 to the Trade Union Reform and Employment Rights Act 1993 added a new section 78 to the Employment Protection (Consolidation) Act 1978, a reference to that section should have been, but was not, included in section 7(1) of the 1986 Act. Clause 27(1)(h) of the consolidation Bill had been drafted to correct that oversight by including a reference to section 130, which was to re-enact section 78 of the 1978 Act. The committee accepted this explanation and section 27(1)(h) was accordingly enacted in that form. See the minutes of evidence attached to the Fourth Report of the Joint Select Committee, dated 7 June 1995. If such a mistake was made by Parliamentary counsel in the past, it is at least possible that the officials in the Department of Trade and Industry who were responsible for the 1998 Regulations failed to consider whether section 27(1) should be amended to include a reference to the regulations on payments in respect of annual leave.

29. In the end, however, the dispute on interpretation must be resolved by reference to the words of section 27(1) as enacted. I have already indicated my view that a payment under regulation 14 falls within the normal meaning of "wages". More particularly, it is a sum payable to a worker in connection with his employment. So it comes squarely within the opening words of section 27(1). And, as Mr Jeans observed, there is nothing to take it out of the scope of those words. If one continues into paragraph (a), even if the right to the payment under regulation 14 was created as part of a scheme for improving the health and safety of employees, the payment itself must surely be classified as "holiday pay". Regulation 17 treats annual leave under the 1998 Regulations as being equivalent to annual leave under a contract of employment. This must include the entitlement under regulation 16 to pay during the period of leave. Indeed I understood Mr Cavanagh eventually to acknowledge that it was not possible to draw any plausible

distinction between "holiday pay" under a contract and the kind of payment envisaged by regulation 14. In any event, the payment under regulation 14 would count as an "emolument".

30. Mr Cavanagh conceded that, if the concluding words of para (a) had been "whether payable under his contract or *under statute*", then the regulation 14 payment would have been covered, even though the Regulations had been passed after the 1996 Act. So the eventual issue was whether the words "whether payable under his contract or otherwise" were capable of referring to a payment under a regulation passed after the 1996 Act.

31. In my view, the words "or otherwise" are broad and are apt to cover holiday pay which is payable, whatever the source of the employer's legal obligation to make the payment. Plainly, the reference to holiday pay that is payable under the employee's contract is not confined to pay that was payable under contracts which existed at the time when the 1996 Act was passed. I can therefore see no reason why the immediately following words "or otherwise" should be confined to other sources of obligation, whether statutes or statutory instruments (or indeed something else entirely), which existed when the Act was passed. In my view, the words are ambulatory and so are apt to cover holiday pay that is payable under regulation 14 of the 1998 Regulations. I accordingly conclude that a failure to pay a sum due under regulation 14 is the kind of impermissible deduction from wages that Parliament wanted to prevent by enacting section 13 of the 1996 Act.

32. In these circumstances I do not find it necessary to have regard to the principle of equivalence, but I respectfully agree with what Lord Walker and my noble and learned friend, Lord Neuberger, say about it.

33. For these reasons, as well as for those to be given by Lord Walker and Lord Neuberger, with which I agree, I would allow the appeals and make the orders proposed by Lord Walker.

LORD WALKER OF GESTINGTHORPE

My Lords,

The reference to the Court of Justice

34. The Working Time Regulations 1998 SI 1998/1833 ("WTR") were made under the European Communities Act 1972 in order to transpose into national law the provisions of the Working Time Directive 1993/104/EC. As appears from its recitals, the Directive was intended to promote health and safety at work by restricting the working day and the working week and requiring workers to be given rest periods and paid holidays (described in the English-language version as annual leave).

35. All the appellants formerly worked for the respondent Commissioners of Inland Revenue (now HM Revenue & Customs) but most had retired, or been required to retire, after long absences because of illness. The main issue in these appeals was the effect of the annual leave provisions, as transposed by paras 13-16 of the WTR, in relation to employees like the appellants who had been on long-term sick leave. Since the appeals raised an important issue of Community law the House decided, when the appeals came on for hearing on 30 October 2006, to make a reference to the Court of Justice under Article 234 of the Treaty.

