Appeal No. UKEATS/0029/08/MT
UKEATS/0030/08/MT

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16, 17, 18 & 19 December 2008

Before

THE HONOURABLE LADY SMITH

MR M SIBBALD

MR R THOMSON

UKEATS/0029/08/MT

1) MR M CRAIG
2) MS M TAYLOR — APPELLANTS

TRANSOCEAN INTERNATIONAL RESOURCES LIMITED — RESPONDENTS

UKEATS/0030/08/MT

TRANSOCEAN INTERNATIONAL RESOURCES LIMITED
AND OTHERS — APPELLANTS

MR T L RUSSELL AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants (UKEATS/0029/08/MT) and Respondents (UKEATS/0030/08/MT) Ms Taylor and Mr Craig	MR J HENDY (One of Her Majesty's Counsel) Instructed by: Ms C McCrossan c/o The Library 70 Carden Place Aberdeen AB10 1UP
For the Respondents (UKEATS/0029/08/MT & UKEATS/0030/08/MT) Mr Price, Mr Burgess, Mr Robinson, Mr Sangbarani and Mr McGuire	MR A STAFFORD (One of Her Majesty's Counsel) Mr P Edwards (of Counsel) Instructed by: Messrs Rowley Ashworth Solicitors Suite 1b Joseph's Well Hanover Walk Leeds LS3 1AB & Messrs Allan Mc Dougall Solicitors 3 Coates Crescent Edinburgh EH3 7AL
For the Appellants (UKEATS/0030/08/MT) and Respondents (UKEATS/0029/08/MT) Transocean International Resources & Others	MR J CAVANAGH (One of Her Majesty's Counsel) Instructed by: Messrs Simpson & Marwick Solicitors 4 Carden Terrace Aberdeen AB10 1US

SUMMARY

Working Time Regulations.

Annual leave of offshore workers. Whether employers had given regulation 15 notices. Whether annual leave could be taken out of onshore "field breaks".

Appeal allowed and claims under regulation 30 of WTR dismissed. Regulation 15 notices had been given by employers in response to requests for annual leave and annual leave could be taken out of field breaks.

THE HONOURABLE LADY SMITH

Introduction

1. These appeals concern rights in respect of annual leave under the **Working Time Regulations 1998** ("WTR").

2. The claimants are all offshore workers who are employed by the various respondents as driller (John Price), steward (Andrew McGuire), night cook/baker (Michael Burgess), stewardess (Avril Taylor), radio operator (Michael Craig), senior mechanic (David Robinson), and caterer/steward (Armand Sangbarani).

3. We will continue to refer to parties as claimants and respondents.

4. The appeals ultimately comprised:

   (1) the respondents' appeal against a judgment of the Employment Tribunal sitting at Aberdeen, Employment Judge RG Christie, registered on 21 February 2008, in which it was held that, leaving aside certain jurisdictional issues, the respondents had refused to permit the claimants to exercise the right to annual leave to which they were entitled under the WTR; and

   (2) the TGWU/Amicus claimants' appeal (with which the OILC claimants associated themselves) against a subsequent review judgment, registered on 1 December 2008 by which it was held that:

a. time spent by the claimants in travelling between the embarkation point at the heliport at Dyce and the relevant offshore installation is not working time within the meaning of the WTR,

b. time spent during onshore field break in travelling to training courses or medical appointments or the like is not working time within the meaning of the WTR, and

c. whilst time spent on training courses, medical appointments and the like onshore is working time within the WTR, the claimants' entitlement to annual leave was calculated without taking that working time into account.

5. These were the issues that we required to consider. We determine the first issue only in this judgment, for reasons which we later explain.

6. Certain additional issues were referred to in the notices of appeal but as the hearing developed before us, they narrowed. An issue which had taken much time before the Tribunal was whether offshore offshift time constituted working time or not. A fundamental plank of the OILC claimants' argument had been that those periods *did* constitute working time and a consequence of that was that the whole of the time spent onshore on what is known in the industry as "field break" was consumed by affording the requisite compensatory rest (WTR, regulation 24). That in turn meant that since there was no onshore field break left available to be used for annual leave, leave necessarily required to be taken out of offshore time. However, on the second day of the appeal hearing, Mr Hendy QC, for those claimants, conceded that, even after allowing for the compensatory leave that would be required if the whole of the offshore offshift time was to be regarded as working time, there would be a surplus of onshore

field break time available that was more than sufficient to cover both such parts of onshore time that fell to be categorised as working time *and* all annual leave, assuming that annual leave could be taken from the onshore field break. In the light of that concession, we were satisfied that it was not necessary for us to consider the issue of whether or not time spent offshore and offshift constitutes working time under the WTR. It was not, however, conceded that annual leave could be taken out of field break; it required, according to the claimants, to be taken out of time that they were rostered to be offshore.

7. The claimants' appeal, as set out above, was presented by way of notice of appeal lodged on the third day of the hearing. There were no objections by the other parties and we were satisfied that it contained reasonable grounds of appeal although the issues involved would only require determination if the respondents' appeal was unsuccessful.

The working time directive and the WTR

8. As we have indicated, this case concerns the rights of offshore workers under the WTR, regulations which were extended to the offshore industry in 2003. The relevant provisions of the WTR require to be borne in mind when considering its factual background.

9. The source of the WTR can be traced to the **Community Charter of the Fundamental Social Rights of Workers** (adopted at Strasbourg on 9 December 1989), the provisions of which included:

> **"8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave …**
>
> **19. …**
>
> **improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations;**
>
> **…**

…

… in order to ensure the safety and health of Community workers, the latter must be granted minimum daily, weekly and annual periods of rest and adequate breaks ….”

10. Certain specific provisions which are relevant to these claims are contained in Directive 2003/88/EC (“WTD”). The preamble includes:

> **“(5) All workers should have adequate rest periods. The concept of ‘rest’ must be expressed in units of time, i.e. in days, hours, and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks …”**

11. Article 1 of the WTD provides:

> **“2. This Directive applies to:**
>
> **(a) minimum periods of daily rest, weekly rest and annual leave …”**

12. Article 2 provides:

> **“For the purposes of this Directive, the following definitions shall apply:**
>
> **1. ‘working time’ means any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties …**
>
> **2. “rest period” means any period which is not working time;”**

13. Article 3 provides:

> **“Daily rest**
>
> **Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.”**

14. Article 4 provides:

> **"Breaks**
>
> **Member States shall take the measures necessary to ensure that where the working day is longer than six hours, every worker is entitled to a rest break …"**

15. Article 5 provides:

> **"Weekly rest period**
>
> **Member States shall take the measures necessary to ensure that, per each seven- day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3…"**

16. Article 7 provides:

> **"Annual leave**
>
> **1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks …"**

17. The Directive provides no further specification regarding annual leave. It does not, for instance, require that the leave be taken in any particular blocks of time nor does it define "leave".

18. In the case of offshore workers, derogations from Articles 3, 4, and 5, but not from Article 7, are permitted by Article 17(3)(a).

19. Turning to the WTR, the parts of it that are relevant are as follows.

20. Firstly, some of the definitions in the interpretation regulation (reg.2):

"Rest period" is defined as meaning:

> **"…a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations."**

21. Thus, the term "rest period" is used in a slightly different sense in the WTR than in the WTD. In the latter, it simply denotes all and any time which is not working time. In the WTR, however, the term "rest period" covers daily and weekly rest but is not to be taken to refer to a rest break or to leave. It is though, plainly, not "working time".

"Working time" in relation to a worker is defined as:

> **"(a) any period during which he is working, at his employers' disposal and carrying out his activity or duties,**
>
> **(a) any period during which he is receiving relevant training, and**
>
> **(b) any additional period which is to be treated as working time for the purposes of these Regulations under a relevant agreement;"**

22. Reg. 10 makes provision for daily rest:

> **"10(1) An adult worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer……."**

23. Reg.11 makes provision for weekly rest:

> **"11(1) … an adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven–day period during which he works for his employer …"**

24. Reg. 12 makes provision for rest breaks:

> **"12(1) Where an adult workers' daily working time is more than six hours, he is entitled to a rest break ….**
>
> **…**
>
> **(3) … the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one."**

25. Reg. 13 makes provision for annual leave:

> **"13(1) … a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).**
>
> **(2) The period of leave to which a worker is entitled under paragraph (1) is –**
>
> **…**
>
> **…**
>
> **(c) in any leave year beginning after 23rd November 1999, four weeks."**

26. In common with the WTD, there is no requirement that annual leave be taken in any particular blocks of time nor is there any definition of the word "leave". Workers are entitled to be paid in respect of any period of annual leave at the rate of one week's pay for one week's leave (reg. 16). Also in common with the WTD, workers are not obliged to take the annual leave to which they are entitled.

