Case Numbers: 3202414/02 & 1901170/03

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THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		***Respondent***
Mr J A Herring Mr S Harrison	**AND**	CIS Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Stratford

ON: 7-9 February & 7 March 2007 (in chambers)

CHAIRMAN:

MEMBERS: Mr P J King
Mr N 0 Weaver OBE

Appearances

For the Claimant: Mr A Sheftel (Counsel)

For the Respondent: Mr 0 Segal (Counsel)

JUDGMENT

The unanimous decision of the Tribunal is that the Claimants' claims for compensation for breach of the Working Time Regulations are out of time and must be dismissed. Mr Harrison's claim pursuant to s11 ERA 1996 is upheld and our determination is set out in paragraph 97 of the reasoned judgment.

REASONS

Introduction

1. By these claims Mr Harrison and Mr Herring seek recompense for alleged breaches of the Working Time Regulations and Mr Harrison seeks a declaration pursuant to s11 ERA that the Respondent did not provide him with proper particulars of how his holiday pay could be calculated.

2. The procedural history of these claims is complicated. Both the Claimants were employed for many years as insurance agents by the Respondent. Mr Herring resigned and Mr Harrison retired through ill-health. Mr Herring's claim was issued on 5 July 2002, and Mr Harrison's claim was issued on 16 June 2003. Both cases were stayed for a considerable period pending the outcome of a similar case bought by a fellow-insurance' agent and ex-employee of the Respondent, a Mr Walker. Mr Walker's case failed and he appealed to the Employment Appeal Tribunal. His appeal was dismissed and he appealed to the Court of Appeal. Mr Walker's appeal to the Court of Appeal was dismissed in April 2003 and he was refused leave to appeal to the House of Lords by the House of Lords (17 December 2003).

3. Following the Court of Appeal decision, Mr Herring's case and Mr Harrison's case were set down (by Order made on 5 July 2004) for a preliminary hearing to determine whether they should be struck out as "misconceived". At that time there were two other Claimants, Mr Gosling and Mr Lee, and all four claims were consolidated or at least conjoined (that is joined for the purpose of being heard together). Originally there had been eight claimants (including Mr Walker).

4. On 22 September 2004 the Employment Tribunal (Regional Chairman Mr I S Lamb and members) heard the application of the Respondent to strike out the surviving claims of their ex-employees on the ground that the claims were misconceived. Both sides were represented by experienced employment law advocates. No evidence was heard at the hearing. It is not clear whether the decision was given on the day of the hearing. The full written reasons were sent to the parties on 23 November 2004. The Tribunal's unanimous decision was that the complaints of Mr Herring and Mr Harrison had

> "no reasonable prospect of success because they inevitably re-litigate issues which have already been resolved in the Walker litigation in favour of the Respondent. The Court of Appeal has considered every relevant aspect of the standard form of contract."

5. The claims of Mr Harrison and' Mr Herring were struck out, and the Tribunal heard an application for the costs of the misconceived claims. The Tribunal acceded to that application and made an award of costs (under Rule 14 ETRP 2001) which were summarily assessed in the sum of £4,725. Those costs were paid by the Claimants.

6. Mr Herring and Mr Harrison appealed against the decision of the Employment Tribunal. That appeal was heard on 13 July 2006 by the Employment Appeal Tribunal (HHJ Serota QC and members) and judgement was delivered on 13 October 2006. The EAT allowed the appeal. The EAT held that the claims were "fairly arguable" on facts and law and the claims of Mr Herring and Mr Harrison were remitted to the Employment Tribunal for full hearings.

7. For reasons which are not clear the Respondent has not yet re-paid the costs received from the Claimants as a result of the Tribunal's order made after the strike out, despite the successful appeal against the strike out. Those costs were ordered to be paid (under Rule 14 ETRP) because the proceedings were said to

have been misconceived, and the costs' order was made in respect of the claims as a whole. It is clear that the money paid by the Claimants to the Respondent pursuant to that order of the Tribunal should have been re-paid by now.

8. The claims of Mr Herring and Mr Harrison have now received a final hearing in accordance with the Order of the EAT. The hearing took place over three days, 7-9 February 2007. Both sides were represented by counsel. Both sides called evidence.

The Jurisdictional Issue

9. Shortly after the decision of the EAT, the Respondent wrote to the Employment Tribunal to raise an issue of jurisdiction which had not been raised before. Both claims are brought pursuant to Regulation 30 of the Working Time Regulations ('WTR"). Regulation 30(2) provides that,

> "An employment tribunal shall not consider a complaint under this regulation unless it is presented,
>
> (a) before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should be permitted (or in the case of a rest period or leave extending over more than one day, the day on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
>
> (b) within such period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

10. The last day of holiday taken by Mr Herring during his employment was 1 April 2002 (the Bank Holiday). He issued his claim on 5 July 2002. The last day of holiday taken by Mr Harrison during his employment was 1 January 2003 (the Bank Holiday). He issued his claim on 12 June 2003.

11. By letter dated 22 November 2006, the Respondent objected to the claims on the ground that each was out of time. It was curious that the point had not been taken before. The Respondent explained that

> lithe decision was taken by the Respondent not to raise this issue.. [at the strike out hearing].., so as to avoid adding to the complexity of the

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12. It seemed to us more likely that the jurisdiction issue had been overlooked, and it was unfortunate that this issue had not been raised earlier. If it had not been overlooked, the failure to raise the issue at the earliest practicable date was an error of judgment, in our opinion.