36. The Grand Chamber of the Court of Justice considered the reference together with another reference, raising the same issues, from Germany. On 30 January 2009 the Court gave judgment in both cases (Case C-350/06 *Schultz-Hoff v Deutsche Rentenversicherung Bund*, Case C-520/06 *Stringer v HM Revenue and Customs*) in terms favourable to the former employees. The Court of Justice's interpretation differed from that adopted by the Court of Appeal (*IRC v Ainsworth* [2005] ICR 1149), which had itself differed from the Employment Appeal Tribunal. Counsel agree that on the main issue the appropriate course for your Lordships is simply to allow the appeals and restore the orders of the Employment Appeal Tribunal.

The jurisdiction issue

37. Mr Ainsworth (who was an Inspector of Taxes based at Chester but became ill at the end of 2000) and some of the other appellants made their applications to the employment tribunal not only under the WTR but also under sections 13 (Right not to suffer unauthorised deductions) and 23 (Complaints to employment tribunals) of the Employment Rights Act 1996 ("ERA"). That gives rise to the only remaining issue before the House: whether a claim under the ERA was available to these appellants. That issue might be described as technical and in some cases (where an aggrieved employee applies to the employment tribunal promptly) it is of no more than academic interest. But it becomes a matter of practical importance if the normal three-month time limit for an application to the employment tribunal has expired since the complaint arose, and other grounds for extending the time limit are not available. That is because section 23 of the ERA permits (but regulation 30 (Remedies) of the WTR, the corresponding procedural provision, does not permit) an aggrieved employee to make a claim in respect of the whole of a "series" of deductions of which he complains if he acts within three months of the latest deduction in the series. (There is some case law about the meaning of "series", which has been fairly generously interpreted, but it is unnecessary to consider that point in these appeals.)

38. The time limit point is of practical importance not only to employers and workers but also to those engaged in administering employment tribunals. Sometimes a point of principle about entitlement to holiday pay affects a large class of employees and arises every time any of them takes a few days' holiday. The sums involved may be relatively small on each occasion but if employees feel that they are not getting their full entitlement, and conciliation fails, they will wish to take the matter to an employment tribunal. This has been strikingly illustrated by the large number of small claims made by pilots employed by BA and other airlines in disputes over whether holiday pay should be calculated on basic pay alone, or should take account of flying time supplements and TAFB (time away from base) allowances: see *British Airways plc v Williams* [2008] EWCA Civ 281, 19 March 2009.

39. For that reason the President of the Employment Appeal Tribunal readily gave the Revenue permission to appeal to the Court of Appeal on this issue as well as on the main issue which was referred to the Court of Justice, and the Court of Appeal decided to consider the point even though Mr Ainsworth's counsel submitted, at that stage, that the point

was academic to his client and should not be argued. Since in allowing the appeal the Court of Appeal overruled the Employment Appeal Tribunal's decisions in *List Design Group Ltd v Douglas* [2002] ICR 686 and *Canada Life Ltd v Gray* [2004] ICR 673 it is clearly appropriate for your Lordships to consider the matter, even if it is no longer important to any of the appellants themselves.

Employment tribunals and the WTR

40. I must give a fuller account of the relevant provisions of the WTR and the ERA. But as this appeal is concerned with the jurisdiction and powers of employment tribunals they are the best starting point. Employment tribunals (renamed in 1998, having previously been industrial tribunals) are regulated mainly by the Employment Tribunals Act 1996 (formerly the Industrial Tribunals Act 1996). Their jurisdiction is entirely statutory, conferred by a wide range of primary and secondary legislation including the Equal Pay Act 1970, the Health and Safety at Work Act 1974, other statutes against discrimination and (most relevantly) the WTR and the ERA.

41. Because the WTR are concerned primarily with health and safety, breaches of some of the provisions in Part II of the WTR, such as regulations 10 (Daily rest), 11 (Weekly rest period), 12 (Rest breaks) and 13 (Entitlement to annual leave) do not give rise to readily quantifiable monetary claims. If a worker works and receives a week's pay, when he should have had a week's holiday with pay, it is rest and recreation, not money as such, that he has lost. Consequently regulation 30 (Remedies) provides for statutory compensation to be awarded by the employment tribunal as is just and equitable in the circumstances, having regard to the employer's default and any loss sustained by the worker (see regulation 30(1)(a)(i), (3) and (4)). Some other claims under Part II, that is under regulations 14 (Compensation related to entitlement to leave) and 16 (Payment in respect of periods of leave), are liquidated in nature. For them the remedy is an order for payment of the amount due: see regulation 30 (1)(b) and (5).