27. Reg. 15 makes provision for notification as between employer and employee regarding annual leave:

> **"15. (1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).**
>
> **(2) A worker's employer may require the worker –**
>
> **(a) to take leave to which the worker is entitled under regulation 13(1);**
>
> **or**
>
> **(b) not to take such leave,**
>
> **on particular days, by giving notice to the worker in accordance with paragraph (3).**

> **(3) A notice under paragraph (1) or (2) –**
>
> **(a) may relate to all or part of the leave to which a worker is entitled in a leave year;**
>
> **(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and**
>
> **(c) shall be given to the employer or, as the case may be, the worker before the relevant date …"**

28. Notices under regulation 15 need not be in any particular form and need not be in writing. Employers are not obliged to give any notice under regulation 15. Nor are employees.

29. Reg. 17 makes provision for where workers have other entitlements:

> **"17. 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."**

30. Regulations 10, 11 and 12 do not apply in relation to offshore workers (reg. 21) but provision is made for the allowance of "compensatory rest" in regulation 24:

> **"24. Where the application of any provision of these Regulations is excluded by regulation 21 or 22 …. and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break –**
>
> **(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest …".**

31. All parties agreed that compensatory rest was due to the claimants by the end of each period offshore. Quite apart from anything else, such as overtime, the claimants all regularly worked on fourteen consecutive days offshore without a weekly rest period. That, of itself, entitled them to compensatory rest in respect of the loss of their weekly rest periods when offshore.

32. It is not necessary for us to identify exactly how much compensatory rest each claimant was entitled to at the time when the various requests for annual leave were made in these cases, given the concession made by Mr Hendy. Nor is it necessary for us to reach any general view on the matter in the light of that concession. The central issue in the appeal can be resolved on the basis that compensatory leave regularly becomes due but even after allowing for it and any working time whilst onshore, there is more than sufficient in the field breaks to cover the claimants' entitlement to annual leave (assuming such leave can properly be taken during field breaks).

33. Finally, we refer to the remedies which are provided for in regulation 30. They include:

> **"30.(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 … 13(1);**
>
> **…**
>
> **(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well founded, the tribunal –**
>
> **(a) shall make a declaration to that effect, and**
>
> **(b) may make an award of compensation to be paid by the employer to the worker.**
>
> **(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –**
>
> **(a) the employer's default in refusing to permit the worker to exercise his right, and**
>
> **(b) any loss sustained by the worker which is attributable to the matters complained of."**

34. The WTD and WTR both, as we have observed, refer to the concept of "working time" and define it as a period during which the worker is (a) working, (b) at his employers' disposal, and (c) carrying out his activity or duties. The WTR, in addition, remove any need for debate

on the matter by providing that periods spent receiving relevant training and any that are agreed, under a relevant agreement, to be working time are working time. The European Court of Justice ('ECJ') have discussed what does and does not amount to working time in a number of cases involving workers who are, at times, required to be on call. In **Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana** [2001] ICR 1116 it was held that time spent on call by doctors in primary health care teams was to be regarded as working time if they were required to be present at the health centre whilst on call but if they only had to be contactable then, it was only time when they were actually providing health care services that was working time. The ECJ considered what was required to satisfy the three elements of the definition of "working time" in Article 2 of the WTD. Whilst the Advocate General expressed the opinion, at paragraph 36, that Article (1) of the WTD should be interpreted as meaning that the three given criteria are autonomous and need not be met concurrently, the ECJ did not follow that suggested approach; they looked to see if all three criteria were met before being satisfied that the time in question was working time. At paragraph 48 of their judgment, they state:

> **"In the main proceedings, the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on call under these rules, the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance."**

35. A similar approach was adopted by the ECJ in **Landeshauptstadt v Jaeger** [2004] ICR 1528, when it was considering whether time spent on call by doctors where they were required to be at the hospital but were allowed to sleep/rest when not providing medical services. The Advocate General there had argued that the three criteria should not be regarded as cumulative although he pointed out, at paragraph 29 of his opinion, that only one criteria

would not suffice for a certain period to be calculated as working time. However, the ECJ did not depart from the three separate criteria approach and at paragraph 63, they stated:

> **"According to the court, the decisive factor in considering that the characteristic feature of the concept of working time within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from SIMAP at para 48, those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties."**

36. The court goes on and contrasts the position of such a doctor with that of one who is required to be accessible but not present in the health centre.

37. It is evident from both **SIMAP** and **Jaeger** that the first criteria is satisfied by the worker having to be at a place determined by the employer so as to be immediately available to perform the services for which he is employed. He does not have to be actually working in the sense of performing those services. It is the third criteria that deals with that and it can be fulfilled where the worker is not actually performing those services at the time but is subject to a duty to be present so as to be ready to perform their services if called on so to do.

38. The ECJ has also made it plain that working time and rest periods are mutually exclusive (see: **SIMAP** at para 47, **Jaeger** at para 48, **Jan Vorel v Nemocnice Cesky Krumlov Case C - 437/05** at para 24, **Dellas v Premier Ministre and another** [2006] IRLR 225 at para 42). Thus, bearing in mind that all three criteria require to be satisfied before a period of time qualifies as working time, a period which is a rest period can be a period within which one or two of those criteria apply. An obvious example is the doctor who is required to be available on call but not required to be at the hospital. On the authority of **SIMAP** and **Jaeger**, the time that such a doctor is on call is not working time but he would be under a duty

to his employer in the context of the on call system. He would not be entirely free to do as he likes. Whilst the period would, since it is not working time, be a rest period, the element of duty involved means that there hangs over it the possibility of it, or part of it, becoming, at the employer's behest, working time. Leave, however, connotes a period that is and will remain a rest period that is free from all and any of the three criteria involved in the WTD and WTR definitions of working time and free from any possibility of the employer, during it, being able to make any requirement of the worker that turns it into working time. It is not, accordingly, surprising that although it is a period of rest, it is separately provided for.

Background

39. These seven claims were referred to by the tribunal as "sample" claims. They were selected out of a group of some 500 claims. They are all claims under regulation 30 in respect of allegations that the relevant respondents refused to permit the claimants to exercise their rights to annual leave under regulation 13 of the WTR.

40. The claimants all worked on offshore installations. At the relevant time their working patterns involved equal offshore and onshore periods. They were, mainly, 2 weeks offshore followed by 2 weeks onshore field break. When on field break, apart from those occasions when they required to attend training courses or medical appointments or the like (of which notice was given in advance of the field break), their time was free to do with as they chose. As we have indicated, the field breaks were, in quantity, more than enough to cover leave, the most compensatory rest to which they were entitled and such onshore working time as was involved in training courses and medical and any similar appointments. We note that no suggestion has been made by or on behalf of any of the claimants that this 2 weeks on/2 weeks off pattern has or is liable to have an adverse effect on their health and safety. Nor was it suggested that it was

not known to every worker including the claimants, at the beginning of each year, that during that year, they would have 26 weeks off (save those days spent on training courses and medical etc appointments onshore) which would, under the 2 week on/2 week off pattern, be afforded to them in thirteen 2 week blocks. Further, given the concession regarding the amount of field break that was left over even after allowing for compensatory rest and onshore time on training and at appointments, it must be taken to be the case that offshore workers including the claimants accepted that there were more than enough days available in the field break to cover their entitlement to annual leave.

41. Transport to offshore installations was (and is) by helicopter from a heliport at Dyce, Aberdeen. The heliport is not owned or operated by the respondents. An independent company runs it and an independent company is responsible for the flights. The claimants are subject to its rules and regulations imposed by the helicopter company once they have checked in. In terms of some of their contracts of employment, they are required to comply with the relevant airline's rules on baggage restriction and, for security purposes, submit to personal/baggage searches if required.

42. The actions of the respondents that gave rise to the claims were as follows.

43. By letter dated 16 February 2007, the first claimant, **Mr Price** requested annual leave during a period that he was rostered to work offshore. Transocean replied:

> **"After taking into account compensatory rest, training and all other times that you are required to be at work the leave which you will take, including as it does the majority of all field break under your existing arrangements, is significantly more favourable than your entitlement under WTR. As entitlement to leave under WTR only arises if it is the more favourable, your request is invalid.**

> **However, if notwithstanding this you have an entitlement to more favourable leave under WTR and if your request is invalid (sic) we refuse it under Regulation 15(2). Our position is to require all leave under WTR to be taken under field break."**

44. By letter dated 10 May 2004, the second claimant, **Mr McGuire**, made a similar request. In his letter, referring to his request that he be able to take leave at certain specific dates when he was rostered to be working offshore, he stated:

> **"I do so in line with the working time regulations (amended) 2003 and unless I am served counter notice not to take paid leave on these dates then it will be my understanding that you have sanctioned my request."**

That request was refused by his employers.

