Michaelmas Term
[2011] UKSC 57
On appeal from: [2010] CSIH 82

JUDGMENT

Russell (Appellant) and others *v* Transocean International Resources Limited and others (Respondents) (Scotland)

Russell and others (Appellants) *v* Transocean International Resources Limited and others (Respondents) (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Mance
Lord Kerr
Lord Wilson

JUDGMENT GIVEN ON

7 December 2011

Heard on 26 and 27 October 2011

Appellant	*Respondent*
Thomas Linden QC Peter Edwards (Instructed by Thompsons Solicitors)	John Cavanagh QC Sandy Kemp (Instructed by Simpson & Marwick)

LORD HOPE (WITH WHOM LORD BROWN, LORD MANCE, LORD KERR AND LORD WILSON AGREE)

1. This appeal is about the application of the annual leave provisions of the Working Time Regulations 1998 (SI 1998/1833) ("the WTR") to offshore workers in the oil and gas industry. Employers differ in the way they organise their employees' working time. The familiar pattern of working from 9am to 5pm five days each week throughout the 52 weeks of the year, with a few weeks taken from that commitment for annual holidays, is by no means uniform. For some, the nature of the job requires them to work for longer hours during each working day and to be given more days off during the working week to compensate. For others such as teachers and others who work in the education sector, the working pattern has to take account of the fact that the organisation for which they work is open for some periods of the year and is closed for others. The appellants in this case work offshore, so their working pattern is divided into time spent working offshore and time spent onshore when, by and large, they are not working. The only unifying factors in what is, after all, an infinite variety are that the way in which a worker's time is organised is a function of the nature of the job itself, and that in the interests of health and safety workers must be given some time off to rest.

2. The WTR contain the provisions that currently provide for rest periods in domestic law. They were designed to implement Council Directive 93/104/EC. The 1993 Directive was repealed by Council Directive 2003/88/EC concerning certain aspects of the organisation of working time ("the WTD"). It consolidated the 1993 Directive and a subsequent amending Directive and took effect as from 2 August 2004. Among the aspects of the organisation of working time that are the subject of rules in the WTD are minimum rest periods. They are set out in chapter 2. As it is concerned with laying down what are described as minimum requirements, the provisions which it contains adopt for the most part a one size fits all approach. There is scope for derogation in particular cases, and there are special rules for mobile workers, those engaged in offshore work and workers on board seagoing fishing vessels. But there is no attempt, either in the WTD or the WTR, to identify particular patterns of working and legislate for them individually. It is for the judiciary, in the event of a dispute, to work out how its requirements are to be applied in particular cases

3. The problem in this case is how the statutory right to paid annual leave under the WTR is to be applied to offshore workers in the oil and gas industry. Typically they work a two weeks offshore and two weeks onshore (known as "field break") shift pattern. Some work three weeks offshore and three weeks onshore, and some work two weeks offshore and three weeks onshore. But nothing

turns on these differences. The central issue is whether the period spent onshore should count towards the workers' entitlement under regulation 13 of the WTR to what, when the appellants made their claims, was to four weeks paid annual leave. That entitlement has now been increased by an amendment to the WTR to 5.6 weeks, by adding 1.6 weeks to take account of Bank Holidays: regulation 13A, inserted by regulation 2(1)(2) of the Working Time (Amendment) Regulations 2007 (SI 2007/2079). But nothing turns on that point either in this case.

4. The appellants say that "annual leave", properly construed, means release from what would otherwise have been an obligation to work, and that the employers cannot discharge their obligation to provide them with annual leave by insisting that they take this during periods of field break. Their periods of field break, they say, is their time. It is not their employers' time, and they insist that it is the employers' time out of which the annual leave should be taken. The respondents say that the time spent onshore is in itself a rest period, as it is not working time. And they point out that it is substantially more than the minimum of four weeks' annual leave to which the appellants are entitled under the WTR. Their case is that the requirements of the WTR are more than satisfied already, and there is no need for the appellants to take annual leave out of the periods spent offshore.

5. As the appellants point out, the issue that this dispute raises is important not just for the parties themselves. It has significant implications for other parts of the labour market. We cannot resolve all the problems that may possibly arise in this case. But the answer to the dispute has to take account of the fact that the WTD, and the WTR which give effect to it, have been designed to apply to the labour market generally.

