Case Number 1315342/2012

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Neal	**AND**	Freightliner Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 15 & 16 April 2013

EMPLOYMENT JUDGE van Gelder

Representation
For the Claimant: Mr M Ford, Q.C.
For the Respondent: Mr S Jones, Q.C.

RESERVED JUDGMENT

The judgment of the Tribunal is that :

(1) the correct basis for calculation of the claimant's entitlement to holiday pay is by reference to the claimant's normal earnings which includes overtime and shift premia
(2) in order to achieve the result required by the Directive Regulation 16(3)(d) of the Working Time Regulations 1998 ("the WTR") should be construed to read as though the following words had been added :" and, in the case of entitlement under regulation 13, sections 223(3) and 234 do not apply."
(3) the respondent is not entitled to credit for the Annual Leave Premium formerly paid to employees of the respondent.
(4) the claimant's remedy under Regulation 3 of the WTR is an award under regulation 30(1)(b) and Regulation 30(5).
(5) the claimant is entitled to an award for unauthorised deduction of wages under Section 23 of the Employment Rights Act 1996.
(6) the claimant is entitled to an award under section 38 of the Employment Act 2002.
(7) the claimant is not entitled to interest on any award.

REASONS

1. The claimant is employed by the respondent as a Multi-Skilled Operative ("MSO") based at their Birmingham depot. His employment began on 23 July 2007. On 27 January 2012 the claimant issued a written grievance with regard to holiday pay. Subsequently the claimant lodged proceedings with the Employment Tribunal claiming that he had suffered a series of unauthorised deductions from wages in relation to underpayment of holiday pay. He subsequently amended his claim to include an alleged breach of the Working Time Regulations 1998 in relation to the underpayment of holiday pay. The respondent contends that the holiday pay was correctly calculated in accordance with the claimant's basic pay. The claimant asserts further that the written particulars of employment failed to comply with Sections 1 and Sections 4 of the Employment Rights Act 1996 and requests the tribunal to amend or substitute in the claimant's written particulars, confirmation of the claimant's normal working hours and how holiday pay is to be calculated. The respondent accepts that it has failed to give the claimant full details with regard to the calculation of holiday pay. Finally the claimant seeks an award of interest in the event of his claim succeeding.

2. The claimant was represented by Mr Michael Ford, Q.C. who called the claimant to give evidence and also called another employee of the respondent, Maurice Hamilton, who has been a representative of the recognised trade union, the National Union of Rail and Maritime Transport Workers ("RMT") for many years and holds local and national positions including representation on the respondent's National Business Council ("NBC"). The respondent was represented by Mr Shaun Jones Q.C. who called the following witnesses: Gary Stocker, General Manager of the respondent's Birmingham terminal; Mark Whitcher, the respondent's Head of Personnel; Michael O'Hagan, General Manager – Inland Terminals for the respondent. The tribunal was also provided with an agreed list of issues, a bundle, supplemental bundle (referred to with the suffix 'S' in front of the page number), respondent's bundle (referred to with the prefix 'R' in front of the page number), a bundle of authorities and witness statements for all witnesses.

3. The agreed list of issues is as follows:

1. The legal issues before the Tribunal, which concern the Working Time Directive 2003 /88/ EC (the "Directive") and the Working Time Regulations 1998 ("WTR") are the following:

a. What level of pay during the four-week period of annual leave is required by Article 7 of the Directive? In particular, must the level of pay under the Directive be based on the claimant's actual remuneration (including his overtime pay), or is it sufficient to base it on his basic pay only?

b. Depending on the answer to (a), can the provisions of WTR and/or ss 221-224 ERA be interpreted to achieve the result required by the Directive?

c. Is the respondent entitled to credit for the Annual Leave Premium formerly paid to employees?

d. In the event that the claimant was not paid the correct level of paid annual leave under WTR:

i. What is his remedy under regulation 3 WTR?

ii. Can the claimant claim any under-payments of holiday pay as a series of deductions from wages under Part II of ERA?

e. In the event the claimant is successful in his claim:

i. Should the tribunal make an award under s.38 EA 2002 owing to the failure to provide details of the calculation of holiday pay as required by s.1(4)(d) ERA? (The respondent concedes that it failed to give the claimant the details of how his holiday pay is calculated for the purpose of s.1(4)(d) ERA).

ii. Is the claimant entitled to interest either in accordance with the principle in ***Marshall No.2*** [1994] QB 126 or under s.24(2) ERA?

The Findings of Fact

4. The tribunal made the following primary findings of fact:

4.1 The respondent is part of the Freightliner Group. It provides freight transport solutions using railway and road between ports and inland terminals across the United Kingdom. There are nine such inland terminals one of which is at Birmingham. Each terminal has a local manager who reports to the general manager of the respondent, Mr O'Hagan. The respondent recognises a number of trade unions including the RMT of which the claimant is a member.

4.2 Protracted negotiations between the respondent and the recognised trade unions began in 2001/2002. Their purpose was to explore various differences and discrepancies which had arisen as a result of a number of factors including privatisation of the rail sector, the conclusion of various unofficial local deals and extensive collecting bargaining. One issue which was included in those negotiations concerned employees' wages which at the outset were relatively low basic salaries supplemented by a variety of bonuses and shift allowances.