42. Mr Ainsworth's claim, so far as brought under the WTR, was brought under regulation 14 (Compensation related to entitlement to leave), the first two paragraphs of which are in the following terms:

> "(1) This regulation applies where –

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 differs from the proportion of the leave year which has expired.

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

43. A worker with contractual rights cannot claim them on top of his rights under the WTR, but can opt for whichever rights are the more favourable. That is the effect of regulation 17 (Entitlements under other provisions):

"Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable."

44. The Working Time Directive required member states to transpose its provisions into national law by 23 November 1996. In the United Kingdom the Directive was a subject of great political controversy. When it was being negotiated the Conservative government opposed many of the proposals, including in particular the proposal for a maximum 48-hour working week from which employers and workers could not agree to opt out. The government went so far as to challenge, in proceedings before the Court of Justice, whether the Directive was under the Treaty (as it then stood) capable of being approved by only a qualified majority of the member states. The challenge was unsuccessful: Case C-84/94 *United Kingdom v Council of the European Union* [1996] ECR I -577. The WTR were eventually made on 30 July 1998, over 20 months after the final date fixed by the Directive, and contained provisions facilitating the United Kingdom's derogation from the mandatory 48-hour week (see Article 17 of the Directive and

Regulation 31 of the WTR, inserting a new section 45A in the ERA in order to comply with the conditions for derogation).

The ERA

45. The ERA is a consolidating Act. The immediate predecessor to Part II (Protection of wages) was the Wages Act 1986, but parts of it have much older roots, going back to the Truck Act 1831. Section 13, which is the first section in Part II, provides (so far as now relevant):

> "(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.
>
> (2) *defines "relevant provision"*
>
> (3) Where the total amount of wages paid on any occasion 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 on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

46. The purpose of section 13(3) is not immediately apparent but it has been interpreted as having two important effects. In *Delaney v Staples* [1991] 2 QB 47 the Court of Appeal (Lord Donaldson of Lymington MR, Ralph Gibson LJ and Nicholls LJ) relied on its predecessor (section 8(3) of the Wages Act 1986) for the conclusion that "a deduction from wages" can for this purpose cover a total failure to pay any wages when due (in that case, contractual commission and holiday pay). But the Court of Appeal also held that the employment tribunal had no jurisdiction to make an award in respect of an unliquidated contractual claim for a payment in lieu of notice. The House of Lords [1992] 1 AC 687 dismissed the ex-employee's claim on the latter point (on which the law has since been changed, in 1994, to give employment tribunals a

limited jurisdiction to hear certain contractual claims for unliquidated sums). There was no cross-appeal against the Court of Appeal's decision as to the meaning of "a deduction from wages", nor was it challenged before your Lordships.

47. The other decision of the Court of Appeal on section 13(3) is *New Century Cleaning Co Ltd v Church* [2000] IRLR 27. In that case the Court of Appeal (Beldam and Morritt LJJ, Sedley LJ dissenting) held, on unusual facts arising out of the way a team of window cleaners operated, that the effect of the words "properly payable by him to the worker on that occasion" excluded anything in the nature of an unliquidated claim from coming within section 13. Again, that decision has not been challenged before your Lordships. It is not directly relevant to Mr Ainsworth's claim but it shows that the very wide definition of "wages" in section 27 of the ERA (the last section in Part II) must in effect be filtered, for the purposes of a claim under section 13, by eliminating any unliquidated amounts. The definition of "wages" in section 27 (to which I now proceed) does contain some items (for instance, some of those in subsection (1)(e) and (f): see sections 60(3) and (4) and 70(6) and (7) of the ERA) which, like statutory compensation under regulation 30(3) and (4) of the WTR, cannot be quantified until the employment tribunal makes its own evaluative judgment on a claim.

48. Section 27(1) provides as follows:

> "(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including –
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his
> employment, whether payable under his contract or otherwise,
>
> (b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,
>
> (c) statutory maternity pay under Part XII of that Act,
>
> [(ca) statutory paternity pay under Part 12ZA of that Act,
>
> (cb) statutory adoption pay under Part 12ZB of that Act,]

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc),

(f) remuneration on suspension on medical grounds under section 64 of this Act and

remuneration on suspension on maternity grounds under section 68 of this Act,

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

Subsection (2) then makes five general exclusions: (a) an advance by way of loan; (b) a payment of expenses; (c) a payment making provision on retirement or for loss of office; (d) a redundancy payment; and (e) any payment to the worker otherwise than in the capacity of a worker.