Annual leave - the statutory entitlement

6. It will be necessary to examine the WTD and the WTR in more detail later. For the time being it is sufficient to note that article 7 of the WTD provides that member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks. This is to be in accordance with conditions laid down by national legislation and/or practice. Regulation 13(1) of the WTR gives effect to this requirement. It provides that a worker is entitled to four weeks' annual leave in each leave year. Regulation 15 contains provisions about how the days when this is to be taken are to be worked out between the worker and the employer, if this has not already been agreed, by a system of notices and counter-notices.

The facts

7. The appellants' cases are seven sample cases which have been selected from a much larger number of similar complaints that were lodged with the employment tribunal. They were all employed to work in various capacities on offshore installations located in the United Kingdom Continental Shelf. There were differences in the way their contracts were expressed as they were working for different employers, but it was agreed that nothing turns on these details. With the exception of Mr Craig, the appellants were contracted to work to a pattern of two weeks offshore with a period of field break for two weeks onshore. Mr Craig was contracted to work three weeks offshore followed by three weeks onshore. Whilst offshore the appellants generally worked, and still work, a 12 hour shift each day during which rest breaks are taken. This was followed by 12 hours off duty living offshore on the installation. They did not have any days off while they were offshore.

8. Part of the time during which the appellants were on field break was occupied in travelling to and from the installation and Aberdeen airport by helicopter, and to and from home once they were onshore. During the periods of field break the appellants attended occasional events that could only be undertaken onshore, such as training courses, appraisals, grievance and disciplinary hearings, medical assessments and offshore survival courses. But it is agreed that these occasional activities are of no significance for present purposes. For the most part the appellants were free from work-related obligations during the entire period of their field breaks. They could spend their time as they chose.

9. The appellants issued proceedings in the employment tribunal at Aberdeen in which they contended that the relevant provisions of the WTR required the respondents to permit them to take four weeks paid annual leave from periods when they would otherwise be required to work on the offshore installation. The respondents maintained that the paid annual leave entitlement was discharged by two weeks onshore within the shift pattern. In a long and careful judgment, which covered various other issues with which we are not concerned and was sent to the parties on 21 February 2008, the employment tribunal held that "leave" in regulation 13 of the WTR involved a release from what would otherwise have been an obligation to work, or at least to be available for work or otherwise in some way on call: para 300. So the field breaks were not to be regarded as annual leave for the purposes of the regulation, although they might provide periods of compensatory rest for the purposes of regulation 24 to the extent required: para 310 (xxviii).

10. In a review judgment dated 1 December 2008 the tribunal confirmed that, in its view, a worker is entitled to exercise his or her right to paid annual leave under

regulation 13 at such times as he or she would otherwise be obliged to work or be available to work. In the case of a worker whose pattern of work was to work for two weeks followed by two weeks' break from work, the entitlement to paid annual leave amounted to two weeks to be taken from time when he or she would otherwise be working. It had already explained in para 308 of its judgment the calculation on which this conclusion was based and which is not now in dispute. The number of days worked during each period of 28 days was 14 days, which amounted to an average of three and a half days a week. This produced an annual leave entitlement of 14 days. The number of hours worked each day made no difference.

11. The tribunal's finding that the respondents had refused to permit the appellants to exercise their right to paid annual leave because this could not be taken out of field break was set aside by the Employment Appeal Tribunal (Lady Smith, Mr M Sibbald and Mr R Thomson, Mr Thomson dissenting) in a judgment issued on 6 March 2009: [2009] IRLR 519. Lady Smith said in para 130 of the judgment that the time conceded to be available during field breaks, after allowing for compensatory rest to take account of the fact that the appellants worked offshore without a weekly rest period, was more than sufficient to cover the entitlement to annual leave. It was time when they were free of all and any work obligations and not subject to the possibility of being called on to work. It was to be regarded as a rest period. It did not matter that, because of the working patterns in the industry, the appellants would not otherwise be working during these periods.