4.3 One allowance was known as the Annual Leave Premium ("ALP") which was paid as part of holiday pay. The manner of calculation varied with the grade of the employee. In essence it was a portion of the difference between the basic pay and the weekly pay of the employee taking into account matters such as the shift premium payable during unsocial hours and overtime rates. Eventually a concluded agreement was reached for the incorporation of the ALP and other benefits into a restructured contract which offered a higher basic rate of pay. The new contract was introduced in January 2005 and applied to the newly created role of MSO.

4.4 The claimant began working for the respondent on 23 July 2007. He was issued with written particulars of employment dated 3 August 2007 (pages 38-42). The statement of terms and conditions includes the hours of duty at paragraph 7 in the following terms:

> "7.1 You will be expected to work a basic 35 hours per week (the standard working week for salaried grade staff). The standard working week is from 00.00 Monday to 24.00 Friday. The number of working hours within each working day may vary or be changed periodically depending upon the particular requirements of your post. You will be expected to work one in three Saturday shifts, which will have at the latest a finishing time of 14.00 hours. Saturday working on top of this will be on a voluntary basis.
>
> 7.2 You may be required to work overtime when necessary. The company will give you reasonable notice of when this may be required. You may not work overtime unless this has previously been authorised by your manager and no payment will be made for unauthorised overtime.
>
> 7.3 Overtime will be paid in accordance with the basic and overtime enhancement rates contained in the Multi-Skilled Operative Agreement."

Paragraph 8 deals with "holidays and holiday pay" but makes no specific provision for the calculation of holiday pay. At paragraph 17 ("Incorporation of Trade Union Agreements") it provides that "full details of the relevant collective agreements that directly affect the terms and conditions of your employment are contained within Freightliner Limited's Procedure Agreement, signed by all parties concerned and effective from 26 June 1995". The claimant signed confirming his understanding that the main terms of particulars form part of his contract of employment with the respondent and agreeing to those terms.

4.5 Following the introduction of the new contract in January 2005 and as a result of agreement at national level between the respondent and the recognised trade unions at the NBC the respondent began preparing rosters on the basis of 9 hour shifts rather than the 12 hour shifts previously employed. As a result of the

introduction of 9 hour shifts to the rota, this meant that the terminal could operate a 24 hour business requiring the MSOs to work shifts of 9 hours so that three individuals would between them cover 24 hours with an allowance of 1 hour overlap which ensured no delays. As the activites of MSOs involved the movement of heavy goods, including shunting loads some distance from the terminal, it would not always be straightforward for one MSO to hand over to the succeeding MSO on the following shift. The Birmingham terminal in particular was one of the busiest terminals at which the MSOs were required to carry out loading and unloading duties throughout their shift. The terminal was subject to scrutiny by its customers who would be quick to complain if they saw evidence of the respondent's machinery lying idle at any point.

4.6 Although the claimant had been employed on terms and conditions which provided for a 7 hour shift, it was not in dispute that he had never worked a 7 hour shift throughout his employment. The records including the rosters (pages 50-51) demonstrated that the claimant worked shifts of largely 9 hours or 8.5 hours and on occasion 12 hours. The 12 hour shifts would normally arise where cover was required for holidays or sickness absenteeism.

4.7 By March 2009 there had been a downturn in the volume of work required at the respondent's depots. The respondent carried out a review of its requirements and concluded that it wished to introduce new rosters from late April 2009 which were either 9 or 8.5 hour shifts (page 32). The topic was the subject of a consultation meeting between members of management at the Birmingham depot and union representatives which included the claimant (pages 81-83). During the course of the meeting the union representatives raised the issue of the extent to which overtime was compulsory or voluntary. The respondent's position was explained by the Terminal Manager, Gary Stocker, as: "The Company guarantees 35 hours as per contract of employment; the other 2 hours per day were agreed nationally". He stated that only the 35 hours were guaranteed and that if there were weekend trains then the company would look for the commitment of 1 in 3 i.e. the provision in clause 7.1 of the terms and conditions that "you will be expected to work 1 in 3 Saturday shifts...." and, at 7.2, "you may be required to work overtime when necessary". That position was reiterated by Mr Stocker as "....if someone wants to give away their Saturday they can but if there is no one else available to cover then they would be required to do it". Mr Stocker further referred to overtime not being compulsory but the subject of a national agreement. He also referred to there being members of staff who were not willing to cover overtime or swap a shift so that the roster manager had to bring in agency workers. The terms and conditions of employment set out the minimum contractual obligation on the part of the respondent to offer work and on the employee to do work. The National Agreement and the agreement over the length of each shift as set out in the respondent's rosters was an agreement to try and ensure that the company was able to meets its obligations to its customers and the workforce assisted in that process but could not be forced to assist if it meant working beyond the minimum contractual hours. The

respondent had contracted to give reasonable notice of Saturday working. In return, once their names had been put on the roster for the coming week, which would be distributed on Wednesdays, and no objection had been raised in the course of the following day, the respondent expected the individuals who had committed to work the roster for that week to do so, including working beyond the 7 contractual hours and weekend hours.