13. A Chairman of the Tribunal Ms V Gay considered the parties' representations as to the jurisdiction issue and directed,

> "The Chairman does not agree that it is sensible to hive off the jurisdictional issue because:
>
> (i) This may itself then be the subject of appeal to and remission from the Employment Appeal Tribunal;
>
> (ii) (ii) The case of Commissioners of Inland Revenue v Ainsworth in the House of Lords/ECJ is to determine whether such claims may be brought as unauthorised deduction of wages claims. If they can, "series of deductions" argument applies - and the claims may not be out of time;
>
> (iii) Pre-Hearing Review jurisdictional points should not be raised four years after the cases commenced!
>
> The Hearing will proceed because it is appropriate that the relevant facts are determined before memories fade and witnesses disappear. The effect of the jurisdictional point can be considered at the Hearing, together with what should be done about pending HUECJ judgments."

14. Accordingly, we have heard all the evidence that the parties wished to call on both the jurisdictional and substantive issues. We have endeavoured to make comprehensive findings of fact, and to deal (on the basis of the existing law, Ainsworth having reached the Court of Appeal) with the issues arising in these claims, as well as to deal with the jurisdiction issue.

Are either or both of *the claims out* of *time?*

Mr Herring

15. It was submitted for Mr Herring that his claim was not out of time. It is said that Mr Herring's last day of holiday was taken on 1 April 2002. It is conceded by Mr Herring that his next pay slip after the last holiday was dated 4 April 2002. That concession was made by counsel for Mr Herring during final submissions and following production during the hearing by the Respondent of a copy of the relevant payslip (or rather the computer record of the information which would have been on the payslip). That pay slip record shows remuneration for the 14 days ending 4 April 2002, and therefore includes payment for the Bank Holiday on 1 April 2002.

16. It was submitted for Mr Herring that the relevant payment (for a holiday) which should have been made in respect of the 1 April holiday would not have been identified in the 4 April 2002 payslip. Mr Herring contended that the calculation of the holiday pay (if it had been done in accordance with the WTR) would not have been completed by that date, and would have fallen due for payment sometime on or after 6 April 2002, and therefore within 3 months of the issue of the claim.

17. As will appear from our analysis of the substantive claim, Mr Herring's case is that his holiday pay was inadequate and in breach of the WTR. Mr Herring contends that his holiday pay should (but did not) include a notional amount to reflect in particular the commission element of his earnings (including procuration fees) calculated (in accordance with s224 ERA) on the basis of such average earnings in the 12 weeks prior to the holiday.

18. Echoing the words in Regulation 30 WTR Mr Herring argues that the relevant payment (for his holiday on 1 April 2002, correctly calculated in accordance with the WTR) "should have been made" some time after the 6 April 2002.

19. In our judgment (and having regard to the hypothetical world in which such a calculation would be carried out) and on balance of probabilities, a reasonably well-organised employer (as is and was the Respondent) would have made the appropriate calculation in time for the salary payment made on 4 April 2002. Proper payment for a one day holiday on 1 April could have been calculated (on the average basis contended for by Mr Herring) in time for a salary payment on 4 April.

20. Therefore whether one considers simply the date of the salary payment which actually included a payment referable to the 1 April holiday (which payment was made on 4 April) or one considers the hypothetical date of probable payment of holiday pay calculated in accordance with Mr Herrings submissions by reference to the WTR, the result is the same. The three month limitation period laid down by Regulation 30 started to run on 4 April 2002. It had expired (shortly) before the claim was issued.

21. In written submissions it was submitted for Mr Herring that even if the claim was out of time it was not reasonably practicable to bring the claim within the prescribed period. At the hearing this alternative submission was abandoned (in respect of Mr Herring) and this Claimant called no evidence to support the proposition that it had not been reasonably practicable to bring the claim within
the prescribed period. Accordingly this Tribunal had no jurisdiction to hear Mr Herring's claim.

22. Even if Mr Herring had been permitted to bring a claim pursuant to s23 ERA 1996 on the basis of a "series of deductions", this result would have been no different. If (which is not the case) the Court of Appeal decision in IRC v Ainsworth [2005] EWCA Civ 441 had not barred such a claim, Mr Herring's complaint would still have been out of time.

Mr Harrison

23. At the hearing Mr Harrison admitted that his claim was out of time. He argued that it had not been reasonably practicable to bring the claim during the three month limitation period, and that it had been presented within a reasonable time thereafter. It was his case that his last holiday was on 21 (or 22) October 2002 and the last Bank Holiday during his employment was on 1 January 2003. His claim was issued on 12 June 2003.

24. In Walls Meat Co Ltd v Jhan [1979] ICR 52 CA, Lord Denning said that the test was,

> "simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights - or ignorance of the time limit - is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

25. In Palmer and Saunders v Southend on Sea Borough Council [1984] ICR 372 CA, the Court of Appeal adumbrated the test of "reasonable feasibility",

> "...one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360 HL. In the context in which the words are used ..... they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in Singh v Post Office [1973] ICR 437 and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."

26. It was for Mr Harrison to satisfy us that it was not reasonably feasible to present the complaint within the relevant three months. There was very little evidence to show that it would not have been reasonably practicable to present the complaint within that period. In fact Mr Harrison himself said nothing to support the proposition, except that in passing he mentioned that he had been ill during his last 6 months or so of employment, and that he had taken ill-health retirement from employment on 22 March 2003. He did not explain what had been his health problem, nor how serious it had been. Another witness mentioned that the illness (or a condition associated with the illness) had been colitis (inflammation of the lining of the colon), but we were not given any explanation of the severity or duration of the condition.