12. The appellants appealed to the Inner House of the Court of Session. Their case was heard by an Extra Division (Lord Eassie, Lady Paton and Lord Emslie), which refused the appeal and remitted various outstanding issues to the Employment Appeal Tribunal to proceed accords: 2011 SC 175. The opinion of the court was delivered by Lord Eassie. He said that the court found force in the analysis advanced by the respondents that the structure of chapter 2 of the WTD involved different cycles of working time, and that what article 7 of the WTD required was that there be provided to the worker within the year at least four remunerated weeks of the yearly cycle in which he was free from working commitments: paras 33-34. There was nothing in the WTD to suggest that employers might not arrange matters so that annual leave was taken during the school holidays or such similar industrial equivalent: para 36. In para 37 he acknowledged that the appellants were required to work for about 26 weeks every year. But that requirement did not constitute an infringement of the cap, or limit, on the number of working weeks in the year set by article 7 as 48 weeks. That the 26 weeks "onshore" were termed as field break was not a matter upon which anything turned. He summarised the court's decision in para 51:

> "… on the core question of whether the annual provision by the employers of 26 weeks of field break fails to satisfy the entitlement of the employees under regulation 13 of the WTR, the answer which we give is in the negative. For all the reasons which we have given we consider that the working pattern of field break applicable in these appeals satisfies the requirements of the WTR, interpreted in the light of the WTD."

Relevant provisions of the WTD

13. The Treaty base for the WTD is identified in recital 2 of the preamble. It refers to article 137 of the Treaty establishing the European Community, which provides that the Community is to support and complement the activities of the member states with a view to improving the working environment to protect workers' health and safety. As Lady Smith pointed out in the EAT's judgment [2009] IRLR 519, para 9, the source for the WTD can be traced back to the Community Charter of the Fundamental Social Rights of Workers, adopted at Strasbourg on 9 December 1989. Adopting words used in paras 8 and 19 of the Charter, recitals 4 and 5 of the preamble to the WTD then state:

> "4. The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.
>
> 5. All workers should have adequate rest periods. The concept of 'rest' must be expressed in units of time, ie in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours."

14. The purpose and scope of the Directive are identified in article 1, which states that it lays down minimum safety and health requirements for the organisation of working time and that it applies to minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time. Article 2 provides the following definitions of the expressions "working time" and "rest period":

> "1. 'working time' means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. ‘rest period’ means any period which is not working time.”

There then follows Chapter 2, which is headed “minimum rest periods – other aspects of the organisation of working time.” The way working time is to be organised is then set out in articles 3 to 7.

15. Article 3, which is headed “Daily rest”, states that the 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. Article 4, which is headed “Breaks”, states that 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, the details of which shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation. Article 5, which is headed “Weekly rest period”, states that member states shall take the measures necessary to ensure that, per each seven day period, every worker is entitled to a minimum uninterrupted period of 24 hours plus the 11 hours daily rest referred to in article 3. Article 6, which is headed “Maximum weekly working time”, states that member states shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers, the average working time of each seven-day period, including overtime, does not exceed 48 hours.

16. Pausing there, one can see that the time that is available within the working week is to be organised in such a way as to ensure (i) that every worker whose working day is longer than six hours is entitled during the day to a rest break, (ii) that every worker is entitled to a minimum period which is not working time of 11 consecutive hours of daily rest during each 24 hour period and (iii) that every worker is entitled during each seven-day period to a minimum uninterrupted rest period of 24 hours as well as 11 consecutive hours of daily rest in each 24 hour period. Each period must therefore be measured separately from each other. They cannot intrude upon each other or overlap.

17. Article 17 provides in paragraph 3(a) that derogations may be made from, among others, articles 3, 4 and 5 in the case of activities where the worker’s place of work and his place of residence are distant from one another, including offshore work, or where the worker’s different places of work are distant from one another. In that event, paragraph 2 of article 17 requires that the workers concerned are afforded equivalent periods of compensatory rest or, if in exceptional cases for objective reasons this is not possible, that they are afforded appropriate protection. It was agreed that in the appellants' case the first two days of each period of their field break is accounted for as compensatory rest, to make up for the fact that they work a 12 hour shift each day during their two weeks’ offshore.

18. Article 7 is headed “Annual leave”. As article 17 makes clear, it cannot be derogated from. It is in these terms:

> “1. Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
>
> 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.”

The words “consecutive” and “uninterrupted” which qualify the periods of daily rest in article 3 and weekly rest in article 5 do not appear here. So article 7 does not require that the weeks of annual leave must be taken consecutively or that those weeks cannot be interrupted.