45. By letter dated 6 May 2004, the third claimant, **Mr Burgess** requested annual leave in terms of the WTR on specific dates when he was rostered to work offshore and his request was refused by letter of 7 May 2004, the terms of which included:

> **"It is not the case that you have an outstanding entitlement to 2/4 weeks annual leave under that regulation and on that basis your notice is invalid. Entirely without prejudice to that position, we give you notice that in any event you are not to take leave in the period from 23 August 2004 until 4 October 2004."**

46. By letters dated 6 May 2004, February 2005 and October 2006, the fourth claimant, **Ms Taylor**, requested leave on specific dates when she was rostered to work offshore. By letter dated 7 May 2004, her request was refused in terms which included:

> **"(you are) not entitled to any additional payments, as you have requested … as we believe that the existing terms and conditions of your contract of employment are compliant with the requirements of the HAD. If you still wish to take the aforementioned dates as unpaid leave then please liaise with your facilities manager …."**.

Similar responses were given to her later requests to take such leave.

47. By letters dated 21 May 2004, the fifth claimant, **Mr Craig** wrote saying that he was giving notice under regulation 15 of the WTR that he intended to take 3 weeks paid leave on dates when he was rostered to work offshore. The response to his request, dated 24 May 2004, included the following terms:

> **"You are hereby notified in terms of Regulation 15 of the Working Time Regulations 1998 that you are not to take leave during the period 5 July 2004 to 26 July 2004. Your entitlement to annual leave is discharged by your field break. You will therefore be entitled to exercise your right to take annual leave on the submission of an appropriate notice in respect of a field break period."**

A similar request and refusal took place as between Mr Craig and his employers in October 2004.

48. By letters dated 8 October 2004, 23 May 2006 and 19 December 2006, the sixth claimant, **Mr Robinson**, requested annual leave on specific dates when he was rostered to work offshore and they were all refused. The refusal letters advised him:

> **"I regret to inform you that your request cannot be processed. Under your current terms and conditions of employment you are not entitled to additional leave other than that incorporated into your existing work rotation."**

49. By letter dated 10 May 2004, the seventh claimant, **Mr Sangbarani**, requested annual leave on specific dates that he was due to be offshore in June and July 2004. In his letter he stated that he was doing so:

> **"… in line with the Working Time Regulations (amended) 2003 and unless I am served counter notice not to take paid leave on these dates then it will be my understanding that you have sanctioned my request."**

The response to his request was in a letter of 10 May 2004 which included:

> **"Under the Working Time Regulations valid notice can only be given in relation to leave, which you are entitled to take under Regulation 13. It is not the case that you have an outstanding entitlement to two/four weeks annual leave under that Regulation and on that basis your notice is invalid."**

50. Mr Sangabarani was, at the time of the hearing before the tribunal, receiving what was referred to as two weeks "gifted leave" each year. It is not entirely clear whether he received such leave in 2004. "Gifted leave" is not a statutory term. It is, as we understand it, a term that, according to the respondents, denotes a period of paid leave that has been granted on the basis that the employer does not accept that he is obliged to grant it and does not thereby undertake any continuing obligation to grant such leave in the future. We should record that, in the course of the hearing before us, Mr Stafford QC, on behalf of Mr Sangbarani, conceded that any "gifted leave" that had been received by that claimant in the year in respect of which he claimed ought to be regarded as counting towards the annual leave to which he was entitled.

51. What had, accordingly, occurred was that each claimant had sought to be allowed to take annual leave on specific dates, all of which were dates that they were rostered to work offshore. They had done so in writing and the requests for those dates had all been refused in writing. In the case of Mr Price and Mr Craig, the refusal letters also specifically advised them that leave was to be taken during field break. In the case of Mr Robinson, he was, in addition, told that leave was incorporated into his existing work rotation, a work rotation which involved equal offshore and onshore periods, the latter as field break and can thus, we consider, be regarded as having advised him that leave could be taken during field breaks.

52. Certain of the terms of the claimants' contracts of employment are also relevant to the issues that arise in this case.

53. Clause 4 of **Mr Price's** contract provided:

> **"A tour of duty on the drilling unit will be for 7, 14, 21, 28 days respectively. This tour will be followed by paid off-time period of 7, 14, 21, 28 days respectively …"**

and clause 6 of his contract provided:

> **"In addition to paid leave as specified in Clause 4 above, 4 days vacation pay will be paid to all offshore employees ……..".**

54. Clause 4 of **Mr Craig's** contract provided:

> **"A tour of duty on the drilling unit will be for 7, 14, or 21 consecutive days of 12 hours per day. This tour will be followed by an off-time period of 7, 14, or 21 days respectively ……"**

and clause 6 of his contract provided:

> **"Annual Leave**
>
> **There is no remuneration paid for vacation for offshore employees. Vacation pay is included in your monthly base salary."**

55. Clause 15 of **Ms Taylor's** contract provided:

> **"Work Pattern**
>
> **You will be required to work fourteen/twenty one days as directed by the Company Management, and for each fourteen/twenty one days worked you will be entitled to fourteen/twenty one days leave onshore at the end of your tour of duty ……."**

and clause 18 of her contract provided:

> **"The work pattern provides for 13 trips per annum, a trip comprising of a 28 day period of 14 working days and 14 days field break. Should an employee request (in writing) one trip off work in order to take his annual unpaid holiday entitlement, he will be allowed to do so by arrangement with Offshore Management ……. Should no request be made, he/she will be allowed to work 13 trips per annum."**

56. In **Mr McGuire's** case, his contract referred to the "offshore staff handbook" for "Work pattern". That handbook was not produced to the Employment Tribunal or to us.

57. **Mr Burgess'** contract specified that:

> **"The standard work pattern will consist of an equal amount of weeks offshore as to the number of weeks onshore."**

58. Clause 2 of **Mr Sangabarani's** contract provided:

> **"The standard work pattern will consist of an equal amount of weeks offshore as to the number of weeks onshore."**

and it specified that his "Trip Length" was "2 weeks on/2 weeks off".

59. Clause 7.1 of **Mr Robinson's** contract provided:

> **"The work/field break cycle will be either 28 or 42 days … On completion of the work period, and handover the remainder of cycle is taken as field break."**

60. The tribunal considered the question of how much annual leave the claimants were entitled to, given that they worked, essentially, a pattern of two weeks offshore/two weeks onshore. They carried out a *pro rata* calculation and concluded that the entitlement was to be afforded fourteen days annual leave. Parties were content, before us, to proceed on the basis that that approach was, in principle, correct.

61. It was against the above background that the first and central issue arose, namely whether the respondents' were in breach of their obligations under the WTR regarding annual leave.

62. As regards the three issues raised in the cross appeal, these were potentially relevant to the calculation of the number of days annual leave to which the claimants were entitled. That calculation could be of relevance in the assessment of any compensation that was considered to be due under regulation 30(3) and (4) of the WTR, but not otherwise. The periods of time with which each of the three matters was concerned were all contained within field breaks. The claimants' contention was that all three in fact constituted working time within the meaning of the WTR. The tribunal had, though, carried out the *pro rata* calculation to which we have already referred by regarding the whole of the field breaks as non working time and if the claimants' contentions were correct then the calculation would require to be reworked. It was, however, accepted that, for the most part, it would not make a substantial difference.

63. Ms Taylor's position has changed since she wrote requesting to take leave during offshore periods. Her employer, Marathon Oil, is now operating a 2 weeks offshore/3 weeks onshore pattern. She accepts that her entitlement to annual leave is satisfied under that arrangement.

The Tribunal's Judgment

Annual Leave

64. The tribunal concluded, at paragraph 300, that the claimants had not been granted the annual leave to which they were entitled. They took the view that it required to be taken out of time when they would otherwise have been working offshore. Regarding the respondents' submission that annual leave was provided in the field break, they found that it did not count as annual leave because the claimants were not required to work during such breaks.