49. Section 23 provides for complaints to employment tribunals by workers alleging breaches of a number of provisions, including section 13. It sets time limits as follows:

"(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

The correct construction of section 27 of the ERA

50. It is common ground that section 13 of the ERA has a wide scope, extending to a variety of statutory and contractual entitlements to liquidated sums, provided always that they fall within the definition of "wages" in section 27. That definition is at the heart of these appeals.

51. It is on its face a very wide definition. Section 27(1) starts with words of a generous ambit,

"Any sums payable to the worker in connection with his employment..."

The ambit of these words is cut down by the five general exclusions in section 27(2), but none of them has any possible application here. The wide opening words of section 27(1) are then followed (in the

subsection as amended) by eleven paragraphs of specific inclusions, the first of which is itself in wide and general terms:

> "(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."

The remaining ten paragraphs refer with differing degrees of particularity to various statutory entitlements, including statutory maternity pay (included in section 27(1)(c) as originally enacted) and statutory paternity and adoption pay (added as paragraphs (ca) and (cb) by amendments made by the Employment Act 2002).

52. Mr Cavanagh QC (appearing with Mr Tolley for the Revenue) relied on the absence of any reference to the WTR in the long list of statutory rights enumerated in section 27(1)(b) to (j). It was significant, he submitted, that Parliament made amendments specifically mentioning some new rights but had not done the same when the WTR were made in 1998. Statutory paid annual leave did not exist when the ERA was enacted, and Parliament cannot have intended, by the general words "or otherwise" in section 27(1)(a), to cover a non-existent right, based on considerations of health and safety, which might be introduced in the future. He relied on the general observations of Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, paras 8-10, citing a passage (now recognised as authoritative) in the dissenting opinion of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. That may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if

> there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive."

Mr Cavanagh submitted that Parliament must have intended the WTR to remain as a single and exclusive regime for the enforcement of the rights which it created.

53. In the Court of Appeal Maurice Kay LJ (with whom Kennedy and Laws LJJ agreed) accepted these submissions. Maurice Kay LJ dealt with the point quite shortly in para 24 of his judgment:

> "I do not consider that, in 1996, Parliament can have intended to refer to a subsequently created statutory right which comes with its own enforcement regime. If there were any doubt about this it is dispelled by section 205(2) of the 1996 Act which provides that the remedy in respect of any contravention of section 13 'is by way of a complaint under section 23 and not otherwise'. If *List Design* were correct, it would not be possible for a claim of statutory holiday pay to be pursued under regulation 30 which expressly provides for such a claim. Parliament cannot have so intended."

54. Before your Lordships Mr Cavanagh expressly disclaimed any reliance on section 205(2) of the ERA. In my opinion he was right to make that disclaimer. So the Court of Appeal's reasoning comes down to the simple assertion that Parliament cannot, in this context, have intended to refer to a statutory right to be created in the future. That all depends, in my opinion, on the width of the language used by Parliament, on the one hand, and the degree of novelty of the new statutory right, on the other hand. The decision in *Quintavalle* (a case concerned with scientific and technological progress in human embryology) is miles away on the facts. In this case Parliament chose to use wide language, and the statutory right to paid annual leave is by no

means dissimilar from rights which have for many years appeared in many employment contracts. Statutory paternity pay and adoption pay, by contrast, were relatively unusual rights which called for specific mention, especially as statutory maternity pay was already specifically mentioned. The statutory purpose of the definition of "wages" appears to be wide and inclusive.

55. In the *Royal College of Nursing* case Lord Wilberforce referred to what Parliament would have known about the existing state of affairs. The ERA was enacted on 22 May 1996, and there can be little doubt that Parliament was well aware, when the Bill which became the ERA was before it, that the Working Time Directive conferred rights to annual paid leave and that the United Kingdom was under an obligation to transpose them into domestic law by the end of 1996. Initially I was inclined to see this as an argument in favour of the appellants but on reflection I think it is (in Housman's phrase) a two-edged sword, with both edges fairly blunt. The Bill was a consolidating measure, and the introduction of any amendment containing fresh material would have altered its character. Moreover the decision of the Court of Justice in *United Kingdom v Council of the European Union* on the United Kingdom's assault on the *vires* of the Working Time Directive was not yet known; it was given on 12 November 1996, very shortly before the expiry of the time limit for transposition of the Directive. I do not think it is possible, or appropriate, to draw any inference from these aspects of the ERA's parliamentary history.