4.8 The claimant has sought to argue that he is required to work the hours in accordance with the roster rather than 35 hours per week. He refers to having been told by various (unidentified) managers and cites a particular email from Mr Stocker sent to three of his staff on 22 September 2008 (R41) on the subject of MSO overtime which specifically states: "An MSO cannot decide to just do his basic 7 hours". The rosters of 9 hours are referred to as the minimum that a person can be expected to work whereas a request to work 12 hours could be accepted or declined. However, once accepted a person would be committed to those hours. However, in his witness statement Mr Stocker, as the manager responsible for the preparation of the rosters, states at paragraph 23 that where an MSO is adamant that he will no longer work beyond the 7 hour contracted requirement the company would after attempting to resolve the matter through discussion with the RMT union revert to 7 hours per day and the company would be required to recruit from the market place to cover the extra hours. This is consistent with the previous memorandum that referred to the requirement to use agency workers where overtime work had been declined.

4.9 Consequently there are three positions: working up to 7 hours which is a contractual obligation for both parties; working between 7 and 8.5 / 9 hours in accordance with a locally negotiated agreement which an individual would be expected to do but could not ultimately be forced to do; work in excess of 8.5 / 9 hours where there was an unfettered right to refuse but once accepted the individual would be expected to honour his/her commitment. Mr Stocker identified the MSOs in Birmingham as falling into three categories with regard to willingness to work overtime: one category could almost always be expected to accept, another category could almost always be expected to decline and the third category, in which the claimant fell, might or might not agree.

4.10 In preparing the roster Mr Stocker has to take into account that trains are operated on a 24 hour basis. Dayshifts begin at 5.00 or 6.00am and run for 8.5 or 9 hours. The shorter shifts begin half an hour later than the 9 hour shifts. Similarly late shifts begin at 1.00pm or 2.00pm, or half an hour later, and run for 8.5 or 9 hours. Nightshifts operate in a similar fashion from 9.00 or 10.00pm or half an hour later operating for 8.5 or 9 hours. MSOs are rotated across the shifts to ensure that there is an equal share of social and unsocial hours. There are different rates of pay in relation to when the shift falls and where hours exceed the 7 hours contracted for. Dependent on the shift the hourly rate increases by a fraction up to $1^3/_4$ times the standard rate for Sunday shifts.

4.11 The current holiday pay arrangements operated by the respondent had been in place since negotiations were concluded in 2005. There had been occasions since 2005 when the basis of calculation of holiday pay limited to the basic 35 hour week has been challenged and has been the subject of a collective grievance raised at the NBC level. The arguments advanced on behalf of the respondent by Mr Whitcher are three-fold: that the company has operated in accordance with his understanding of the law, in particular the judgment in Bamsey -v- Albon Engineering and Manufacturing Plc [2004] ICR 1083. Secondly, he points to the negotiations leading up to the introduction of the MSO contract and the substantial pay rise negotiated at that time part of which was in recognition of the loss of the employee's entitlement to ALP. The third argument is that the claimant has enjoyed an enhanced basic salary in consequence since the start of his employment. The argument has been summarised in a letter of 14 May 2010 from Mr Whitcher to the General Secretary of the RMT, Bob Crow (pages 84-86). That analysis was not accepted by Mr Crow as is evident from his letter to Mr Whitcher of 14 March 2011 (pages 87-88).

4.12 The position adopted by Mr O'Hagan with regard to holiday pay is that the negotiations leading up to the new contract in January 2005 resulted in the ALP, which MSOs in their previous role received, being incorporated into the basic pay for MSOs from 2005. Consequently if there were to be a finding that there was a further entitlement to holiday pay it would amount to double recovery. His position with regard to overtime is, with the exception of the requirement to work on Saturdays,if there are not enough volunteers in order to meet the business needs, that there is otherwise no express obligation to work beyond 7 hours per day. That analysis is disputed by the claimant's witness, Maurice Hamilton, who was involved in negotiations on behalf of the RMT over an extended period and is not aware of there being a concluded agreement between the union and the company in relation to the terms and conditions of the MSO role, and in particular that the issue of holiday pay was never properly concluded. His analysis of the position following the introduction of the MSO role and the enhanced basic salary in return in part for the introduction of a 9 hour shift was that the roster that was negotiated with the local terminal manager and the MSOs' representative would be a binding agreement and that there was no discretion about the roster. The workers simply must follow it. Mr Hamilton also relies on the minute at the meeting of 24 March 2009 (pages 81-83) and the failure as he saw it on the part of Mr Stocker to specifically state that as a result of the introduction of 9 hour shifts the additional 2 hours per daily shift were voluntary. This assertion demonstrates the lack of clarity with regard to the requirement to work 8.5 or 9 hour shifts. By reference to the hours of duty in the statement of terms of employment which applied to the claimant, at paragraph 7.2 the claimant might be required to work overtime when necessary. Generally there was no difficulty in obtaining sufficient MSOs to work the roster whether or not they were working overtime. On occasions agency staff would be called in when there were gaps that could not be filled. The final position if there was consistent refusal to work beyond 7 hours, in effect working to rule, was that the management would go back to the

RMT to discuss the fact that the local agreement was not working and if necessary arrange to revise the roster by reducing the hours to the contracted 7 hours and supplementing the staff with new recruits, be they permanent or agency staff.