19. The units of time referred to in recital 5 of the preamble (days, hours and/or fractions thereof) do not include weeks. But the text of articles 5 and 6 shows that the word “weekly”, which appears in the heading to those articles, refers to a seven-day period. Article 21 of the WTD, which deals with workers on board seagoing fishing vessels, also refers to a seven-day period, as does article 22. In this context the reference in article 7 to “four weeks”, rather than to 28 days, would seem prima facie to mean four uninterrupted seven-day periods, but the conditions of the granting of such leave are left to national legislation and/or practice. As a period of leave is not a period which is working time, as defined in article 2, it must be taken to be what that article defines as a rest period. It is an annual period of rest: see recital 5.

20. There is one other point. Mr Linden QC for the appellants said that the right to paid annual leave had a qualitative dimension. It was not just a matter of calculating, as a matter of arithmetic, how much time the worker was to have in a given year. The word “leave” was not defined in the WTD, but it was more than just “rest”. Reducing the matter to a simple arithmetical exercise would defeat the safety and health purpose of the annual leave provision and ignore the point that the compulsory rest periods are the minimum periods that are required. His submission, as I understood it, was that the field breaks did not have the quality that would enable any periods within them to be enjoyed as periods of annual leave. He used it to support his basic point that, as these periods onshore were not part of the appellants’ working time, they could not count towards their annual leave entitlement.

21. I do not think that a qualitative requirement, as an additional test of whether a given period can be accounted as rest within the cycles of time that are identified, is to be found in the wording of the WTD. It is true that the safety and health of workers lies at the heart of the rules that it lays down. But there is no indication anywhere that it was concerned about the quality of the minimum periods of rest, other than to make it clear in the definition of "rest period" that it means a period which is not working time. The periods that it has identified must be taken in themselves to meet the objects stated in the preamble. The plain indication of its wording is that the exercise that must be carried out is indeed simply one of counting up the relevant hours, days or seven-day periods and ensuring that the worker is not required to work during those periods. For example, conditions offshore vary from installation to installation and from time to time. The quality of the rest that can be enjoyed will vary. It may be disturbed by the noise and vibration that are part and parcel of offshore operations. But so long as the worker is given not less than 11 consecutive hours each day which is not working time, the requirements of article 3 will have been satisfied.

Relevant provisions of the WTR

22. The purpose of the WTR was to implement the provisions of the WTD. Its provisions must be interpreted, so far as possible, in conformity with the wording and purposes of the Directive: *Litster v Forth Dry Dock and Engineering Co Ltd* 1989 SC (HL) 96, 101, 105; [1990] 1 AC 546, 554, 559 per Lord Keith of Kinkel and Lord Oliver of Aylmerton; *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, para 9. So they are of secondary importance in this case. They are nevertheless relevant, as they set out the domestic rules that must be complied with in conformity with the obligations set out in the WTD.

23. Regulation 2(1) sets out the meaning that is to be given to various words and phrases, among which are the following:

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

(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,

(b) any period during which he is receiving relevant training, and

(c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement."

24. Regulation 2(2) provides that in the absence of a definition in the Regulations, words and expressions used in particular provisions which are also used in corresponding provisions of the WTD have the same meaning as they have in those corresponding provisions. The word "leave" is not defined in the WTR, but it is not defined in the WTD either. It is left to take its meaning from the context. Like the expression "rest break", it is a period which is not "working time". This accords with the fact that a period which is not working time is defined by article 2 of the WTD as a rest period: see para 14, above.

25. The rules about daily rest, weekly rest periods and rest breaks are set out in regulations 10, 11 and 12 in terms which, without reproducing exactly the language of the WTD, reflect its requirements. They also contain some additions. For example, regulation 11, which deals with the weekly rest period, allows the employer to provide the worker with either two uninterrupted rest periods each of not less than 24 hours within each 14-day period or one uninterrupted rest period of not less than 48 hours in each such 14-day period in place of the entitlement to an uninterrupted rest period of 24 hours in each seven-day period during which he works for the employer. Regulation 13, as amended, which sets out the entitlement to annual leave, contains the following provisions:

"(1) Subject to paragraph (5) [which is not relevant for present purposes], a worker is entitled to four weeks' annual leave in each leave year.