65. The process by which the tribunal arrived at that conclusion seems to be as follows. The language of the WTR was not such as to be definitive as to when leave may or may not be taken but under the WTR "leave" was not a "rest period" unlike under the WTD (paragraph 266). The starting point was the WTR and it was the WTR that they were required to apply (paras. 262 and 266). Then, the fundamental purpose of the WTR and the WTD was to protect the health and safety of the workers (paras. 269-271). Then, as a matter of commonsense, a worker's entitlement to rest breaks, rest periods and annual leave required to be "real" so as to genuinely provide a break from:

> **"……. what would otherwise be an obligation to work or be available to work."** (para 272)

66. The next step in the tribunal's reasoning seems to be that rest periods and annual leave were, under the WTR, mutually exclusive concepts; if a period was a rest period then it could not be annual leave. They relied on the case of **Gallagher v Alpha Catering Services Limited** [2005] ICR 673 (CA) in reaching that conclusion. They then found that the respondents could not rely on regulation 17 of the WTR because none of their written contracts of employment identified particular periods of annual leave to which they were entitled (paras 275-277) and they were the only "separate provisions" on which the respondents could rely for regulation 17 purposes. In the circumstances, the "necessary ingredients" for the operation of the regulation were not met (para 277). Then, the tribunal considered that the judgment of the Court of Appeal in **Inland Revenue Commissioners v Ainsworth** [2005] ICR 1149 (CA) did not assist and it was not likely that the forthcoming ECJ judgment would contain anything of relevance for the present cases. It did, however, consider that the case of **Merino-Gomez v Continental Industrias del Cauco SA** [2005] ICR 1040 assisted because of the ECJ having emphasised the need, during annual leave, to get actual rest from actual work. The tribunal also considered this tribunal's judgment in the case of **Sumsion v BBC Scotland** [2007] ICR 678, noted certain

concerns expressed there regarding the position of schoolteachers and others (to which we will return) but dismissed them as being examples of employments where, by agreement, certain parts of the year are set aside for the taking of annual leave (paras 288–9). The tribunal then noted that the respondents relied strongly on a part of the judgment of the Court of Appeal in the case of **Marshalls Clay Products Ltd v Caulfield** [2004] ICR 1502 and that it did support their argument but decided that it should be approached with caution and it was "sufficiently materially different from the circumstances of the present case not to be of assistance" (para 294, and paras 291–293). Then, the tribunal found that it seemed "more logical" (para 298) to regard the regular periods of field break, which they referred to as "non- work" and simply as "rest periods" and therefore not leave. They comment, at paragraph 297:

> **"Any suggestion that at the beginning of any particular field break a worker could give notice that he was about to take two weeks holiday seems fatuous. No-one would be interested."**

67. They did not consider whether the employer could, immediately prior to such a point, or indeed, at any earlier point, give notice that a particular field break was to constitute the annual leave entitlement notwithstanding that, under reg. 15(3), an employer can give notice of leave days allowed or prohibited at any time in advance which, in the claimants' case, would include the day before the field break. Their final conclusion was arrived at on the basis that:

> **"In our view, contrary to that of the respondents, a distinction requires to be drawn between days of non-work which can properly be designated as leave, and those which are simply part of the workers' standard working pattern." (para 298)**

68. The tribunal then discusses what it perceives as difficulties in the respondents' approach under reference to the position of the worker who works five days per week:

> **"Every worker we can think of has periods of non-work, even when the system under which he works might not necessarily follow a strict pattern. The most obvious example is perhaps the Monday – Friday worker, for who Saturday could**

> **be said to comprehend the minimum 24-hour weekly rest period, leaving Sunday undesignated in WTR terms – undesignated at least in terms of the minimum rest periods. The logic of the respondents' position would be to regard each Sunday as part of annual leave, thus affording 52 separate days of leave per annum which in total is in excess of four weeks. Thus, it would be said such a worker has no further entitlement and would never then be released from any day of his scheduled work to take leave." (para 298)**

69. At paragraph 299, the tribunal draw their discussions to a close:

> **"The point then is not so much that there is more than ample time onshore to comprehend annual leave, after allowing for all conceivable rest or compensatory rest periods. The point is more that it is only in any sense meaningful to have leave from the time when a worker would otherwise have been working."**

70. Overall, the tribunal appear to have determined this issue as they did for two main reasons. One was that the field break could not count as annual leave because it was simply part of the normal working pattern. The other was that it could not constitute annual leave because it was not time when the claimants would otherwise have been working.

Travelling time and treatment of periods on training courses etc

71. The tribunal determined that the time between the claimants arriving at the embarkation point in Dyce, the site of the heliport, and reaching the installation was not working time because they were not at their workplace or at the respondents' disposal or carrying out their work activities or duties until their shift started on the installation (p. 146).

72. The tribunal determined that the time that the claimants spent travelling to and from any training courses or medical or other appointments, during the field breaks, was not working time, for the same reasons.

73. The tribunal was satisfied that the time spent at such training courses or appointments was working time but did not factor it into their pro rata calculation when assessing how many days annual leave the claimants were entitled to under the WTR.

Appeal in respect of Requests for Annual Leave:

i) Respondents' Submissions

74. Mr Cavanagh QC submitted that the practical reality was that the claimants received 26 weeks "off" each year. That enabled them to gain the rest that the WTD and WTR was concerned with and return to work refreshed at the end of each field break. There was no reason of principle, law, commonsense or logic for ignoring the field breaks when considering whether they had had their annual leave. The oil industry happened to have called the onshore time "field break". They could, equally, have called it "leave". Time off during field break was "real" and provided a genuine break from work. It was a release from what would otherwise have been an obligation to work, had the respondents not been prepared to build generous amounts of leave into the working pattern. The respondents were not in breach of their WTR obligations.

75. Mr Cavanagh QC submitted that when the claimants' contracts of employment were examined, they made it clear that the claimants were entitled to the field break periods onshore and that that field break covered their leave entitlement; some, such as Mr Price's and Ms Taylor's even referred to the field break as "leave". Others used terminology which was indicative of the onshore period being leave. It was not necessary for the contracts to use the word "leave" for it to be clear that they were referring to periods of leave. The claimants' requests for leave had been validly refused.

76. He observed that at the core of the tribunal's reasoning was the conclusion that annual leave required to be taken from time that the claimants would otherwise be working and since the claimants did not require to work during field breaks, those periods could not count towards annual leave. That was, he submitted, circular reasoning and not sustainable in principle. It was not supported by the WTD or the WTR where there was no reference to the "worker's standard working pattern", an idea which was introduced by the tribunal. The tribunal's conclusion was contrary to commonsense and contrary to the spirit and purpose of the WTD and WTR. It would make the WTR unworkable. Further, it was inconsistent with the decisions in **Caulfield** and **Sumsion**, both of which he relied on as supporting the respondents' case. The respondents in fact had a requirement for work to be carried out during 52 weeks each year. They operate so as to allow a generous period of rest to their workers and employ them in sufficient numbers so as to allow for the field breaks. The result was that offshore workers in fact received more annual leave than the statutory minimum.

77. Regarding the tribunal's reliance on the fact that the WTR provides for "rest periods" and "annual leave" to be mutually exclusive periods, that did not mean that the field breaks could not be leave. The regulations were so drafted only to ensure that workers obtained their entitlements to weekly rest, compensatory rest and annual rest and that there was no double counting.

78. Mr Cavanagh submitted that if the tribunal's approach was correct that would mean that teachers, professional footballers and other workers who did not work during certain periods of the year because there was no work for them to do, could not be regarded as being on leave during those periods and so would be entitled to leave out of the periods when they were working. In the case of teachers that would be term time and in the case of footballers that

would be during the football season. The tribunal's reasoning was misconceived. In such cases and in the case of the claimants' field breaks, the "off" periods were periods when there was no work for them to do simply because they had been already been designated as leave. In fact the offshore workers' case was *a fortiori* of the teacher and footballer examples because the business carried on operating as usual when they were on field break.

79. Mr Cavanagh submitted that the tribunal had been wrong to view the decision in **Sumsion** as supporting their conclusion; it did not. It supported the respondents as showing that annual leave could be taken from periods when a worker was not rostered to work. Also, the comments of Laws LJ in the case of **Caulfield** regarding the issue of whether a day "off" within an established working pattern can count as leave, supported the respondents' argument and whilst recognising that it was not binding on this tribunal, invited us to be persuaded by it. He also referred to the case of **Ainsworth**. It concerned what a worker required to do to earn his annual leave and was a dispute about pay; the employee on long term sickness absence had run out of sick pay and contended that there was an entitlement, at the year end, to pay in respect of annual leave. There was no question in such a case of a need to take rest from work; the employee had not been working. It did not support the claimants' case.

80. Since the appeal hearing in December 2008, the ECJ has issued its judgment in **Ainsworth** (Case C -520/06: C Stringer v HMRC). It was delivered on 20 January 2009. Since it was referred to by the tribunal and all parties had referred to the case in the course of their submissions, we considered it appropriate to give counsel the opportunity to make any further submissions they wished to make regarding it, in writing. Those submissions were exchanged between counsel and lodged with this tribunal on 30 January 2009.