27. We note that Mr Harrison was initially represented by his Union USDAW (see the claim form). His claim form states that his representative was Kate O'Neill the legal officer of USDAW in Manchester. We know also that Mr Harrison had been a long-standing member of USDAW which was active on behalf of Mr Harrison and fellow insurance agents employed by the Respondent.

28. Mr Harrison seems to have been physically capable of giving instructions so as to make his claim in June 2003. We have no evidence on which we could find that he was less capable in the preceding months and in particular during the three months after 22 October 2002 or (if the later date was the relevant date) during the three months after 1 January 2003.

29. It was Mr Harrison's prerogative not to tell us anything about his illness. But in the absence of any evidence to connect the illness with the failure to lodge a timely application to the Tribunal we are not prepared to reach the conclusion that it was not reasonably practicable to bring the claim within the relevant 3 months.

30. It is possible that the late challenge made by the Respondent (to jurisdiction) and/or the difficulties in arranging representation for Mr Herring and Mr Harrison played a part in the state of the evidence on this aspect of the case. It may be that the Respondent could have adduced evidence of the negotiations for early retirement (on the ground of ill-health) which would have thrown more light on this issue. But in the end the decision as to what evidence to call lay with the Claimant who was represented by counsel who conducted the case with care and skill, and we must not speculate as to what evidence there might have been.

31. Accordingly, Mr Harrison's case, in so far as it was dependent on Regulation 30 WTR, must fail. That leaves his claim based upon s 11 ERA 1996. That claim had to be issued within 3 months of the termination of his employment (22 March 2003). The s11 claim was issued within 3 months of the termination of his employment, and the Respondent accepts that the Tribunal has jurisdiction to consider this part of Mr Harrison's claim.

The Substantive Claims

32. In the unusual circumstances of these two cases, and as already explained, we shall give a full decision on the substantive claims even though we have decided that we do not have jurisdiction to deal with the claims for compensation for breach of the WTR made by Mr Herring and Mr Harrison. So far as Mr Harrison is concerned we do not see, in any event, how we can reach a decision on his claim for a determination pursuant to s11 ERA 1996 without reaching conclusions about the applicable law and making findings about relevant facts.

33. The complaint made by both Claimants is that their holiday pay was inadequate because it was not equivalent to what they were paid for work done by them during periods of working time. In respect of periods of holiday both Claimants acknowledged receipt of a basic salary (and expense allowances and protection of earnings/non-life bonus), but complained that they were not paid in addition a notional sum referable to commissions and procuration fees which would have been earned during the holiday period had they not been on holiday: rather they were paid the actual commissions and procuration fees which the Claimants said had been earned prior to the holiday period.

34. Thus, said the Claimants, there was a breach of the WTR, and they were entitled to recompense. It was the Tribunal's task to decide whether or not there was a breach of the WTR, and if there was, to assess compensation. Both parties agreed at the hearing that if the Tribunal decided there had been a breach of the WTR (and the Tribunal had jurisdiction to hear the claims), the assessment of compensation would be adjourned to await finality in the Ainsworth litigation.

35. The written terms and conditions of both Claimants' contracts of employment provided for various elements or ingredients which together made up the

remuneration paid for work done. The analysis which follows is an agreed analysis:

(i) The **Basic Salary** was paid at a set weekly rate, plus the "book value" element at a further set rate on a well-established formula, the "book value" being the notional value of the portfolio of business manager by the remunerated insurance agent

(ii) The **Expense allowance** paid at a notional set rate

(iii) **Procuration fees** paid on new business introduced ("sold") by the insurance agent

(iv) **Commission** paid by the Respondent on instalments of premium paid to the Claimants by customers under existing policies (ie post introduction of a customer and initiation of a policy and payment of procuration fees). These **Commissions** were also known as "collection fees" because historically they were referable to work done to collect the instalment premiums (on the doorstep) even if in recent times most of the **Commission** was earned on payments of instalments made by standing order or direct debit and therefore not monies physically "collected" by the agent

(v) **Protection of earnings/non-life bonus** paid to agents (including Mr Harrison) who achieved certain levels of non-life business.

It is common ground that the major part of each Claimant's earnings was made up of commissions and procuration fees.

The law relatina to the substantive claims

36. Article 7 of the EC Working Time Directive 93/104 provides that,

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

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

37. The requirements of the Directive were transposed into UK legislation by the Working Time Regulations 1998. Regulation 13 establishes a worker's entitlement to four weeks annual leave. Under Regulation 16,

"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under reg. 13 at the rate of a week's pay in respect of each week of leave.....

(5) Any contractual remuneration paid to a worker in respect of a period of . leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period."

38. For employees like the Claimants with no normal working hours, the amount of "a week's pay" is defined by s224(2) ERA 1996,

"The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise with the last complete week before the calculation date.

(c) In arriving afthe average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken. "

39. It is also relevant to mention (in connection with Mr Harrison's claim) the statutory obligation on an employer to provide an employee with a written statement of particulars, including by s 1 (4) ERA 1996,

"(a) the scale or rate of remuneration or method of calculating remuneration

(b) the intervals at which remuneration is paid....