4.13 In the three months prior to lodging his claim with the tribunal on 12 October 2012, the claimant had taken annual leave between 1 and 5 October 2012, on 1 day in September 2012 and a further 6 days in August 2012 (pages 369-370). On each occasion the claimant had been paid for annual leave at the rate of his basic salary only without reference to the additional amounts of remuneration which he received when working beyond the 35 hours required under the terms and conditions of employment.

The Law

5.1 The following provisions of Directive 2003/88/EC apply:

CHAPTER 1
SCOPE AND DEFINITIONS
Article 1
Purpose and scope
1. This Directive lays down minimum safety and health requirements for the organisation of working time.
2. This Directive applies to ... annual leave
Article 2
Definitions
For the purposes of this Directive, the following definitions shall apply:
1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.
Article 7
Annual leave
1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

5.2 The relevant provisions of the Working Time Regulations 1998 (but regulations 13(6)-(8) were revoked from 1 October 2007) are:

Interpretation

2.—(1) In these Regulations —

"the 1996 Act" means the Employment Rights Act 1996;

"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;

and "work" shall be construed accordingly;

"Working Time Directive" means Council Directive 93/104/EC of 23rd November 1993 concerning certain aspects of the organization of working time;

Entitlement to annual leave

13.—(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is-

(a)in any leave year beginning on or before 23rd November 1998, three weeks;

(b)in any leave year beginning after 23rd November 1998 but before 23rd November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23rd November 1998 which has elapsed at the start of that leave year; and

(c)in any leave year beginning after 23rd November 1999, four weeks.

(3) A worker's leave year, for the purposes of this regulation, begins—

(a)on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply- -

(i)if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii)if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture) except where, in the case of a worker partly employed in agriculture, a relevant agreement so provides.

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

[(6) Where by virtue of paragraph (2)(b) or (5) the period of leave to which a worker is entitled is or includes a proportion of a week, the proportion shall be determined in days and any fraction of a day shall be treated as a whole day.

(7) The entitlement conferred by paragraph (1) does not arise until a worker has been continuously employed for thirteen weeks.

(8) For the purposes of paragraph (7), a worker has been continuously employed for thirteen weeks if his relations with his employer have been governed by a contract during the whole or part of each of those weeks.

(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.

Payment in respect of periods of leave

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

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply

(a)as if references to the employee were references to the worker;

(b)as if references to the employee's contract of employment were references to the worker's contract;

(c)as if the calculation date were the first day of the period of leave in question; and

(d)as if the references to sections 227 and 228 did not apply.

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration").

(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; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

5.3 The relevant provisions of the Employment Rights Act 1996 are:
220 Introductory.
The amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter.

Employments with normal working hours

221 General

(1)This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2)Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

(3)Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of 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.

(4)In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5)This section is subject to sections 227 and 228.

222 Remuneration varying according to time of work.

(1)This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2)The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

(3)For the purposes of subsection (2)—

(a)the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and

(b)the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.

(4)In subsection (3) "the relevant period of twelve weeks" means 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.

(5)This section is subject to sections 227 and 228.

223 Supplementary.

(1)For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—
(a)the hours when the employee was working, and
(b)the remuneration payable for, or apportionable to, those hours,
shall be brought in.
(2)If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.
(3)Where—
(a)in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and
(b)the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime),
account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

224 Employments with no normal working hours.
(1)This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.
(2)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.
(3)In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee 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.
(4)This section is subject to sections 227 and 228.

The calculation date

227 Maximum amount.
(1)For the purpose of calculating—
(zza)an award of compensation under section 63J(1)(b),
(za)an award of compensation under section 80I(1)(b),
(a)a basic award of compensation for unfair dismissal,
(b)an additional award of compensation for unfair dismissal,
(ba)an award under section 112(5), or
(c)a redundancy payment,
the amount of a week's pay shall not exceed £400 .

228 New employments and other special cases.
(1)In any case in which the employee has not been employed for a sufficient period to enable a calculation to be made under the preceding provisions of this Chapter, the amount of a week's pay is the amount which fairly represents a week's pay.
(2)In determining that amount the employment tribunal—
(a)shall apply as nearly as may be such of the preceding provisions of this Chapter as it considers appropriate, and
(b)may have regard to such of the considerations specified in subsection (3) as it thinks fit.
(3)The considerations referred to in subsection (2)(b) are—
(a)any remuneration received by the employee in respect of the employment in question,
(b)the amount offered to the employee as remuneration in respect of the employment in question,
(c)the remuneration received by other persons engaged in relevant comparable employment with the same employer, and
(d)the remuneration received by other persons engaged in relevant comparable employment with other employers.
(4)The Secretary of State may by regulations provide that in cases prescribed by the regulations the amount of a week's pay shall be calculated in such manner as may be so prescribed.

229 Supplementary.
(1)In arriving at—
(a)an average hourly rate of remuneration, or
(b)average weekly remuneration,
under this Chapter, account shall be taken of work for a former employer within the period for which the average is to be taken if, by virtue of Chapter I of this Part, a period of employment with the former employer counts as part of the employee's continuous period of employment.
(2)Where under this Chapter account is to be taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated, the remuneration or other payments shall be apportioned in such manner as may be just.