…

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."

26. Regulation 15 makes provision for the dates on which annual leave may be taken under regulation 13. This is where the conditions for the granting of such leave, referred to in article 7 of the WTD, are to be found. The basic rules are set out in paragraph (1). They are that a worker may take leave to which he is entitled on such days as he may elect by giving notice to his employer in accordance with paragraph (3), but that this is subject to any requirement imposed on him by his employer under paragraph (2). Paragraph (2) provides:

"A worker's employer may require the worker –

(a) to take leave to which the worker is entitled …; or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3)."

Paragraph (3) states that a notice under paragraph (1) or (2) may relate to all or any part of the leave to which a worker is entitled in any leave year, must specify the days on which leave is or is not to be taken and, where the leave on a particular day is to be in respect of only a part of a day, its duration. It contains provisions about the date before which notice is to be given to the employer or the worker, as the case may be.

27. Regulation 21 takes advantage of the provisions about derogation in article 17 of the WTD. It provides that regulations 10, 11 and 12 do not apply in relation to a worker, among others, whose activities are such that his place of work and place of residence are distant from one another. Regulation 24 provides that where the application of any provision of the Regulations is excluded by regulation 21 and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break, his employer shall wherever possible allow him to take an equivalent period of compensatory rest. This accords with what is to be found in article 17 of the WTD: see para 17, above.

The appellants' case

28. Mr Linden's case was based on the proposition that leave could not be taken out of the periods when the appellants were on field break because they were not required by their contracts to work during those periods. These weeks were, as it was put, theirs already. It was inherent in the concept of leave that the worker was being released from the obligation to work. As they were not required to work during their field breaks, there were no periods within them for which they required to be given leave in order to remain onshore. This gave meaning to the concept of leave, and it was how the bargain between the parties should be interpreted. It was more than just "rest". It was the worker's right to say to his employer that, although his employer required him to work during a given period, he wanted to take his annual leave and to be released from the obligation to work during that period so that he could do so.

29. He submitted that the importance of the purpose for which the right to leave was given was illustrated by *Merino Gomez v Continental Industrias del Caucho SA* (Case C-342/01) [2005] ICR 1040. The problem that arose in that case was a conflict between the Community law right to maternity leave on the one hand and the statutory right to annual leave under the Spanish implementation of article 7 of the WTD on the other. The ECJ held that the entitlement to paid annual leave was not to be regarded as having been met where the worker had been absent on maternity leave, as the purposes of these two entitlements was different. In paras 29, 30 and 32 the court said (omitting its references to previous case law):

> "29. 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 Directive 93/104 [the then current working time Directive].
>
> 30. It is significant in that connection that that Directive also embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that article 7(2) permits an allowance to be paid in lieu of paid annual leave.
>
> …

> 32. The purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave. Maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth."

30. Mr Linden referred also to *Stringer v Revenue and Customs Comrs* (Joined Cases C-520/06 and C-350/06) [2009] ICR 932, in which the issue was whether workers continued to accrue an entitlement to paid annual leave whilst absent on long term sickness and were entitled to take it during periods of absence on sick leave. He submitted that the judgment identified the qualitative nature of paid annual leave, which was different from sick leave. After recalling what had been said about annual leave in *Gomez*, paras 29 and 30, the Grand Chamber said this in para 25 of its judgment:

> "It is common ground that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill."

But it did not add anything to its previous jurisprudence on this matter. There was no indication here or in *Gomez* that the quality of any periods of time that were set aside for rest affected the question whether, in terms of their duration or the time that was selected, they were sufficient for the purposes of the WTD.

31. In *Pereda v Madrid Movilidad SA* (Case C-277/08) [2009] ECR 1-8405, recalling what had been said about this in *Gomez* and *Stringer*, the ECJ again said that the purpose of the entitlement to annual leave was to enable the worker to rest and enjoy a period of relaxation and leisure: see paras 18-21. Mr Linden drew attention to the fact that the claimant in that case was under a 52 week contract that required him to work all the year round. He said that this was to be contrasted with the facts of this case, where the contract to work was what he described as a 26 week contract and there was no obligation to work for the other 26 weeks. But there was no suggestion in the *Pereda* case that the scheduled leave period did not count towards the statutory minimum annual leave entitlement because it was a period when the workers would not otherwise be working. It is to be noted too that the court said in para 22 that the scheduling of leave according to the rules and procedures of national law could take account of the various interests involved, including the overriding reasons relating to the interests of the undertaking. In the appellants' case, it is the overriding interests of the employers that has led to the working pattern being organised in a way that requires their workers to work

throughout the 14 days when they are offshore and to have their periods of rest and relaxation, other than breaks and the daily rest, during their field break onshore.