(d) any terms and conditions relating to any of the following

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement ... to be precisely calculated."

40. A breach of section 1 enables an employee to rely on section 11 ERA 1996 to seek a declaration as to the particulars which should have been included in the written statement of particulars.

41. In Walker v CIS [2003] EWCA 632 CA the Court of Appeal considered Regulation 16 WTR in a case very close to the Claimants' cases. Mr Walker was employed on a contract containing exactly the same written terms and conditions as those in Mr Herring and Mr Harrison's contracts.

42. The Court of Appeal in Walker decided that there had been no breach of Regulation 16(1):

"That is because weekly pay, calculated in accordance with. section 224

and applicable to the holiday period, did not exceed the contractual pay

> actually paid by CIS, and so, on the application of Regulation 16(5), there was no breach of Regulation 16(1) and nothing is payable under Regulation 30." (paragraph 49 judgment of Peter Gibson LJ with whom Hale LJ and Charles J agreed).

43. It is implicit in that decision that the words "paid to a worker in respect of a period of leave" in Regulation 16(5) mean "received by the worker during a period of leave or by reference to that period of leave". The case of Walker decided that commission (including procuration fees) may have been earned through work done prior to the leave period, but if it is received in the pay packet which covers the holiday period, that is good enough to satisfy the Regulation.

44. In fact, a distinction has to be made between procuration fees and commissions in this context. The Claimants earned their procuration fees through work done outside the holiday period. But the commissions were earned on payment of instalments of premium "collected" throughout the year (including during the holiday period). Over the holiday period the Claimants received whatever portion of commission or procuration fee earnings happened to be due at that time, and in addition they received their basic salaries (and the other unchanging elements of their salaries). But on the analysis of the Court of Appeal in Walker, the mere receipt of those procuration fees in the holiday pay packet (together with payment of a basic salary for the period of the holiday) was sufficient to discharge the employer's obligations.

45. The Court of Appeal could have decided that although the basic salary paid for a period of leave could be said to be "paid in respect of a period of leave", the procuration fees which had been earned before the leave period could not be said to be "paid in respect of a period of leave" because they were earned during the period prior to the period of leave (that is to say when the claimant Mr Walker was going about his normal work), and therefore could not be said to be paid in respect of a period of leave. But it did not.

46. It was on the basis of the decision in Walker that the claims of Mr Herring and Mr Harrison were struck out.

47. Following the Court of Appeal decision (and after the strike out of the Claimants' claims by the Tribunal in September/November 2004), and on 16 March 2006, the European Court of Justice ruled on questions arising out of the application of Article 7 of the Directive. This decision, Robinson-Steele v R D Retail Services Ltd (and joined cases) [2006] IRLR 386 is relied upon by the Claimants as a basis for criticism of the Court of Appeal decision in Walker.

48. In the Robinson-Steele references the ECJ considered questions. referred in respect of three cases and ruled,

> "1. Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving in that

respect, a payment additional to that for work done. There can be no derogation from that entitlement by contractual arrangement."

49. We note that the holiday pay arrangement made for the Claimants by their contract of employment may (on one view) have included, as part of their payment for annual leave, remuneration payable for work done - that is to say the procuration fees, without the Claimants receiving in that respect a payment additional to that for work done.

50. The ruling in Robinson-Steele continued,

"2. Article 7 of Directive 93/104 precludes the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave.

3. Article 7 of Directive 93/104 does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker."

51. There were no provisions in the Claimants' terms and conditions of contract which set out transparently and comprehensibly (or opaquely and incomprehensibly!) that a part of the annual leave payment was paid in part payments staggered over the holiday year.

52. In the course of the judgment of the ECJ the Court examined the particular questions which had been referred. At paragraph 47 the Court said,

"47. By its second question, which it is convenient to examine first, the Court of Appeal is asking, in essence, whether Article 7 of the Directive precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for the work done.

48. In that regard it must be recalled that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by the Directive itself....

49. The holiday pay required by Article 7(1) of the Directive is intended to enable the worker to take the leave to which he is entitled.

50. The term "paid annual leave" in that provision means that for the duration of annual leave within the meaning of the Directive, remuneration

must be maintained. in other words, workers must receive their normal remuneration for that period of rest.

51. In those circumstances, it must be held that an agreement under which the amount payable to the worker, as both remuneration for work done and part payment for minimum annual leave, would be identical to the amount payable, prior to the entry into force of that agreement, as remuneration solely for work done, effectively negates by means of a reduction in the amount of that remuneration, the worker's entitlement to paid annual leave under Article 7 of the Directive. Such a result would run counter to what is required by Article 18(3) of the Directive *[that implementation* of *this Directive shall not institute valid grounds for reducing the general level* of *protection afforded* to *workers].*

52. Consequently, the answer to the second question referred in case C-257/04 must be that Article 7(1) of the Directive precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done. There can be no derogation from that entitlement by contractual arrangement."

53. In the Tribunal's judgement it is clear from this ruling of the ECJ that it is not permissible for procuration fees earned by the Claimants in respect of work done outside the holiday period to be paid as holiday pay, thereby depriving the worker of an equivalent payment referable to the holiday period.