234 Normal working hours.
(1)Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2)Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3)Where in such a case—

(a)the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b)that number or minimum number of hours exceeds the number of hours without overtime,

the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

Submissions

6. The claimant's submissions:

6.1 Mr Ford submitted a written skeleton argument supplemented by an additional note and further oral submissions. The legal sources giving rise to the entitlement of every worker to 4 weeks' paid annual leave are Regulation 13 of the Working Time Regulations 1998 ("WTR") which implements, among other provisions, the Working Time Directive 2003 / 88 / EC (formerly Working Time Directive 93 /104 / EC).

6.2 The claimant has been in receipt of paid annual leave which has been calculated on the basis of his 35 hour basic salary without reference to the additional enhancements which he has received as a result of his working throughout his employment for more than 35 hours per week. The claimant's argument is that holiday pay should be paid on the basis of his actual normal remuneration rather than on his basic pay. He relies on the decision of the CJEU in case C-155 / 10, British Airways Plc -v- Williams [2012] ICR 847. His contention is that this decision provided that pay during the 4 week period of annual leave guaranteed by Article 7 of the WTR 2003 / 88 must correspond to the normal remuneration received by a worker. Where pay varies across time then it must be calculated by reference to an average over a representative reference period. There are to be no derogations from these requirements. The claimant's normal remuneration comprised all his pay for the hours actually worked which included weekend work, night work and overtime. The calculation of the holiday pay should have been based on the claimant's normal remuneration to be consistent with the judgment in the Williams case. The provision in Article 7 for paid annual leave represents "a particularly important principle of community social law from which there can be no derogations" unless expressed or permitted by the Directive as stated by the Grand Chamber in case C – 520 / 06 Stringer & Others -v- Revenue and Customs Commissioners, reported as IRC -v- Ainsworth [2009] IRLR 237 at paragraph 22.

6.3 The rights granted to the worker were twofold: the right to annual leave and the right for it to be paid. How the level of pay was to be calculated was considered in the context of rolled up holiday pay in the case of Robinson-Steele -v- RD Retail Services Ltd [2006] ICR 932 in which the First Chamber of the CJEU at paragraph 50 referred to the need for remuneration to be maintained during the period of annual leave "in other words, workers must receive their normal remuneration for that period of rest". The intention was that during

periods of annual leave workers would be put "....in a position which is, as regards remuneration, comparable to periods of work" (paragraph 59).

6.4 Mr Ford also refers to the opinion of the Advocate General in the Stringer case in support of his contention as to the correct basis for the calculation of pay. Although the case is concerned with the rights of employees to holiday pay while on sick leave, he cites two passages in the opinion of the Advocate General. At paragraph 78 the Advocate General refers to a worker taking annual leave being "....quite often put in a better financial position than if he were on sick leave since during his annual leave he enjoys the right to continued payment of his wages under Article 7(1) of Directive 2003 / 88 without any reduction, whilst his right to continued payment of wages in the event of illness under the relevant national rules is only a fraction thereof". And more succinctly in the concluding paragraph of the Advocate General's opinion at paragraph 91: "In assessing the amount of that entitlement [i.e. to paid holiday leave] it is necessary to ensure that the amount of the allowance in lieu that the worker receives is equivalent to that of his normal pay". This contention is made in relation to the compensatory payment that might be made to a worker who has not taken his entitlement to paid holiday at the date of termination of the contract of employment.

6.5 In its reference to the CJEU the House of Lords had posed the question whether Article 7(2) imposed any requirements or laid down any criteria as to whether the allowance was to be paid or how it was to be calculated. In representations from four national governments including that of the United Kingdom, the suggested answer was that it was a matter for the national legislature. In its judgment the Grand Chamber of the CJEU noted, at paragraph 58, that "....according to the case law of the Court, the expression "paid annual leave" in Article 7(1) of Directive 2003 / 88 means that, for the duration of annual leave within the meaning of that Directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest: see Robinson-Steele -v- RD Retail Services Ltd". Further, at paragraph 61 of the judgment in Stringer, it provides that the allowance in lieu "....must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship. It follows that the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards to the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship".

6.6 The third case relied on by Mr Ford is British Airways Plc -v- Williams [2012] ICR 847 (the judgment of the CJEU) and [2012] ICR 1375 (the judgment of the Supreme Court). The referral to the CJEU in this case was specifically in relation to the basis for calculation of the payment for paid holiday leave. Although it concerned pilots employed by British Airways who received a fixed annual salary together with certain supplementary payments which varied in accordance with their flying time and time away from their home base, and which

formed the basis for calculation of annual paid leave in accordance with Regulation 4 of the Civil Aviation (Working Time) Regulations 2004, the wording in the regulations mirrored the wording in the provision for the right to paid annual leave provided for in Article 7 of Directive 2003 / 88.