81. In those further submissions, Mr Cavanagh argues that the ECJ's judgment confirms the correctness of his earlier submission that the case concerned different issues. He points out that the ECJ refers to the **Merino Gomez** case and endorses its earlier expressed view that a worker cannot be required to take annual leave during a period when he is exercising a separate entitlement – the EU entitlement to maternity leave in the **Merino Gomez** case and the entitlement to sick leave in **Stringer.** He also draws attention to the ECJ's observation at paragraph 25 that annual leave must be actual rest and submits that that describes field breaks. He resists the submission made in the claimants' written submissions on **Stringer** to the effect that the judgment shows that an employer extinguishes a worker's right to annual leave (which needs to be actual rest) if he requires him to take the leave at a time when he is already at rest. That, submits Mr Cavanagh, simply highlights the fallacy at the heart of the claimants' case. He adds that if the claimants were right about that then whenever a contract of employment sets out a specific leave entitlement, that entitlement would require to be ignored when assessing whether or not the leave to which they are entitled under the WTR has been afforded to them. **Stringer** does not, he submits, support such a conclusion.

82. Regarding the **Merino Gomez** case, Mr Cavanagh submitted that it did not support the claimants' case either. It was irrelevant. It concerned maternity rights. When the worker was on maternity leave she could not also be regarded as being on annual leave. The employers were, accordingly, obliged to give her annual leave when she returned to work after her maternity leave. Had the employers been entitled to deny her such leave on the basis that she had been absent on maternity leave during their annual shut down, the result would have been a denial of her maternity rights.

83. He observed that the claimants' approach involved ignoring the field breaks because they were part of the normal working pattern. He submitted further that a side effect of the claimants' approach would be that it would be impossible to establish gaps in work which could count as leave and those which could not. He referred to the fact that Ms Taylor now accepted that her new working pattern provided her with her annual leave entitlement but that was inconsistent with the argument that time off within an established working pattern could not count. The field breaks were not working time. They were, applying the principle of the WTD, rest. They were not weekly rest nor were they wholly compensatory rest. Insofar as field breaks were not compensatory rest, they must be annual leave.

84. Mr Cavanagh also relied on regulation 17. The effect of its provisions was that if a contractual right to annual leave was more generous than the statutory entitlement then the worker was not entitled to the statutory period in addition. The tribunal had rejected the respondents' reliance on regulation 17 because the annual leave periods had not been earmarked in advance but that reasoning was misconceived. The contracts of employment provided for a work pattern that had a generous period built into it during which the claimants could do as they liked. It was plain that there was more than enough allowed for to satisfy the annual leave period. The tribunal had, in effect, introduced a new requirement into the WTR namely that the respondents were under an obligation to identify specific periods of annual leave in advance. There was no justification for that and it would, moreover, be contrary to the spirit and intent of the WTR. Such an approach would put form before substance. If, in practice, a worker knew in advance that he had certain periods of time off, why should it matter that the employer had not used the words "annual leave" when specifying that in his contract? Field breaks were not something that were only known about in retrospect. They were quite different from the WTR "rest breaks" and the case of **Gallacher** was not in point.

85. Regarding what had come to be known as "the Saturday problem", namely the claimants' argument that if the respondents were correct in saying that annual leave did not require to be taken from offshore periods during which the claimants would have been rostered to work then an employer in a five day per week contract could designate Saturdays as annual leave, it was a false analogy, if an employer in a five day per week contract did that it would be a sham (**Sumsion**) and it may be that it is necessary to read Article 7 of the WTD and regulation 13 of the WTR as meaning that employers must allow employees to take their leave in periods of more than a single day if that is what they wish. The issue did not arise in this case though; the respondents were not seeking to have the claimants take their leave in single days.

ii) Claimants' Submissions

86. For the TGWU/Amicus claimants, Mr Stafford QC invited us to refuse the respondents' appeal. This was the latest episode in a long running struggle by offshore workers to secure annual paid leave for themselves in accordance with their statutory entitlement. The tribunal were correct in their conclusion.

87. Regarding the respondents' reliance on the contracts of employment, it was ill-conceived because the contracts predated the introduction of the WTR; they were not drafted with the WTR in mind. The 2 weeks on/2 weeks off system was all concerned with the respondents' organisational needs not with the affording of annual leave. The respondents were attempting to label periods as annual leave retrospectively and they were not entitled to do that. They were, in effect, arguing for rolled up leave, which was as prohibited as rolled up holiday pay.

88. If the respondents were correct, then it would sanction the employer in a five day contract insisting that annual leave had been taken because he had allowed his employee every Saturday off. On the contrary, a worker was entitled to know in advance when he was at work and when not at work (and not on call). What was required was that a worker was put in the position of knowing in advance that his employer regarded a period as annual leave and that the leave was at a time when, otherwise, the worker would be working. That was the core of his submission.

89. Mr Stafford submitted that although the WTR did not specify that an employee had to know how time that he was not at work was labelled, that was something that really had to be read into the regulations. It was necessary to identify in advance that a period of time off was a period of annual leave. Regarding regulation 17, it should be read as envisaging that the worker will make an election and that also meant that he was entitled to know in advance what his employer was proposing to treat as annual leave. Without that, how could he make the election? It was information which, for the purposes of regulation 17, he was entitled to have. It was not enough, for instance, for a worker to know that he had "next week off". He needed to know its status.

90. Mr Stafford relied on the **Merino Gomez** case. It was, he submitted, devastating to the respondents' case because it showed that the ECJ were not content that annual leave should have been reduced to a question of finance. It showed that what was required was actual leave and that the national court had to look beyond the fact of leave and look at the reason for it. It was not permissible to treat rest that was for some other reason to be treated as annual leave; to do so would reduce the matter to one of pay and ignore the importance of rest.

91. Mr Stafford also relied on the case of **Sumsion**. The discussion at paragraph 29 demonstrated how an employer could shut down the workplace for a period each year yet still achieve real annual leave; the order of events would be that he would first tell his employees that they were to take leave during that period and thereafter determine that the workplace would be closed. As to teachers and footballers and the like, they had contracts which told them when their annual leave was going to occur and therefore, he submitted, those cases fell outwith the scope of the argument in the present case.

92. Regarding **Ainsworth**, Mr Stafford recognised that it was not binding authority and that the decision of the ECJ was not yet known but it could be distinguished as it concerned a case of absence through sickness and recognition of the fact that if someone is not working at all in any event then the burden of work cannot be reduced by leave.

93. A written submission regarding the ECJ's judgment in **Stringer** was lodged jointly on behalf of all the claimants. They doubt whether it is of any real relevance to the appeal. They submit, however, that some themes emerge from it which indicate that the ECJ would take a favourable view of the claimants' case about leave and field breaks. They submit that one such theme is the capacity of the worker to choose when to take his annual leave. That shows, they say, that a worker cannot be compelled to take annual leave at a time when there is no actual benefit to him. Leave has to confer an actual benefit and if a worker was "already absent from work for one reason or another" then he would not have enjoyed the social value of his EU right to annual leave. They submit that the ECJ emphasises that the worker must be allowed to take the actual benefit of leave and that that shows there is inconsistency if the employer is allowed to extinguish its social value by compelling him to take leave at a time when he is already at

rest. They submit that overall the decisions in the cases covered by the **Stringer** judgment are strongly in favour of workers and it would be would be difficult to imagine that the ECJ would adopt the opposite philosophy in respect of the issues that arise in these appeals.

94. Mr Hendy QC, for the OILC claimants adopted Mr Stafford's oral arguments. Further, the contracts of employment confirmed that they were correct. They did not specifically give the claimants an annual leave entitlement, they did not specify that annual leave required to be taken during the field breaks and they did not say which parts of the field break were to count as annual leave. It was commonsense that annual leave had to be taken from what would otherwise have been offshore time; that was what leave meant to an offshore worker. Further, no regulation 15 notices had been given by the respondents apart from in Ms Taylor's case. The WTR had come into effect for the offshore industry in 2003. These contracts of employment predated that occurrence. It was hard to imagine that it was thought that the introduction of the WTR required no amendments to be made.

Claimants' Appeal: When working time begins in respect of each offshore trip, whether periods of travel to and from training courses and medical etc appointments is working time and whether the tribunal erred in failing to allow for onshore time on training courses and medical etc appointments in its calculation of days of annual leave to which the claimants were entitled?