54. The decision in Walker that payments of procuration fees (put together with commissions by the Court of Appeal) received in the holiday pay packet were paid "in respect of the period of leave" and therefore offsettable under Regulation 16(5) against the employer's holiday pay obligations, cannot stand in the face of the ECJ ruling. The conclusion of the Court of Appeal in Walker (see paragraph 46 of the lead judgment in Walker) was based upon a construction of Regulation 16 which is contradicted by the ECJ in Robinson-Steele. The procuration fees (though not the commissions) paid to Mr Walker were earned outside the holiday pay period, and the fact that they were paid as part of the holiday pay packet did not mean that these payments were "paid in respect of a period of leave."

55. We have had some debate as to how we should approach the difficult task of considering the Claimants' case in the light of Walker, and Robinson-Steele. The case of Walker is very close to the facts of the Claimants' cases under consideration. But in our judgment the decision on the law in that case is contradicted by the ECJ ruling in the Robinson Steele (and linked) references, and we must follow the ECJ.

56. In passing we note that the Employment Appeal Tribunal (having regard to the potential impact of Robinson-Steele) said (at paragraph 64 of HHJ Serota ac's judgment),

(a) "It seems fairly arguable that an employer cannot make a payment in respect of "work done" and treat it as a payment in respect of annual leave..."

57. In our judgment, following Robinson-Steele, an employer cannot make a payment in respect of "work done" and treat it as payment in respect of annual leave, just because the payment for work done is received as part of the holiday pay packet.

The facts

58. The issues of fact in this case were divided into two categories: the generic facts, or those referable to the fixed terms and conditions shared by Mr Walker (1), and the Claimants before us (2); and the individual facts specific to each Claimant (and which might or might not be significantly different from the individual facts of Mr Walker's case). The Claimants have conceded the generic similarity of Mr Walker's terms and conditions and their own.

59. The Claimants have sought to distinguish the case of Walker on the facts, while accepting a generic similarity. In Walker, it was found that there was no evidence to suggest that Mr Walker lost out through not obtaining new business while on holiday. When Mr Walker was on holiday his clients were left a contact number and his colleagues were able to deal with any enquiries as to current policies or new business.

60. As the Court of Appeal expressed it,

(i) .....(para 42) " the Tribunal recorded Mr Walker as indicating that if an agent is about to take a period of annual leave which would coincide with his collection and/or district office accounting date, he would do the necessary collection in advance. Further he was allowed to leave it to others to make the collections on his behalf. As for the additional time taken in making collections outside the holiday periods, that has to be considered against the provision in paragraph 4 of the Terms of Appointment that he was expected to work such hours as might be necessary for the performance of his duties. He was not paid by the hour. In any event, the time devoted by an agent on making collections is small. Mr Riley in his evidence said that typically an agent would devote six days to collecting in each four weekly period. In my judgment, on the evidence there is simply no factual basis for any assertion that Mr Walker lost out through being unable to collect the procuration fees and commission during the holiday period."

61 . It may be that in the last sentence of that paragraph the reference to procuration fees is inapt. Procuration fees were earned by Mr Walker (and Messrs Herring and Harrison) on new business, not on existing policies. To that limited extent the evidence cited in the paragraph is not referable to procuration fees, but only to commissions earned on the collection of instalments of premiums. Clearly, however, the Court of Appeal decided that Mr Walker was able to do all his business (and get paid for it) as though he had never been on holiday at all: presumably by working harder during his working weeks than he would otherwise have had to do; and presumably by working harder also during those working

weeks so as to cover (when necessary) for his holidaying colleagues. In itself this seems to us to contradict the purpose of Article 7 of the Directive as interpreted by the ECJ in Robinson-Steele. However, the factual (as opposed to legal) issue that we have to resolve is whether either or both of the Claimant's cases are different from the relevant facts of Walker?

62. We heard evidence from 5 witnesses: the two Claimants, and three witnesses called by the Respondent all of whom are still employed by the Respondent. All the witnesses were recalling events at least 4 years ago. Mr Herring had left the Respondent in April 2002. Mr Harrison left the Respondent in March 2003, but he had been unwell for a period of time prior to his retirement. The Respondents' witnesses were recalling a system of work which no longer exists. Since 2003 the system has been radically changed, and there are no more insurance agents like Messrs Walker, Herring and Harrison. Now, the Respondent employs financial advisers who do nothing but sell financial services products, and the system of remuneration is also different. Thus all the witnesses were handicapped in the sense that they were recalling events which were not recent, and systems of work which have not existed or been practised for some years.

63. Moreover, there were also difficulties with the documentation. Notwithstanding the Walker litigation (which also concerned an insurance agent, holiday pay and Regulation 16 WTR), and the overlapping claims of Mr Herring and Mr Harrison, relevant documentation which had existed in the Respondent's records had been disposed of at some time prior to the hearing.

64. On the first day of the Hearing we considered an application by the Claimants for disclosure of

> "All copy *[sic]* of original proposals (motor household and all other general business, together with life and investment business necessarily written by other staff because of my level of authorisation) written on my agency in the last 12 months of my employment, the method of payment clearly shown, along with who wrote the proposal. If copy proposals are not kept this information is to be supplied in another format. " (see Mr Herring's letter of 16 January 2007).