6.7 Five questions were referred for a preliminary ruling (set out in paragraph 14 of the judgment of the CJEU) which included the extent to which European law laid down any requirement as to the nature or level of payments required to be made in respect of periods of paid annual leave and to what extent might member states determine how such payments were to be calculated. It posed the question whether it was sufficient that the payment enabled and encouraged the worker to take and to enjoy in the fullest sense of these words his/her annual leave and did not involve any sensible risk that the worker would not do so. Further, the reference asked whether it was required that the pay should either (a) correspond precisely with, or (b) be broadly comparable to the workers "normal" pay.

6.8 In summarising the main arguments of the parties the Advocate General referred to the position of British Airways that European Union law did not lay down any requirement with respect to the nature and level of payments to be made beyond that it be established by contract and was sufficiently high not to deter workers from claiming their entitlement to annual leave. It did not have to correspond exactly to or be comparable to the worker's normal pay. In his analysis Mr Ford points to the opinion of the Advocate General by reference to the previous decisions in the Robinson-Steele and Stringer cases of the necessity for a worker not to" suffer any disadvantage" through taking annual leave, a prime example of which would be financial loss (paragraph 51). Where remuneration comprises several components, an excessively narrow interpretation is to be avoided as it would encourage the employer to declare individual components not to be part of the remuneration in order to reduce the scope of holiday pay. The Advocate General concluded in principle (at paragraph 79) that a worker was entitled to the supplements normally due to him also in respect of periods of annual leave. Examples of supplements included pay supplements for overtime and shift allowances (paragraph 77). The purpose of doing so was to interpret the legislation so that a worker taking leave was not treated any differently from a financial point of view from when he was working.

6.9 In its judgment the CJEU referred to the Robinson-Steele case as authority for its decision that remuneration must be maintained during annual leave as meaning workers must receive their normal remuneration for that period of rest (paragraph 19) and that during the leave period the worker is to be in a position which is as regards remuneration comparable to periods of work (paragraph 20), and that remuneration paid in respect of annual leave "....must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker" (paragraph 21). This requirement is not satisfied by a payment which is just sufficient to ensure that there is no serious risk that the worker will not take his leave.

6.10 As to the question of components of remuneration, the structure of ordinary remuneration may be determined by provisions and practices under the national law but that structure could not affect the worker's right "....to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment" (paragraph 23). That approach is then summarised in paragraph 24 of the judgment as: "Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of Airline Pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave". In contrast components of total remuneration intended exclusively to cover occasional or ancillary costs arising at the time of performance are not required to be taken into account (paragraph 25).

6.11 It is then left to the national court to assess the intrinsic link between the various components making up the total remuneration of the worker and the performance of the task he is required to carry out under his contract of employment which must relate to an average over a reference period established under the relevant case law (i.e. Robinson-Steele and Stringer).

6.12 The Court then concludes (at paragraph 31) that the answer to the questions referred is that Article 7 of Directive 2003 / 88 ...must be interpreted as meaning that an airline pilot is entitled , during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot. It is for the national courts to assess whether the various components comprising that worker's total remuneration meet those criteria."

6.13 In reliance on the judgment of the CJEU in the Williams case and the authorities cited in Robinson-Steele and Stringer, Mr Ford asserts that as the claimant under his terms and conditions of employment was "expected" to work 35 hours and was "expected" to work Saturdays 1 week in 3, and contractually "required" to work overtime when necessary, and as the claimant normally did work those hours and did receive overtime pay and other enhancements of his remuneration for performing his work in accordance with his contract of employment, all those elements formed part of his normal remuneration. They were paid systematically and in the ordinary course of events. They were not expenses or costs.

6.14 In support of his contentions Mr Ford points to the purpose of Article 7 being to ensure that a worker rests and enjoys the period of rest and leisure. The maintenance of normal pay is consistent with that purpose because the worker has no financial incentive not to take annual leave i.e. that he will earn more by staying at work rather than going on holiday. Secondly, the interpretation advanced on behalf of the claimant addresses what would otherwise be potential disadvantages for workers who were either on zero hours contracts or whose basic salary was deliberately set at a low level of basic hours by the employer. Thirdly, Mr Ford points to the provisions contained in C132 – Holidays with Pay Convention (Revised) 1970, a convention of the International Labour Organisation ("ILO") specifically referred to in the recital to the Directive, that account be taken of the principles of the ILO with regard to the organisation of working time. The CJEU has taken account of the convention in interpreting Article 7 previously in Stringer as emphasising that a worker must receive the same level of remuneration as he receives while working. The convention replaces the earlier convention C52 which had provided for the level of pay being set by collective agreement, but this was not retained in C132.

6.15 Mr Ford contends that in accordance with Article 7 the claimant should receive remuneration for the 4 week period of annual leave equivalent to the remuneration which he would have received while working and that restricting holiday pay to basic pay is inconsistent with that proposition – see Williams. The meaning of Article 7 as explained in the decisions leading up to and including Williams is abundantly clear. It is *acte clair*.