Submissions for the claimants

95. The claimants' submissions, as advanced by both Mr Stafford and Mr Hendy were that the tribunal had erred in determining that the time involved between the embarkation point and installation did not amount to working time. They had wrongly likened the position to that of the 9am to 5pm office worker whose travelling time from home to workplace may be significant but is not working until 9am when he is at his desk. It was not simply a question of

viewing the claimants' situation as being a matter of "commuting to work albeit by unusual means" (p.146). All three parts of the test for working time as set out in the WTD and in the WTR were met as soon as the claimants "clocked in" at Dyce. They were under the control and direction of their employers from that time onwards. Their freedom was considerably restricted from that point. It was analogous to being on call. Reliance was placed on the judgments of the ECJ in **SIMAP** and **Jaeger** where, at paragraph 63, the ECJ explained that the fact that on call doctors required to be present at a place determined by the employer was a decisive amongst the decisive factors that showed that the time spent on call was working time. The requirement to be physically present at the place determined by the employer was also regarded as satisfying the first part of the three part test in **Dellas** and **Vorel**. What happened at the heliport was, it was submitted, an integral part of the job. Travel to the installation by helicopter was for the respondents' purpose of providing the workers' services at the start of the next shift.

96. Regarding time spent travelling to training and appointments when on leave, the claimants' argument was not pressed so strongly as that for having working time regarded as beginning once they "clocked in" at Dyce. It was, nonetheless, insisted on. It amounted, it was said, to working time because the claimants were called off leave and were not then free to spend their time as they chose to do. It was not argued on behalf of the claimants that time spent travelling to and from Dyce at the start and end of every offshore tour amounted to travelling time and it was recognised by counsel that it might seem illogical to argue that time spent travelling to and from these activities during onshore field break *was* working time. There was, however, it was submitted, a subtle distinction that lay in the fact that the claimants were being called away from what would otherwise have been free time.

97. The point regarding the working time involved in training and medical etc appointments was a short one. The tribunal had erred in failing to make some allowance for them when carrying out its calculation of leave days. Whilst it was recognised that since it might, depending on the individual claimant, not even amount to a full day, it mattered because the claimants would seek to argue, if they were ultimately successful, that they had lost paid leave and since they could not now be given the leave they should be given the pay in respect of it. Although the tribunal had commented that the periods involved were *de minimis* (at paragraph 295), that was not in the section of the judgment that was dealing with this issue.

Submissions for the respondents

98. Mr Cavanagh submitted that in respect of the period between Dyce and the installation, the test for working time was not met. All three parts of it required to be satisfied and the claimants were ignoring that. There was no doubt that each part of the test had to be satisfied; that was clear from the fact that the Advocate – General in **Dellas** had expressed the view that that was not necessary but the ECJ had declined to follow it. The first element required workers to be physically at the workplace (**Jaeger**) and the embarkation point at Dyce was not the workplace. It was not where the respondents had the claimants do the work for which they were employed. It was not the respondents' premises nor were they in control of the helicopter flights; an independent company provided the helicopter transportation services and rules about baggage, clothing, searches and conduct were imposed by them for health and safety purposes. Nor were the claimants at their employers' disposal just because they were at the heliport. Whilst there were certain controls to which they were subject, they were not at the respondents' disposal. A comparison could be drawn between them and, say, an airline pilot who was not allowed to drink alcohol for 48 hours prior to his shift but was not at the employers' disposal or with an employee who was subject to a particular residence requirement who again was subject

to a measure of employer control but not constantly at the employers' disposal. Under the WTD and WTR, some activities that did not feel restful would nonetheless amount to a rest period. The fact that being at the heliport and being transported to the installation was not particularly restful did not mean that it was therefore working time.

99. Regarding the travelling time to and from training courses and appointments, the claimants' position was even weaker. Those periods could not be shoehorned into the statutory requirements for "working time".

100. Regarding the time spent at training and appointments, the tribunal had not erred. It had regarded these periods as *de minimis* as explained at paragraph 310.12.

Discussion

Annual Leave:

101. We consider that two rather different issues have arisen in relation to this matter.

102. The **first issue** concerns the giving of notice in respect of annual leave periods. It involves looking at whether the respondents had in fact already, in terms of the claimants' contracts of employment, given effective regulation 15 notice that annual leave would be taken during field break. Then if they had not done so, the question arises as to whether they gave other notice to the claimants, in accordance with their entitlement under regulation 15, that they were not to take leave during the periods requested and also whether any notice of periods when leave could be taken was given.

103. The **second issue** involves considering whether time off during onshore field break can ever constitute annual leave.

104. Turning to the *first issue*, we begin by observing that regulation 15 of the WTR does not require that employers communicate the directions they are entitled to give to their employees about the timing of their leave or the days that they are to refrain from taking leave, in any particular form. Any such notice that the employers decide to give must tell the employees what days they may or may not take leave but neither the WTD or WTR suggest that actual dates require to be specified by the employers.

105. We can see that there will be circumstances where it will be possible to identify days in advance before the precise dates are known whether by reference to, say, the summer weeks that a manufacturing workplace closes for servicing purposes or to a period after the completion of a particular piece of work for a client, or otherwise. Similarly, it may be possible for an employer to identify, in advance, days when he does not want employees to take leave; accountants, for instance, may be prohibited from taking leave whilst a particular client's annual audit or other piece of work is ongoing. Further, the employers' notice under regulation 15 can be given at any time in advance of the "relevant date", whether before, after or in response to an employee's regulation 15 notice. So, in a case where an employers' position is that he has given regulation 15 notice, the question is simply that of whether the employee knows, as a result of whatever communication there has been on the matter, either when he can, or when he cannot, take his annual leave. Both may be specified but either is sufficient to entitle the employer to refuse to allow leave to be taken at a time that does not match specified leave days or conflicts with days that have been specified as not available for leave.

106. In this case, to answer the above question, it is necessary, firstly, to examine the terms of the contracts of employment, to which we have referred above.

107. In the case of Mr Price, a majority of us consider, that it is plain from a reading of clauses 4 and 6, that he was given notice by his employers, in his contract, that they required annual leave to be taken out of the field break. One of the lay members considered otherwise; the contract required, in his view to provide "specific designation" of the claimant's period of annual leave before it could be seen as amounting to regulation 15 notice by the employer.

108. In the case of Mr Craig, whilst the judicial member of this tribunal considered that the reference to a tour of duty being followed by an equal period of "off time" was sufficient to communicate to the claimant that his employers required him to take leave during the "off time" periods, the lay members considered otherwise.

109. In the case of Ms Taylor, a majority of us considered that it is plain from a reading of her contract, particularly the specific reference in clause 15 to "leave onshore" that she was given notice by her employers, in her contract, that they required annual leave to be taken out of the field break. One of the lay members considered otherwise, again, because in his view the contract required to provide "specific designation" of the claimant's period of annual leave before it could amount to effective regulation 15 notice.

110. In the case of Mr McGuire, no copy of the staff handbook referred to in his contract was available which prevents a concluded view being reached as to whether or not it contained effective regulation 15 notice.

111. In the case of Mr Burgess, his contract is in the same category as Mr Craig's.

112. In the case of Mr Robinson, the majority of us considered that the reference in his contract to the work/field break cycle and to the fact that on completion of the "work period and handover" the remainder of the cycle is taken as field break amounted to effective regulation 15 notice that his employers required him to take annual leave out of the field break. Again, one of the lay members considered otherwise because of his view that the contract required to provide "specific designation" of the claimant's period of annual leave before it could amount to effective regulation 15 notice.

113. The majority of us would also observe that although the labelling may vary from contract to contract, it is clear that the field breaks are free time, not working time and (subject to such training courses and appointments as are required) the claimants are free to use the time during the field breaks as they choose. They are certainly available for the claimants to use as rest periods and they amount to rest periods which, even after allowing for compensatory rest training and appointments, exceed the minimum annual leave provided for in the WTD and WTR. It is not, in the circumstances, surprising that it was not suggested on behalf of the claimants that the existing work/field break patterns were problematic from a health and safety perspective.

114. We recognise that the contracts largely predate the point at which the WTR came to affect the offshore industry. That fact of itself does not, however, prevent them from being viewed as giving effective regulation 15 notice as to the days when annual leave can or cannot be taken.

115. We also require to consider whether regulation 17 applies. The respondents say that it does since it is plain that the contracts provide for more generous leave than that which the WTR require. The claimants say that it does not because the claimants were not made aware, through the contracts, of precisely when their leave could be taken and without that, they were not in a position to assess which of the WTR and the provisions of the contracts of employment were a better option.