56. In the end it is a short point of statutory construction. I respectfully consider that the Court of Appeal had no good reason, either linguistically or on policy grounds, to take a restrictive view of the wide natural meaning of the definition in section 27.

The principle of equivalence

57. Before the House Mr Jeans QC (appearing with Mr Ford for the appellants) asked leave to rely on a point of Community law not taken below, that is the principle of equivalence. Under that principle, and the linked principle of effectiveness, national remedies for breaches of Community rights must be no less favourable than those available in similar domestic proceedings, and must be capable of effective exercise in practice: Case C-78/98 *Preston v Wolverhampton Healthcare NHS Trust* [2001] 2 AC 415, para 31 (citing numerous earlier decisions of the Court of Justice to the same effect). *Preston* was concerned with the

exclusion of female part-time workers from "contracted-out" pension schemes. Their claims appeared to be time-barred under section 2(4) of the Equal Pay Act 1970 and (as regards retrospective entitlement) under section 2(5) and equal access regulations made in 1976.

58. National courts are required to consider relevant issues of Community law even if not raised at the right time by the parties: Case C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgium* [1995] ECR I-4594, para 21. Your Lordships did therefore hear argument on this point. For my part I do not think that reliance on the principle of equivalence is necessary for the appellants to succeed in these appeals, but consideration of the principle does to my mind serve to emphasise the substantial similarity between the Community right to paid annual leave and similar rights conferred by employment contracts.

59. Mr Jeans submitted that the time limit under regulation 30 of the WTR was obviously less favourable than that provided for by section 23 of the ERA, since section 23(3) contains the possibility of an extension of time for a "series" of deductions. Against that Mr Cavanagh submitted that it was artificial to equate annual leave under the WTR with a claim for unauthorised deductions from wages. He also submitted that the appellants' argument proved too much, because of the six-year period available for a contractual claim by an employee brought in a county court (there are strict time limits for complaints invoking the employment tribunal's extended jurisdiction: Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 S.I. 1994/1623, articles 7 and 8).

60. I comment first on Mr Cavanagh's submission that the appellants' argument proves too much. That submission was to my mind disposed of when *Preston* returned to this House after the decision of the Court of Justice: see the opinion of Lord Slynn of Hadley [2001] 2 AC 455, at paras 24-31. The comparison between procedure in an employment tribunal and in the county court must be made in the round, and the informal and inexpensive procedure in the employment tribunal confers many benefits. Lord Slynn's views on that point were accepted by all the other members of the Appellate Committee, either directly or through their agreement with the opinion of Lord Clyde. The relevant comparison is therefore between regulation 30(2) of the WTR and section 23(2), (3) and (4) of the ERA, and there is no doubt that the latter is more advantageous.

61. Lord Clyde (with whom Lord Goff of Chieveley and Lord Nolan agreed) was less ready to accept Lord Slynn's views (paras 14-23) as to the similarity of the suggested domestic parallel in a case where part-time workers had for years been deprived of the opportunity of joining a pension scheme. Indeed Lord Slynn himself was cautious about the point (para 21):

> "…one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under article 119 that somehow or other a claim could be framed in contract."

62. In these appeals, however, the parallel between the statutory right to paid annual leave and a contractual right to holidays with pay is to my mind much clearer and closer. It is not less close because of the Working Time Directive's emphasis on health and safety at work. Similar thinking has for many years informed the approach of responsible employers in framing contractual terms of employment. Moreover in each case the remedy would be an order for payment of the liquidated sum due.