65. Mr Herring wanted this disclosure because (as he wrote in his letter),

> "I am confident that the series of proposals I wrote in the last 12 months will show a steady production of business week by week with the majority of it being motor business. Car owners have a legal responsibility to insure their car, so if I had taken holidays I would have lost out. Copy proposals will show how little business was written by other CIS staff on the days holidays taken by me [and] that rather than being on holiday I actually wrote business when on holiday ... "

66. In the event this application was duplicated by Mr Harrison.

67. The issue of disclosure had been raised shortly after the Employment Appeal Tribunal decision was promulgated (in late October 2006). At the end of 2006

there had been a tacit agreement between the parties (following application by the Respondent) for the jurisdictional issue to be dealt with at a preliminary hearing. But Ms V Gay's decision to require a full hearing was made on 7 December 2006, and may have caused a stir. We do not accept in these circumstances any criticism of the Claimants for the apparently delayed application for disclosure.

68. In answer to the application for disclosure, the Respondent has explained (see the letter dated 31 January 2007) that the relevant proposal forms for general insurance business ("GI") (including motor business) were kept for three years and then destroyed. As regards life proposal forms these too were not available, although the reason was different. However, computer recorded information was still available to cover sales during the last 3 months of Mr Herring's employment and the last 16 months of Mr Harrison's employment. That information did not record the date when GI business was done, or by whom the GI business was done, but recorded the date when the policy was issued. In relation to life business the date of the sale and the person who sold the policy was recorded. We accept that there was nothing wilful in the Respondent's current inability to make disclosure of insurance policy proposals.

69. Within the limitations of the period for which this computer sourced information was available, it was helpful, at least to the Tribunal. But it was much less helpful from the point of view of witnesses, particularly the Claimants, because it was not copy documentation such as to trigger recollection of events more than several years ago. Staring at a spreadsheet trying to recall events in 2002 is not as helpful to a witness as looking at a proposal form filled in by them in their own handwriting on behalf of one of their clients.

70. The Claimants were also handicapped because for a crucial period of time prior to this final hearing (from late December 2006, shortly after it was decided that the final hearing would take place in February 2007, and would not be replaced by a shorter preliminary hearing on jurisdiction) they were without legal representation (their solicitor came off the record on 19 December 2006). That meant that their witness statements were exceedingly homemade, and the Respondent made the most of the amateurish preparation of those statements.

71. The Claimants were recalling events in which they had actually been involved, as working insurance agents employed by the Respondent. The three witnesses called by the Respondent were: Neil Montgomery, a senior administrative officer, and not someone with any direct experience of an insurance agent's business, or either of the Claimant's business; Gary Smith, a sales manager who was a sales manager for Mr Harrison and anoth.er 9 agents; and Graham Hardy, a one-time District Manager in the District Office to which Mr Herring was attached.

72. Both Claimants were employed on contracts containing the same detailed terms and conditions as those in Mr Walker's contract, and which have enjoyed the extensive attention of the Tribunals and Court of Appeal in Mr Walker's case.
Both Claimants were paid on the same basis as Mr Walker, the system of remuneration being derived from those terms and conditions.

73. Mr Harrison was employed by the Respondent as an insurance agent from 1989 until his retirement through ill-health in March 2003. He was an authorised agent, which meant that he had FSA authorisation to sell certain products, including life business, having obtained a Financial Planning Certificate.

74. Mr Harrison explained that his work as an insurance agent was relatively unsupervised. He worked very hard. His working days lasted 12 - 14 hours in the last few years of his employment. He was a highly successful salesman. He had 1000s of customers. In his last year of employment when he was off sick for several months he still managed to earn £49,000, most of which was commission based. In the previous year he earned about £60,000. He spent a lot of his time out on the road seeing customers. He collected small instalment premiums from customers, and received small commissions based on the premiums paid. He kept in touch with his customer base. When an existing customer had a windfall, Mr Harrison would endeavour to persuade the customer to invest in one of the Respondent's financial products and thereby earn a procuration fee.

75. Unsurprisingly, the actual numbers of large policies sold was relatively low, despite the huge customer base. Thus, the Respondent's computer records showed that between about 1 January and 3 October 2002, he completed sales of life policies (thereby earning a substantial procuration fee) on about 15 days, selling to about 21 customers (or 21 policies). But as Mr Harrison explained, that did not mean that he only sold life business on 15 days during that approximately 9 month period. Mr Harrison told us and we accept that selling to his existing customer base was something that he did all the time, even though he did not complete a sale very often. He couldn't remember holidays interfering directly with the life business but he did remember that it interfered with motor business: when customers needed a motor policy there could be no delay, and if he was not around the business could go elsewhere. He was not certain or confident that his local area office would catch the business when he was on holiday. In a general sense his was a personal business which depended on his presence. Many customers could and would wait until he returned from holiday. But over a period of years there would be some loss as a direct result of his unavailability while on holiday.

76. As to the more mundane side of his business, the collection of premiums on existing policies (thereby earning his piecemeal commission), much of the collection business was automatic, done by direct debit. The physical collection of other instalment premiums was his responsibility. He would try and arrange to go on holiday during weeks when the pattern of collecting meant that he missed few collections (his working year was divided into 4 weekly cycles of business).

77. He didn't have a mobile phone until his last (calendar) year of work. He had an answering machine at home, but he didn't leave it on all the time, and he did not leave it on when he was on holidays.

78. In Mr Harrison's opinion he must have lost business when he was on holiday. He was not there to service his customers. He cannot prove that he lost a particular

item of business as a result of going away, but it is his belief that he did lose business as a result of going on holiday.

79. The Respondent's computer records showed that Mr Harrison took only 10 working days holiday during 2001, and 9 working days holiday in 2002. So far as we are aware, the Respondent's records were accurate. In our judgment the Respondent's records show the correct amount of holiday taken by Mr Harrison.