Interpreting the WTR and/or Sections 221-224 ERA to achieve the results of Williams:

6.16 European Directives in domestic law must be interpreted to achieve the results intended by the Directives even if this requires reading words into the domestic legislation. The approach and authorities in support is summarised in EBR Attridge LLP -v- Coleman (No.2) [2010] ICR 242 at paragraphs 11-14. This obligation is especially strong where the domestic measure is intended to implement a Directive – Litster -v- Dry Forth Dock [1989] ICR 341 per Lord Oliver at 357H – 358B and 370H – 371G. In carrying out this interpretive obligation a court or tribunal may depart from previous authority on the meaning of the provision – R -v- Lambert [2002] 2 AC 545 per Lord Hope at paragraph 81.

6.17 The respondent relies on the case of Bamsey -v- Albon Engineering and Manufacturing Plc [2004] ICR 1083 CA. In Bamsey the Court of Appeal held with reference to Section 234 of the ERA that normal working hours for the purposes of a week's pay in the WTR did not include overtime unless it was compulsory on both sides. The judgment precedes the cases relied on by the claimant – Robinson-Steele, Stringer and Williams. The leading judgment, given by Auld LJ, provides (at paragraph 19) that the Directive says nothing as to how

the payment of annual paid leave should be calculated but leaves that matter for member states to deal with by national legislation and/or practice. However, Mr Ford asserts, that proposition cannot be maintained in the light of the ruling of the CJEU in Williams which interprets Article 7 as requiring the employer to pay annual leave based on the worker's "normal remuneration" whereas in the judgment of Auld LJ it specifically states that "there is no basis for reading Article 7 of the Directive as requiring a broad equivalence of work done, namely overtime" (paragraph 40).

6.18 The issue had been included in the reference for a preliminary ruling from the Supreme Court in Williams to which the CJEU had responded that the requirement under Article 7 went beyond a requirement for a broad equivalence to a requirement that pay for annual leave corresponds with normal remuneration. The analysis in the judgment at paragraphs 15-20 concludes at paragraph 21 "...remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker".

6.19 The reference in the judgment of Auld LJ (paragraph 41) to the absence of evidence that workers were discouraged from taking their leave as a result of it being limited to basic pay was canvassed by British Airways in the Williams case and rejected by the CJEU in its judgment at paragraph 21: "It also follows that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take its leave, will not satisfy the requirements of European union law". In consequence the claimant's position is that, contrary to the assertion of the respondent, Bamsey can no longer be relied upon in the light of the subsequent judgments of the CJEU in Robinson-Steele, Stringer and Williams.

6.20 Mr Ford relies on the judgment of Lord Hope in the case of Regina -v- Lambert [2002] 2 AC. Although the judgment is concerned with the Human Rights Act 1998, the conclusions, in particular at Section 3(1), as to the approach to be adopted are, in Mr Ford's submission, analogous to the approach which should be adopted with regard to the interpretation of the Working Time Directive, in particular at paragraph 81: "....it is clear that the courts are not bound by previous authority as to what the statute means".

6.21 As the purpose of the WTR was to implement the Working Time Directive 93/104 (now 2003/88) which included the provision for paid annual leave referred to in Article 7, then the domestic implementation in Regulation 16 should be interpreted in such a way as to ensure that the payment for annual leave made to workers is in accordance with the provisions of the Directive. The implementation in Regulation 16(2) provides for Sections 221-224 of the ERA to apply in order to determine a week's pay in respect of annual leave. However, by excluding the provisions of Sections 227 and 228 of the ERA (Regulation 16(3)(d)), Regulation 16 fails to provide a complete code. Mr Ford illustrates this by the example of a worker who has an entitlement to annual leave from the

first day of his employment but by that stage will not have sufficient service for a calculation to be made of the appropriate rate at which it is to be paid as he will not have completed 12 weeks service. Provided the tribunal is able to interpret either the WTR or the ERA so as to conclude that the claimant did not have "normal working hours" then his pay can be calculated using the provisions for average remuneration provided for under Section 224 over a 12 week period which the claimant accepts is representative for his purposes.

6.22 Mr Ford proposed two routes by which Regulation 16 can be interpreted to arrive at the result which he contends Article 7 requires. Firstly words can be read in to Regulation 16(2) to achieve the result of a worker receiving his average remuneration during annual leave consistent with the purpose of the Directive. Such an approach has been adopted in other cases e.g. EBR Attridge LLP -v- Coleman in which the Employment Appeal Tribunal read into the Disability Discrimination Act 1995 a provision, Section 3A(5), providing for associative discrimination to be unlawful and in NHS Leeds -v- Larner [2012] ICR 1389, in which Mummery LJ concluded that additional wording was required to Regulation 13(9) and Regulation 14 of the WTR in order to address the issue of unused annual leave which a person is unable or unwilling to take due to absence or sick leave (paragraphs 90-91).

6.23 Mr Ford proposed that Regulation 16(2) should be read with the introduction of the italicised words as follows:

> "Sections 221-224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, *save that where it is necessary to ensure that a worker receives his normal remuneration in respect of the period of annual leave to which he is entitled under Regulation 13, the worker shall be deemed to have no normal working hours and Section 224 of the 1996 Act shall apply,* subject *in either case* to the modifications set out in paragraph (3)."