32. Reference was also made to *Sumsion v BBC (Scotland)* [2007] IRLR 678, which the employment tribunal attempted to distinguish from the present case. The BBC sought to discharge its obligation to Mr Sumsion by requiring him to take every Saturday off as a leave day to make up his annual leave under regulation 13 of the WTR. His contract referred to the fact that his services would be required for up to six turns of duty per week, and that he was to be entitled to six days leave to be taken on any sixth non-scheduled days in a week. The employment tribunal held in *Sumsion* that the BBC was not in breach of the WTR by requiring him to take his leave on Saturdays, and its decision was upheld by the EAT. In this case the employment tribunal said that the period of leave which Mr Sumsion was given was one when there was an obligation to work, whereas in the case of the field break out of which the respondents said leave should be taken there was no such obligation and never had been: para 289. I would not draw that distinction. It seems to me that the arrangements in both cases were essentially the same. It was known from the outset that the periods during which the employer was insisting leave should be taken were periods when the workers would not be required to work.

33. That said, the facts of that case were, as Lord Eassie pointed out in para 50 of his opinion, somewhat special. It was a short term contract under which it could be said, as the EAT in that case concluded, that the employee had elected for his Saturdays to be taken as leave days under regulation 15 with the result that it was open to his employers to request him to do so. The case was also decided in the light of the decision of the Court of Appeal in *Inland Revenue Commissioners v Ainsworth* [2005] EWCA Civ 441, [2005] ICR 1149 before that decision was in effect set aside by the ECJ's ruling in that case: see *Stringer v Revenue and Customs Comrs* [2009] ICR 932. And the device of requiring the worker to take his leave on Saturdays ("the Saturday problem") does not arise in the case of the offshore workers. For all these reasons I do not think that the EAT's decision in *Sumsion* offers any assistance to the solution of the problem that is before us in this case. It is worth noting however that in para 26 of its judgment in that case the EAT recognised that there might be cases in which, if the whole facts and circumstances were examined, it could be demonstrated that the employer, in nominating Saturday as a leave day, was not affording any real leave at all.

Discussion

34. I do not think that is right to describe the contract in this case, as Mr Linden sought to do, as a 26 week contract. The fact is that the appellants were under contract with their employers for the whole of each year. Their working pattern

was organised in such a way that working time was limited to the 26 weeks when they were offshore. But their contractual relationship with their employers continued irrespective of where they were at any given time. They had continuity of employment throughout the year. The fact that their pattern of working was a repeating shift pattern was a product of that contractual relationship.

35. The critical question is how that repeating shift pattern falls to be viewed for the purposes of the WTD. How is it to be determined whether the rules that it lays down for what recital 5 of the preamble refers to as daily, weekly and annual periods of rest are satisfied?

36. As I have already explained (see para 21, above), I do not think that the quality of the periods that are set aside during each cycle determines whether the minimum requirements have been satisfied. I accept that the purpose of the entitlement to annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure, as the ECJ has repeatedly made clear. But the WTD has met that purpose by laying down the minimum periods of rest that must be given in each cycle. As the ECJ said in *Gomez* [2005] ICR 1040, para 30, the fact that rest means actual rest is demonstrated by the rule that it is only where the employment relationship is terminated that article 7(2) permits an allowance to be paid in lieu of paid annual leave. But the ECJ has not said that a pre-ordained rest period, when the worker is free from all obligations to the employer, can never constitute annual leave within the meaning of that article. I would hold therefore that "rest period" simply means any period which is not working time: see article 2. "Any period" includes every such period irrespective of where the worker is at that time and what he is doing, so long as it is a period when he is not working. I think it is plain that any period when the appellants are on field break onshore will fall into that category.