80. Mr Herring was another insurance agent. He was not authorised to sell life business, and most of his business was general insurance business and particularly motor policies. He told us and we accept that he rarely took holidays.
He told us and we accept that he took little holiday during the last 12 months of his employment. He explained to us that he needed to work. He could not afford to stand idle for a period of leave. He told us that no agent would cover for him satisfactorily while he was on holiday. He said that there was no practice in his area of a reciprocal arrangement between agents. He did have a "patch" or area, but he shared it with 3 other agents employed by the Respondent (as well as with agents from other companies, of course). He explained that motor insurance business will not wait. If he had been away on holiday someone else would have taken the urgent motor business.

81. As a result of limited holiday during his last year of employment, on his resignation Mr Herring was paid for the accrued holiday. That payment as he explained (and it

was accepted by the Respondent) was calculated on his average weekly earnings in the previous 12 weeks. Thus his commission from collections and his procuration fees for selling new policies in the previous 12 weeks were averaged out and paid to him (together with the basic and unchanging elements of his earnings) for a period which was referable to the notional holiday period of accrued entitlement.

82. Mr Montgomery (the first of the Respondent's witnesses) was a senior manager but had never worked as an agent. He explained that agent's interests were carefully protected by their union USDAW. He said that agents were protected by limited geographic areas, though he recognised that there could be competition between agents in some circumstances. His expectation was that new business referred from an existing customer when an agent was on holiday would be caught by the area office and probably though not necessarily retained for the holidaying agent. He thought it would be highly unlikely for an agent to be unable to move a collection date. He did concede that there might sometimes be a loss of opportunity to do business because an agent was on holiday, particularly in relation to motor business.

83. Mr Gary Smith had been an agent as well as Mr Harrison's sales manager. He accepted that Mr Harrison may have been working 12 to '14 hours a day on the Respondent's business, and that he had a preference for seeing his clients face to face. He felt that it was very very unlikely that Mr Harrison lost any "collections" business as a result of being on holiday; in other words Mr Harrison could make arrangements to collect instalments of premiums early or late or by another agent or the district office. He did not agree that Mr Harrison lost business by going on holiday.

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84. Mr Graham Hardy had been Mr Herring's district manager. He acknowledged that agents tended to work independently and that referrals between agents were discouraged. He said that the district office would always try to honour a referral made from an agent's client and to ensure that the agent retained the business even if it came in when the agent was on holiday. He accepted that there was competition between agents, and that even though there was a notional geographical area within which agents made their main business, new business could come from anywhere including outside that geographical area (and therefore from a client or an area attached to another agent). He conceded that Mr Herring could have lost motor insurance business by being on holiday.

85. The main issue was whether and to what extent either of the Claimants lost business as a result of going on holiday. In our judgment, and we find as a fact, the collection of instalment premiums was largely though not absolutely unaffected by the taking of leave. The collection of premiums was a regular event. Many instalments were paid by direct debit, or cheque in the post. Cash payments could be paid in advance, or in arrears, and it was unusual and unlikely for a premium to be cancelled as a result of a delayed or deferred collection occurring as a result of a period of leave.

86. The evidence tended to show that the payment of instahnent"premiums went on more or less regardless of the holidays and Mr Harrison and Mr Herring received commissions on those premiums collected, whether physically collected by him or not, whether paid by direct debit, or post-dated cheque, or through a fellow agent, or direct to the area office. We doubt whether any policies lapsed as a result of Messrs Harrison or Herring's inability to make a physical collection during a holiday, and we heard no evidence of such an vent. But we accept that (having regard to the personal service which Mr Harrison especially provided so successfully) the need to make the physical collections and to maintain a personal relationship with so many customers, was a disincentive to take regular full holidays.

87. We accept that both Claimants, and especially Mr Harrison, valued the face to face contact with clients that was required by the physical collection of instalments. Moreover in our judgment the Respondent also valued this face to face contact, which is why it was maintained in the system for so long. Inevitably, the absence of an agent on holiday meant that the agent was not available, not at the beck and call of an anxious customer. That unforeseeable (in the sense of being unpredictable) element of an agent's work could suffer as a result of the agent not being in work: customer claims, enquiries and complaints could not be planned in advance by an agent, and it might sometimes be difficult to catch up with problems which developed when away on leave. Agents were independent and the district office, though good intentioned, was not a substitute for the agent known personally to the existing customer base.

88. The absence of an agent through holiday did not mean that business came to a halt, and it probably meant that agents (and these two Claimants) had to work harder before and after a holiday in order to cope.

89. As to the issue of the loss of new business as a result of being on holiday we are unanimous in our conclusion that both Claimants would have lost new business as a result of holidays over the years. Mr Harrison may not have lost much business, but his unavailability while on holiday, the size of his customer base and our impression of his personal service which led to new business being placed confirm our judgment that he did lose business when he went on holiday. Mr Harrison was a successful salesman and business person. He was able to arrange his business affairs so that periods of leave did not have too much impact on his business. As a result of his business acumen and organisation he was able to arrange his affairs so that holidays did not eat into his business, even if his unavailability did lead to some loss of future business. A lesser man might not have been so successful in limiting the damage done by regular holidays.

90. Mr Harrison told us (and we accept) that holiday leave demanded extra hours before and after a holiday. If he had made the use of holiday time to do more business he would have earned more money. That was our unanimous judgment on the basis of the evidence which we heard. In our judgment he probably did lose new business as a result of taking holidays (notwithstanding his extra hours before and after a holiday), and therefore he lost the procuration fees which would have been earned on such new business.