116. The Employment Tribunal considered the effect of the contractual terms and regulation 17 at paragraph 275. They approached matters on the basis that before regulation 17 could apply the contract of employment required to specify the precise dates when leave could be taken. We do not agree. As we have already observed, all that the WTR provides is that employees are entitled to four weeks annual leave. It does not specify how or when or in what periods the leave is to be granted. Nor are employees required to take the leave to which they are entitled. Where an employer decides to give a regulation 15 notice, precise dates do not, as we have discussed, require to be specified. It would, in particular, be enough to specify a period or periods to be avoided and that without reference to the actual dates of those periods. The Employment Tribunal are wrong to suggest that regulation 17 cannot be relied on unless the terms of the contract of employment are such as to tell the employee precisely when he is to take his leave. That is not what it provides.

117. Regulation 17 seems to us to be principally concerned with two things. The first is to make it clear that employees' rights under the WTR and their contracts of employment or other arrangements are not cumulative. The second is that where the WTR and the contractual or other provision are different, it is open to the employee to opt for whichever is the most

favourable. He is not restricted to the WTR entitlement. That, of course, follows from the fact that the entitlement to four weeks leave is a minimum entitlement and it is always open to employers to afford an employee more than that. The comparison that an employee requires to be able to make is not a complex one. It simply involves considering whether the contractual or other provisions to which his employment entitles him amounts to more or less than four weeks annual leave. In the present case, a majority of us consider that the contracts do make it plain in three of the cases (Mr Price, Ms Taylor and Mr Robinson) that the claimants were and are entitled to more than four weeks annual leave by way of field breaks and if we had been in any doubt about that it would have been resolved by Mr Hendy's concession. Regulation 17 is, accordingly, relevant to them.

118. Still regarding regulation 17, the tribunal took the view that what the respondents were seeking to do was to have periods of onshore field break labelled as annual leave retrospectively and they were not entitled to do that, on the authority of **Gallagher**. We consider that the tribunal erred in considering that **Gallagher** was relevant. It was a decision about rest breaks. It identified the undesirability of telling an employee subsequent to a short period whilst at work that what he had had no reason at the time to think was a rest break had in fact been a rest break. The circumstances are not comparable to those where offshore employees take two weeks of field break and know well in advance that those two weeks are going to be spent onshore and free of work obligations, which was the position here.

119. We turn then to the question of whether the various responses to the claimant's requests for annual leave were regulation 15 notices by the employers as to days when the claimants either could or could not take their annual leave. In every case, the claimants asked to take leave for periods between particular dates. In each case they were told that they could not do so.

That being so, in every case, the employers had given notice that specified the days on which leave was not to be taken, namely the days of leave that were specifically requested. Furthermore, they did so in advance of those particular dates. In these circumstances, a majority of us are satisfied that the respondents had given effective regulation 15 notices and for that reason alone, could not be said to have wrongfully refused to permit the claimants to take leave at the times specified. They were entitled to respond to the requests by giving the notifications that they gave. Their claims under regulation 30 that their employers were in default thus fail. Separately and in addition, the majority of us consider that, in the case of Mr Price, Ms Taylor, Mr Craig, and Mr Robinson, the responses to their requests for leave also intimated to them, in accordance with the respondents' notification entitlements, that their employers required leave to be taken during field breaks. Further, as explained above, a majority of us consider that in the cases of Mr Price, Ms Taylor, and Mr Robinson, regulation 15 notice had been given in their contracts of employment.

120. We turn then to the *second issue* which concerned the claimants' assertion that, as a matter of principle, their entitlement to annual leave had to come out of periods that would otherwise have been offshore working periods. Their argument seemed to be that that being so, the respondents ought to have responded to their requests for leave by granting them. Before looking at this issue of principle, which was and is of great concern to the claimants, we should observe that there is nothing in either the WTD or WTR to render invalid an employers' regulation 15 notice refusing a request for leave at a particular dates on the basis that the reason for the refusal is flawed in some way. Under the WTR, the employer's entitlement to intimate regulation 15 notification is not dependent on his decision to issue the notice being reasonable or on the reasoning behind his decision being free of error. We mention this because it seems that the claimants considered that if they could show, as a matter of principle, that leave had to

be taken out of offshore periods then that would be enough for the success of their claims. That approach ignores, however, that what the tribunal had to consider was whether, in the case of each individual request for leave, the respondents had wrongfully refused to permit the claimants take leave at the dates requested. As we have indicated, the majority of us do not consider that they did do so. The issue of principle regarding taking leave out of offshore or onshore time is one which we require, nonetheless, to consider, because of the fact that in some of the cases, as discussed, the respondents had given notice to the claimants, in addition to advising them that they were not to take leave at the dates required, that annual leave required to be taken out of the field breaks.

121. The question is: Can annual leave be taken out of time when the claimants are rostered to be onshore, on "field break"?

122. We begin by observing that "four weeks annual leave" is not defined in either the WTD or the WTR. Giving the language its ordinary meaning, as used in both instruments, it connotes an entitlement to be absent from work for a total of four weeks in each year, not at the employers' disposal during that period and also free from all employment duties during it. Under the WTD it is a type of "rest period". Under the WTR it is not described as a rest period but it is clear that, just like "rest periods" under the WTD, it is a period during which the employee is free from all three of the component elements of "working time". There is no suggestion that, during the field break that is surplus (i.e. after allowing for compensatory leave and the working time involved in training courses and appointments), the claimants require to be physically present at a place determined by their employer. There is no suggestion that they are at the disposal of their employers. Nor is there any suggestion that they are actually carrying out their normal working activity or, as in the case of the on call worker, under a duty

to hold themselves ready to work if called on (see; **SIMAP**, **Jaeger**, **Anderson v Jarvis Hotels** UKEATS/0062/05). Nor, to put matters more generally and in the light of the underlying purpose of the WTD and WTR, can it be said that the field break is not real rest from work. That background, does not, on the face of it, seem to point to the conclusion that annual leave could not properly be taken during field break.

123. We have considered whether the authorities relied on by parties require us so to conclude. Taking them in the order in which they were discussed by the tribunal, we turn firstly to the case of **Ainsworth**. The facts are not in point. The issue there was whether, where an employee was on long term sick leave and had run out of sick pay, he was entitled to be paid in respect of four weeks' annual leave. As Mr Cavanagh observed, the issue was one of entitlement to pay and not about the taking of actual leave. The Court of Appeal took the view that in such a case the provision of leave could not serve the health and safety purpose of the WTD and WTR. The tribunal relied on it as indicating that they required to be satisfied that the claimants would have been working during the periods that they would otherwise have been working. We do not agree. The tribunal should have borne in mind that its circumstances were quite distinct from the present case and that, at that time, the ECJ's view on the issue raised, were not known. The ECJ judgment has now, as we have observed, been issued. We have considered its terms and note that, in essence, it determines that a worker's right to annual leave is not extinguished by sick leave. So, it is open to him, during sick leave, to designate a future period as annual leave and, if he is on sick leave for a whole year, he does not lose his entitlement to be paid in respect of his annual leave entitlement. We agree with parties that it is of little relevance to the present case. We do not agree that the approach of the ECJ supports the claimant's argument. Whilst the ECJ notes that it was common ground that the purpose of the right to paid annual leave is to enable the worker to rest (paragraph 25), we do not see that

that shows that the ECJ has or would adopt a philosophy whereby a pre-ordained rest period during which the worker is free of all obligation to the employer, as is the case with the field break, could never constitute annual leave, which is what the claimants' appear to suggest in their written submission.

124. Turning then to the **Merino Gomez** case, the tribunal interpreted it as being authority for the proposition that annual leave should not be taken when a worker is, in any event, absent from work but must be held over until he is actually working. The claimants relied on the case as being to that effect and also as showing that it was not possible to be both on field break and on annual leave, as "doubling up" was not allowed. We consider that both the tribunal and the claimants are wrong in their assessment of the principle for which **Merino Gomez** is authority. We agree with Mr Cavanagh that it is clear that the concern of the ECJ was to see to it that the employee was not deprived of her maternity rights, which would have been the result of holding that she had to be taken as having taken her annual leave during her maternity leave since her employers' annual shutdown took place at that time. Again the circumstances are quite different here and no potential clash with or inroad into other statutory rights arises from allowing the respondents to provide that annual leave is not to be taken out of offshore time or that it is to be taken out of field break.