63. In concluding that the appeals on the outstanding issue should be allowed I would therefore base my conclusion both on normal principles of statutory construction and on the principle of equivalence. On this issue also I would set aside the order of the Court of Appeal and restore the order of the Employment Appeal Tribunal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

64. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury. I agree with them and for the reasons they give I too would allow the appeals, set aside the order of the Court of Appeal and restore the order of the Employment Appeal Tribunal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

65. The facts, background and relevant statutory provisions are admirably set out by my noble and learned friend Lord Walker of Gestingthorpe in his opinion, which I have had the privilege of seeing in draft. Following the rulings of the Grand Chamber of the European Court of Justice ("ECJ") in Case C-350/06 *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund*, Case C-520/06 *Stringer v HM Revenue and Customs* [2009] IRLR 214, there only remains one issue in dispute between the parties.

The issue between the parties

66. The issue is whether a claim based on an alleged failure to make payments due under the Working Time Regulations 1998 (SI 1998/1833) ("the WTR") can be brought by way of a claim for unauthorised deduction from wages under Part II of the Employment Rights Act 1996 ("the ERA"). In particular, the issue is whether claims for payment in respect of periods of annual leave under regulation 16, and claims for payment in lieu of leave on termination of employment under regulation 14, of the WTR are claims for "holiday pay… referable to [a worker's] employment, whether payable under his contract or otherwise" within section 27(1)(a) of the ERA.

67. If the answer is in the negative, then such a claim could only be brought under regulation 30 of the WTR, in which case the limitation period is "three months … beginning with the date on which it is alleged that … the payment should have been made" – regulation 30(2)(a). But if the answer is in the affirmative, and the claim could alternatively be brought under section 23 of the ERA, the regime is more generous. While section 23(2)(a) has a similar three month limitation period, section 23(3) provides that, where there has been a "series of deductions or payments", the period starts from "the last deduction or payment in the series".

68. In my judgment, claims under regulations 14 and 16 of the WTR are claims within section 27(1)(a) of the ERA, and are therefore capable of benefiting from the section 23 regime. Like Lord Walker, I have

reached this conclusion for two reasons, namely the language of section 27(1)(a) and the doctrine of equivalence.

The language of section 27(1)(a)

69. As a matter of ordinary language, I am of the view that a payment due to a worker in lieu, or in respect, of his annual leave under the WTR is a sum "payable … in connection with his employment", and, in particular, that it is "holiday pay … payable under his contract or otherwise".

70. Two submissions were advanced by the respondent against this view. First, it was said that that a payment due under regulation 14 or 16 of the WTR was in respect of leave under those Regulations, and not in respect of a "holiday". The purpose of the WTR is to give effect to the Working Time Directive (originally 1993/104/EC, now consolidated in 2003/88/EC), which was aimed at promoting health and safety at work. Accordingly, it was said, "leave" under the Regulations is not equivalent to a "holiday" in the Act.

71. I do not agree. The purpose of a "holiday" from work is, at least in part, the psychological and social well-being of the employee. Further, regulation 17 of the WTR appears difficult to reconcile with the submission. It provides that, where a worker is "entitled to … annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract)", he can take advantage of the more favourable entitlement, but not of both entitlements. Quite apart from this, I would have thought that, even if the submission had been correct, it would not have availed the respondent: the right to payments under regulations 14 and 16 would be within the ambit of "other emolument" in section 27(1)(a) of the ERA.

72. The respondent's second point was that a payment due under the provisions of a statutory instrument was not within the ambit of the words "or otherwise" in section 27(1)(a) of the ERA. As a matter of ordinary language, I find that very difficult to accept. It is said to derive support from the reasoning of the Court of Appeal in *New Century Cleaning Co Ltd v Church* [2000] IRLR 27, paras 43 and 62 (per Morritt LJ and Beldam LJ respectively).

73. I am not sure that this was indeed the effect of the reasoning in those two passages, but, if it was, then I must respectfully disagree. The respondent's argument that the reach of the words "or otherwise" is effectively limited to terms implied into the employment contract not only seems to attribute an artificially narrow meaning to those words. On analysis, it gives them no meaning, as if a right to a payment is implied (by common law or statute) into a contract, then it seems to me that the sum is "payable under his contract". In any event, the argument overlooks the wide compass of the opening part of section 27(1), which refers to "sums payable to the worker in connection with his employment".

74. Accordingly, unless there is some telling reason for excluding payments in lieu of annual leave under the WTR from the ambit of section 27(1)(a) of the ERA, it would appear to be included as a matter of ordinary language.