37. The employment tribunal recognised in para 286 of its judgment that there was an element of circularity in the appellants' argument:

> "ie, is it that a particular period cannot be said to be leave because it is a period when there is no obligation to work, or is it that there is only no obligation to work because the period in question has already been designated as leave?"

It referred to the case of teachers in non-term time and tradesmen in the "trades fortnight" as examples of the latter where the period when annual leave could be taken had already been designated. But it did not try to resolve this apparent anomaly, as it did not see these cases as giving rise in practice to any difficulty. The solution which it favoured, contrary to what happened in practice in those

cases, seemed to it to be founded on the common sense proposition that the worker's entitlement to each of the measures provided for by the WTR required to be real, in the sense that they genuinely provided a break from what would otherwise be an obligation to work or to be available to work. But the facts of this case do not support the idea that the field break is not a genuine break or otherwise unreal. Nor has there been any suggestion that the pattern of working has had, or is liable to have, an adverse effect on the appellants' health or safety.

38. For these reasons I would hold that the respondents are entitled to insist that the appellants must take their paid annual leave during periods when they are onshore on field break. In my opinion this is permitted by regulation 13 of the WTR, read in conformity with article 7 of the WTD.

Other problem cases

39. Attention was drawn in the course of the argument to two other problem cases which it was said might give rise to difficulty. The first was the case of teachers, already mentioned by the employment tribunal, who are required to take their annual leave during non-term time. Various other cases fall into this category, such as professional footballers, staff who work in the devolved legislatures such as the Scottish Parliament and in the Parliament at Westminster and people who work full-time during the season in the tourist industry. They are people who are left, for the most part, with no option but to take their paid annual leave during periods when they are not required to work. But the problem in their case disappears if, as I would hold, there is no objection to their being required to take their annual leave during those periods.

40. The other problem was referred to as the Saturday problem, which is illustrated by the case of *Sumsion*. It was said to arise from the ability of employers under regulation 15 of the WTR to designate days within the week when the worker would not otherwise be working as annual leave. Carried to its extreme this could result in workers who worked a five day week, Sundays being treated as the weekly rest period, being required to take their annual leave each Saturday. This would exhaust the possibility of there ever being whole weeks in the year when annual leave could be taken. A literal reading of the employer's rights under regulation 15(2) suggests that this course might be open to him. It would obviously be an abuse of the system as the EAT indicated in *Sumsion v BBC (Scotland)* [2007] IRLR 678, para 26. But the suggestion was that it was an abuse which could not be prevented.

41. This raises a different problem from that which arises in the case of the offshore workers. The question is not whether a worker can be required to take

annual leave during a period when he would not otherwise have been working but whether the worker can be forced to take his entitlement to annual leave in periods which are shorter than one week. But it is not a problem that has to be answered in this case. There seems to me to be much to be said for the view that, when article 7 of the WTD is read together with the purposes identified in the preamble and in the light of what the ECJ said in *Gomez* [2005] ICR 1040, para 30, the entitlement is to periods of annual leave measured in weeks, not days. The worker can opt to take all or part of it in days, if he chooses to do so. But the employer cannot force him to do so. But I do not need to reach a concluded view on this point, and I have not done so.

Reference

42. Mr Linden submitted that the meaning that was to be given to the expression "annual leave" in article 7 of the WTD was not so obvious as to leave no room for reasonable doubt and that, if the court was not persuaded that the appeal should be allowed, the issue should be referred to the CJEU for a preliminary ruling under article 267 of the Treaty on the Functioning of the European Union. Various other issues were listed in his written case as requiring a reference.

43. I am not persuaded that a reference is necessary in this case on any of the questions that have been listed. We must be mindful of our responsibility as a court against whose decisions there is no judicial remedy under national law. But the ruling in *Srl CILFIT v Ministry of Health* (Case 283/81) [1982] ECR 3415 permits us to decline to make a reference if a decision on the point is not necessary to enable the court to give judgment or the answer to the question is acte clair. I do not think that the meaning to be given to article 7, for the purposes of this judgment, is open to any reasonable doubt. The wording and structure of the WTD plainly favours the respondents' argument, and I can find nothing in any of the judgments of the ECJ to which we were referred that casts doubt on the meaning which I think should be given to it. I would refuse the request for a reference.

Conclusion

44. I would dismiss the appeal. I would affirm the interlocutor of the Extra Division of the Court of Session.