125. The majority of us turn then to the case of **Sumsion** relied on, curiously, by both claimants and respondents as supporting their respective arguments. The claimant there was a carpenter employed on a short term (6 month) contract to work on a particular production. It is important when considering the case to note that the issue that was expressly put before this tribunal was to what extent could an employer in a "weekly based employment relationship" legitimately make use of Saturdays to meet his statutory obligation to afford annual leave. This

was in circumstances where the claimant was, on the tribunal's findings, required to work on Saturdays, albeit on an "on call" basis, where he did not require to be at the workplace and his leave entitlement was met by relieving him of all duties, including that of being on call, on alternate Saturdays. The argument was that his leave days did not count as leave because he would not have worked on them. There was considerable stress placed on the risk of allowing exploitation by unscrupulous employers if Saturdays were allowed to be used in this way. There was concern that employers in five day per week contracts could start nominating Saturdays as leave days. It was in that context that this tribunal decided as it did. We stressed the importance of considering the particular facts and circumstances of each case, of bearing in mind that it would always be open to a tribunal to conclude that a leave provision being advanced by an employer was a sham and that, on the particular facts of **Sumsion**, there was in fact no problem as it was evident that he was taking what was referred to as "real" leave in circumstances where the argument on his behalf was really to the effect that it was a sham. We would add that it seems to us clear that in the case of a five day per week contract it would be very difficult for an employer to elide the obvious conclusion that he has opted to give his employees 48 hours weekly rest rather than stick to the minimum 24 hours rest provided for by the WTR. It would not then be open to him to suggest that the extra 24 hours is also annual leave; it cannot be both.

126. Separately, the discussion that we entered into at paragraph 29 in **Sumsion** has, the majority of us note, given rise to some debate. It was provoked by the submission advanced there (and advanced in the present case) that if a period is one where an employee would not, in terms of his employment contract or arrangements otherwise be working, it cannot count as leave, even though it is a period of rest and freedom for him. The implications of such an argument for types of employment such as those of teachers or in trades where leave is taken

during a period when the workplace is closed are very significant. In **Sumsion**, this tribunal considered that if, in principle, the proposition was correct, that would mean that teachers would have to be allowed to take leave during term time in addition to the normal school holidays. Mr Cavanagh encouraged us to think of other forms of employment including those of professional footballers (who would have to be allowed to take leave during the football season) and potters (who, despite the fact that the kilns have to be cooled once each year during which period no work can be done) would have to be allowed to take leave during periods when the kilns were fired up and ready for use. There are no doubt many others and the majority of us do not consider that the obvious illogicality that arises is met by the claimants' attempt to sweep these examples away as being contractually different from the present case or as it being a matter of looking at the order of events as to which came first: the decision to shut down or the decision to give all employees their leave at the same time, as was at one point suggested. The majority of us continue to consider that these other examples provide useful and instructive tests, by way of analogy, as to the validity of the essence of the claimants' argument and it remains the case that we are reminded of what Lord Steyn said in **Malik & Mahmud v BCCI** [1997] IRLR 462 namely that "if a train of reasoning leads to an unbelievable consequence, it is in need of re-examination."

127. Finally, we consider the case of **Marshalls Clay Products Ltd v Caulfield and others** [2004] ICR 1502, a decision of the Court of Appeal. It concerned contractual arrangements whereby the employees in question worked on a four days on/four days off shift pattern. There was provision in the contract for employees to opt for an extended eight or sixteen day "off" period. Mr Cavanagh was careful to recognise that it is not binding on us and also that the main issue considered in the case was that of the legitimacy or otherwise of rolled up holiday pay, a matter with which this case is not concerned. However, we consider that he was right to draw

our attention to the discussion of what was referred to as *"The applicants' new argument in **Caulfield**"* and the majority of us do not agree with the tribunal that it is not of assistance. At paragraph 24, Laws LJ summarised the "new" argument:

> **"It is convenient first to deal with Mr Hogarth's submission, advanced as I understand it for the first time on this appeal, that the contractual arrangements in Caulfield expose a florid violation of the Directive and the Regulations because they do not allow for annual leave at all. The submission depends on the proposition that a worker who in any year takes advantage of the contract's provision for an extended period leave of eight or 16 days does just as much work, not a day less, than his fellow who takes no such leave but merely sticks, all through the year, to the four days on/four days off regime. The argument's premise, of course, is that the worker remaining on the ordinary regime gets no leave. The premise is false. I have already set out the material terms of the collective agreement, including this provision: 'holidays are taken during the rest day periods in the rota system.' It is beyond contest that rest day periods are included in the four days on/four days off regime. There can in my judgment be no quarrel with the appeal tribunal's finding …**
>
> **"holidays are taken by employees as part of their four out of every eight days throughout the year …"**

128. At paragraph 25, he notes the submission that a day can only be categorised as a day of leave if it is a day on which the worker would otherwise be working and continues:

> **"But the submission proves too much and therefore goes nowhere. Save in a case where the contract dictates the dates on which leave is to be taken (and of course no one contends that the Directive requires so crudely inflexible a state of affairs) any day might be one on which 'the worker would otherwise be working'."**

129. The similarities between the circumstances in Caulfield and the present case are striking and the majority of us cannot help but conclude that Laws LJ would give the argument being presented here to the effect that annual leave cannot be taken out of field break because the claimants would not otherwise be working during it, similarly short shrift Whilst it is not binding on us, it provides the majority of us with a considerable measure of reassurance as to the validity of our own conclusion.

130. In all the circumstances, the majority of us conclude that the claimants' argument is without merit. The time conceded to be available in the field breaks is not working time nor is it compensatory rest. Further, during that available time, the claimants are free of all and any actual work obligations and not subject to the possibility of being called on to work. It is a rest period and is a rest period during which none of the three criteria involved in the definition of working time in the WTD and WTR apply either actually or potentially. It is time that is available for annual leave; it is available to afford to the claimants the rest from work which the WTD and WTR seek to achieve. It does not matter that, because of the working patterns in the industry, the claimants would not otherwise be working during those periods. The tribunal came close to realising as much in recognising that there was a circularity to their own argument. Unfortunately they became deflected by wrongly thinking that field break could not be used for leave because the claimants would not otherwise have been working during it.

131. The majority would add that if it were necessary to consider whether the field break time could be characterised as time when the claimants would otherwise be working, we are satisfied that field break would qualify. That is because the starting point is to recognise that in the offshore industry, workers require to work 52 weeks per year, 24 hours per day. That is plain from the employees' contracts in this case. The reason that that does not happen in the case of the individual is the particular offshore/onshore arrangement that the respondents have organised. So, as Laws LJ recognised in **Caulfield**, in such cases, the "off time" is in fact time when the employee would, were it not for the arrangements put in place by his employer, be working. Unless that is recognised the submission is, as he put it, allowed to "prove too much" when in truth it is going "nowhere".

Minority View

132. Mr Thomson disagreed with the majority. He would refuse the respondents' appeal for the reasons relied on by the tribunal and summarised by them at paragraph 300. He would add that if he were wrong about that he would still refuse their appeal on the grounds that on the facts found by the tribunal the respondents had not properly responded to the claimants' regulation 15 requests for annual leave. The respondent "lumped" rest periods, leave and time for medicals and training into field breaks. In his view for annual leave to be meaningful and conform to the purpose and intention of the WTD and WTR, a worker is entitled to know when they are on annual leave i.e. the actual period of annual leave has to be identified. As a result of this failure by the respondents, the claimants had not received their entitlement to annual leave under regulation 13 of the WTR.

133. Further, he agrees that the ECJ decision in the case of **Stringer** is not directly relevant to the present case. However it is his opinion that the ECJ's emphasis that the worker must be allowed to take the actual benefit of annual leave supports his contention that the period of annual leave has to be identified/designated.

Unanimous Observation

134. It occurs to all of us that the conflict that has arisen in these cases might have been avoided if the respondents had acted as an employer who seeks to achieve best practice in employment relations could have acted. Whilst, as we have indicated, we consider that the respondents here acted in accordance with the rights conferred on them by regulation 15, it would have been open to them to give advance notice to the claimants of the periods that they could and could not take leave, rather than leaving matters until the various regulation 15 notices were served by the claimants. Many employers do, without difficulty, operate on the

basis that employees are given such notification well in advance of the beginning of each leave year either in their contracts of employment or on an annual basis.

Other Issues

135. As we have indicated, the other issues debated in this appeal are only of relevance if the claimant's claims that they have been denied annual leave to which they were entitled are well founded. The result of our decision on that issue being that that claim is not well founded, these issues, which were subsidiary in nature, are now of academic interest only and we do not consider it necessary to indicate our views in respect of them.

Disposal

136. In these circumstances, we will pronounce an order upholding the respondents' appeal, setting aside the finding of the tribunal that the respondents have refused to permit the claimants to exercise their right to annual leave and dismissing the claimants' claims that the respondents had wrongfully refused to permit them to exercise the entitlement to annual leave that they, in each individual case, sought.