75. Mr Cavanagh QC, in his attractive argument for the respondent, contended that there was some telling reason for reaching a different conclusion. He pointed to the fact that the WTR came into force some time after the ERA, and that, in paras (b) to (j), section 27(1) appears to contain an exhaustive list of statutory payments to employees. He also pointed out that section 27(1) has been amended to accommodate later enacted payments such a paternity pay and adoption pay – see paras (ca) and (cb) – but no such amendment was made to accommodate payments under the WTR, which have their own procedure and time limits for claims in regulation 30.

76. In my view, the argument has some force, but not nearly enough to justify cutting down the natural meaning of the words of section 27(1)(a). When introducing paternity pay and adoption pay through the medium of the new Parts 12ZA and 12ZB of the Social Security Contributions and Benefits Act 1992, those drafting the Employment Act 2002 would have noticed that maternity pay, which was already provided for in Part XII of the 1992 Act, was specifically referred to in section 27(1)(c) of the ERA. It would therefore no doubt have been thought sensible to state in terms that the new paternity and adoption pay were to be treated in the same manner. No such imperative would have existed for payments in respect of leave under the WTR, for two reasons. First, there was no equivalent in respect of such payments to section 27(1)(c) in relation to paternity and adoption pay. Secondly, unlike paternity pay and adoption pay, payments in respect of leave could have been regarded as already covered by the reference to

"holiday pay" in section 27(1)(a), so that they did not need to be covered in an additional new paragraph.

77. It is true that, on this basis, very little is served by the provisions of regulation 30 of the WTR, as the time limits in section 23 of the ERA would almost always be the same or more generous. However, the time limit under regulation 30 is six months, rather than three months, for members of the armed forces. Quite apart from this, regulation 30 is concerned with claims which are not only for payments. Further, the statutory payments referred to in section 27(1) (d) (e) and (f) are subject to the same three months regime as that contained in regulation 30 of the WTR, which appears to be in fairly similar form to procedural provisions governing most of the other payments referred to in section 27(1)(a) to (j) of the ERA.

The principle of equivalence

78. For the reasons so far given, it seems to me that, on purely domestic legal principles, the appellants are correct in their contention that payments due under regulations 14 and 16 of the WTR fall within section 27(1) of the ERA. However, if the contrary had been arguable, or even probably right, if one confined oneself to domestic law, I would still have found for the appellants on an additional ground persuasively advanced by Mr Jeans QC for the appellants, based on the EC law principle of equivalence. As succinctly put by Lord Slynn of Hadley in *Preston v Wolverhampton Healthcare NHS Trust* [2001] 2 AC 455, para 13, this principle generally requires that a limitation period in respect of an action on a claim arising out of EU law must not be "less favourable than for similar actions based on domestic law". In *Levez v T H Jennings Ltd* [1999] ICR 521, para 39, the ECJ said that it was primarily for the national court to ascertain whether the principle applies in a particular case.

79. The issue which arises in the present appeal is whether there are claims under section 27(1) which are similar to, but benefit from more favourable limitation periods than, claims under regulations 14 and 16, if such latter claims do not fall within section 27(1). If the answer is in the affirmative, that would reinforce the conclusion, indeed it would provide an additional reason for concluding, that claims under regulations 14 and 16 did fall within section 27(1). Otherwise the UK Government would be in breach of its European Treaty obligations.

80. This issue requires one to address two points, namely difference in limitation period and similarity of claims. In relation to contractual holiday pay, and all other sums covered by section 27(1), an employee can rely on section 23(3) of the ERA. This effectively extends the start of the three month limitation period, in any case where the deduction was one of a "series of deductions", until the date of the last deduction in the series. On the other hand, an employee who can only rely on regulation 30 of the WTR is subject to a similar three month time limit, but cannot contend for a postponement of the commencement of the period where the deduction or non-payment is part of a "series".

81. As Lord Walker explains in para [5], section 23(3) is plainly a provision which is intended to have, and no doubt has, real value to many employees in relation to many claims based on deductions from their wages, even though I accept that it may on occasion be capable of being a little "hit and miss" in its effect. This is therefore not a case where it could be said that the appellants are seeking to benefit from the "most favourable rules" of limitation, which I understand to mean exceptional or unusually beneficial rules (as mentioned by the ECJ in *Levez* [1999] ICR 521, para 42).