91. As to Mr Herring, he sold more motor insurance and less life business and was less successful overall than was Mr Harrison. But we find that Mr Herring also lost new business as a result of the cumulative effect of taking holidays. Of course, because he little actual holiday in his last year's employment (on his own evidence) he cannot claim to have suffered much loss of business as a result (though he certainly suffeted a loss in the sense that he suffered the stress engendered by no proper holidays). His holiday pay (as calculated and paid after the termination of his employment) was in an amount equivalent to what he claimed should have been paid in holiday pay during his employment: based so far as the variable elements of commission and procuration fees were concerned, on the amount actually earned in the 12 weeks of work prior to the end of his employment.

Conclusions

92. We want to make it clear that on the evidence we heard there was no doubt that the system of pay enjoyed by both Claimants was not an incentive to taking a holiday. It did not encourage the Claimants to take regular holidays. Mr Harrison who was very successful could afford to take regular holidays (though he did not bother to notify the Respondent of every holiday); Mr Herring could not afford to take any holiday during his last year's employment, so he worked through the year and falsely informed his employer. Over time, both Claimants lost business as a result of going on holiday, though we find that the main (probably exclusive) loss was a loss of new business rather than a loss of future commissions on policies which lapsed because collection of premiums was interfered with as a result of holidays taken.

93. Thus, and to a limited extent, we distinguish the position of both Claimants from that of Mr Walker in respect of whom it was said in the Court of Appeal,

> "In my judgment, on the evidence there is simply no factual basis for any assertion that Mr Walker lost out through being unable to collect the procuration fees and commission during the holiday period."

We find that the Claimants did lose out in respect of procuration fees, though not commissions.

94. In our judgment the arrangements as to holiday pay made by the Respondent and set forth in the written terms and conditions of both Claimants do not comply with Article 7 of the Directive, and the WTR. The payment (or entitlement to be paid) an amount earned in work done prior to the period of leave does not satisfy the obligation to make a payment referable to the period of leave. An employer cannot make a payment in respect of work done and treat it as a payment in respect of annual leave. Both Claimants have proved to our satisfaction that as a result of periods of leave they have suffered a loss of income. Moreover, it is clear that the system of "holiday pay" applicable to both Claimants was a disincentive to take a holiday.

95. We hold that there has been a breach of Regulation 16(1) WTR in that neither Claimant was (by the terms and conditions of employment laid down by the Respondent) entitled to be paid in respect of any period of annual leave at the rate of a week's pay in respect of each week of leave; and that the payment of procuration fees earned prior to the period of leave but paid as part of a holiday pay packet did not discharge the liability of the Respondent to pay contractual remuneration in respect of that period of holiday (Regulation 16(5) WTR).)

96. As a result of our decision on jurisdiction we must nevertheless dismiss the Claimants' claims for compensation based upon this breach of the Working Time Regulations.

Mr Harrison's s11 ERA claim

97. As to Mr Harrison's claim for a determination pursuant to s11 ERA as to the particulars the Respondent ought to have given in respect of the calculation of annual leave pay, we hold that he is entitled to such a determination (his claim for such is not out of time as we have already noted). We have not received any definitions of such notional particulars from either party (on the basis of a finding favourable to Mr Harrison. On the basis of our findings (and doing the best we can) Mr Harrison is entitled (as would be Mr Herring if his s11 claim had been in time, it not having been made until sometime after he lodged his ET1) to

> "holiday pay calculated on the basis of the average of weekly remuneration in the previous 12 weeks (in accordance with s224 ERA), after deduction of any collection fees which are referable to the period of leave to be taken (in other words any collection fees which are earned during the leave period by virtue of instalment premiums being paid) from the averaged collection fee element of the holiday pay so calculated."

Thus the employee becomes entitled to recognition in respect of average procuration fees earned (and paid) prior to the holiday period and which are

added to his holiday pay packet. That means that in some holiday pay packets the employee receives an amount of notional procuration fees referable to the holiday period, as well as any procuration fees (earned during periods of work) which happen to be due for payment at that time. The formula we have expressed ensures that the employer is not short-changed by fluctuations in collection fee payments ("commissions) to employees.

98. This decision was not notified to the parties on the day of the hearing, but rather, some weeks later after further consideration.

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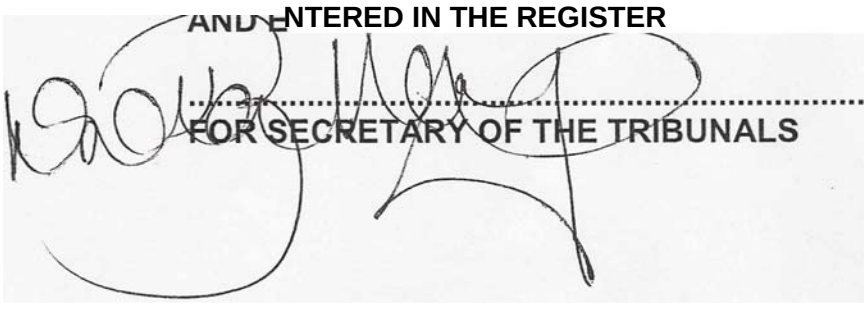

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FOR SECRETARY OF THE TRIBUNALS