82. The argument on this appeal concentrated on the difference in limitation period for claims in respect of contractual holiday pay and claims for payments due under regulations 14 and 16. In my view, that may well be too narrow a comparison. However, whether one confines oneself to contractual holiday pay or considers all the types of payment covered by paras (a) to (j) of section 27(1), I consider that the principle of equivalence would be infringed if payments due under regulations 14 and 16 of the WTR were not comprehended within section 27(1)(a), and thereby within the ambit of section 23(3) of the ERA.

83. So far as contractual holiday pay is concerned, it seems to me that, for reasons already discussed in para [7], it is plainly similar to payments due under regulations 14 and 16. However, unlike such payments, contractual holiday pay can be sued for in the courts, as well as in the employment tribunal, where it would be subject to a six year limitation period under the Limitation Act 1980. It is therefore said on behalf of the respondent that the appellants' argument does not involve comparing like with like.

84. I see the force of that point, but it seems to me that it involves looking at the issue too narrowly. In order to decide whether two claims are similar for this purpose, the court must address "both the purpose and the essential characteristics of the allegedly similar domestic actions" – *Levez* [1999] ICR 521, para 43. As the ECJ went on to say in the next paragraph, what has to be taken into account is "the role played by [the] provision [in question] in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts". To similar effect, in *Preston* [2001] 2 AC 455, para 21, Lord Slynn warned against determining equivalence by reference to "superficial similarity".

85. The specialist, informal and relatively cheap jurisdiction of the employment tribunal renders it the obvious place for an employee to seek redress for an allegedly unwarranted deduction of a sum from wages, at least provided that the sum can fairly be seen as part of the employee's wages. An important aspect of the policy of Part II of the ERA is that there should be a uniform procedural code which applies, inter alia, to limitation periods for the bringing of any complaint relating to the deduction of such sums from wages. The payments within Part II, as set out in section 27(1)(a) to (j), are all sums payable to an employee in respect of, or in the course of, his employment – in effect part of his wages. By contrast, the payments excluded from the ambit of Part II, by section 27(2), do not satisfy that test: they are payments for ceasing to be an employee, loans to the employee, reimbursement of expenses, or payments to him otherwise in the capacity of a worker.

86. Both counsel agree that virtually every type of statutory payment to which an employee is entitled under English law is included in section 27(1), the only possible exception being payments due under the WTR (indeed that is a point relied on by the respondent on the first aspect discussed in this opinion). Furthermore, all, or virtually all, of these payments are subject to their own specific procedural regime, including specific limitation periods. Those within section 27(1)(d), (e) and (f) are subject to the same three month time limit as is contained in regulation 30 of the WTR; any contractually due payment will normally be subject to a six year limitation period; many of the other payments are subject to a six month time limit, including those under section 27(1)(b), (c), (ca), and (cb).

87. If the right approach is to compare the position of payments under regulations 14 and 16 with that of holiday pay, then, once one sees that holiday pay is treated under Part II of the ERA in the same way

as any other payment which can be said to be "wages" (whatever its own specific limitation period), then I consider that there is no basis for treating payments due under regulations 14 and 16 differently. If the right comparator is not merely holiday pay, but all other statutorily and contractually payable sums due from an employer, provided that they can fairly be characterised as "wages" (whatever their own specific limitation period may be), then, again, there is no basis, in my view, for treating payments due under regulations 14 and 16 differently. If not included in section 27(1) of the ERA, payments due under the WTR would be the only statutorily prescribed payments due from an employer to an employee in respect of his employment which were excluded from the benefit of section 23(3).

88. It seems to me that the question of similarity, in the context of the principle of equivalence, has to be considered by reference to the context in which the principle is being invoked. On that basis, not only the substantial breadth of the reach of section 27(1), but also the purpose of Part II of the ERA, comes into play. That purpose is well described by the Title – "Protection of Wages". I find it very hard to see how it can be said, in the context of seeking to protect sums due to employees, provided that they can be fairly described as "wages", that payments due under regulations 14 and 16 of the WTR are other than similar to the many other types of payments described in, or covered by, section 27(1).

89. Accordingly, even if there was a stronger argument based on domestic statutory interpretation in favour of the respondent's case, I would still reject it in the light of the principle of equivalence.

Conclusion

90. For these reasons, which are very much along the same lines as those of Lord Walker, with whose opinion I respectfully agree, I too would allow the appeal of the appellants on the outstanding point at issue.