Alternatively he proposes the introduction of a new paragraph (3)(a):

> "*(3(a)) Where the application of sections 221-224 of the 1996 Act results in a worker receiving less than his normal remuneration in respect of the period of leave to which he is entitled under Regulation 13, the amount of a week's pay shall be based on his average pay over an appropriate reference period*"

It is not suggested that there would be any difficulty in arriving at an appropriate reference period. This is already a requirement for tribunals when applying the Civil Aviation Regulations as was recognised in the Williams case and is an exercise required under Section 228 in relation to the calculation of a week's pay under existing national legislation.

6.24 The second approach proposed is that the provisions of Regulation 16 only refer to Sections 221-224 of the ERA. No reference is made to Section 234 in which "normal working hours" is specifically defined. If Regulation 16 is interpreted as only applying the provisions of Section 221-224 in calculating a week's pay under Regulation 16, it disposes of the difficulty which otherwise arises through the application of the definition of "normal working hours" in Section 234.

6.25 A third proposal was subsequently made by Mr Ford in the form of a further amendment to Regulation 16(3)(d) as follows: "(d) As if references to Sections 227 and 228 did not apply and, *in the case of the entitlement under Regulation 13, Sections 223(3) and 234 do not apply*". This amendment would mean that a worker who did not have normal working hours would use the provision of Section 224 to arrive at an average figure. Where a worker has normal working hours then Section 221 applies. Where he works normal working hours at different times and is paid more then this is taken into account under Section 222.

6.26 The position ultimately adopted by Mr Ford (having originally contended that the appropriate provision for calculation of the claimant's entitlement was Section 224) was that as the claimant had normal working hours of 7 hours a day, the respondent's case is that MSOs work are guaranteed 7 hours per day. The claimant's entitlement falls under Section 234(1). Pay during those hours varies depending on the shift being worked by the claimant in accordance with the MSOs Agreement, as provided for in the MSO package (pages R42/43), and in accordance with the evidence of Mr O'Hagan. Consequently Section 221(2) does not apply when calculating an amount of pay but Section 222 which provides for remuneration varying according to the time of work is applicable. The effect of doing so is that overtime hours are included (Section 223(1)), overtime premia are excluded under Section 223(1) and (2) but other shift premia are included. Mr Ford referred to British Coal Corporation -v- Cheesbrough [1990] ICR 317 which considers the provisions contained in the Employment Protection (Consolidation) Act 1978, Schedule 14 at paragraphs 3, 5(1) and 5(2) in support of his analysis. It is summarised succinctly in the speech of Lord Lowry at 331D. On that analysis Mr Ford asserts the claimant has been paid at the incorrect rate. Consequently the tribunal was invited to read the regulations so that the pay received by the claimant during periods of annual leave is calculated in accordance with Section 224. The alternative conclusion that the regulations implementing Article 7 could not be interpreted to conform with the Directive should not be reached "....in the absence of the most compulsive context rendering any other conclusion impossible" per Lord Oliver in Litster at 358B.

6.27 The claim was put in the alternative under the provisions of Part II of the ERA as a claim for unpaid wages. It was held in Stringer in the House of Lords' judgment that such a claim fell within the ambit of Section 27 of the ERA and could be pursued as a claim for arrears of wages. The claimant's case is advanced

on the basis that for each occasion on which he was paid holiday pay at less than the level for which he contends, he is entitled to recover the deficiency as a series of deductions from wages.

6.28 The claimant also contends that the statement of terms and conditions does not comply with the provisions of Section 1 of the ERA as it fails to give sufficient details of how his holiday pay is calculated. The respondent does not seek to argue to the contrary. The claimant seeks payment of the minimum sum under Section 38 of the Employment Act 2002 amounting to 2 weeks' pay.

6.29 The claimant also contends that if his argument as to the basis upon which holiday pay should be paid succeeds, then in reliance on the judgment in Marshall No.2 (at paragraphs 25-26) he is entitled to be paid interest as the award must take into account factors such as the effluxion of time which may reduce its value. The payment of interest is asserted to be an essential component of compensation and could be awarded with regard to an unlawful deduction of wages claim under Section 24(2) of the ERA or as a claim under the WTR by virtue of Regulation 30(5).

7. Respondent's Submissions

7.1 The respondent accepts that the claimant's case falls within Section 222 ERA.

7.2 Mr Jones has analysed the claimant's pay in relation to overtime outside the agreed roster and overtime within the agreed roster. The potential argument that credit should be given for the additional lump sum previously payable to employees before the revision of the contracts in 2005 and which was applied to holidays (the ALP) could not be argued as having been converted into rolled up holiday pay as there was a lack of transparency in the evidence to support the contention.

Overtime outside the agreed roster:

7.3 The respondent's position is that this cannot be taken into account when calculating holiday pay under Regulation 16 because it was not work that the respondent was obliged to provide nor was it work that the claimant was obliged to perform. The claimant's case falls within Section 222(1) as the claimant has "normal working hours". Normal working hours is defined in Section 234 and Bamsey interpreted Regulation 16(2) as requiring it to be made by reference to Section 234 of the ERA – see the judgment of Auld LJ at paragraphs 31-33.

Overtime within the agreed roster:

7.4 The evidence of Mr O'Hagan and Mr Stocker was that individuals could not be forced to do overtime within the agreed roster. It was at best an

expectation. In the minutes of the meeting held on 24 March 2009 (pages 81-83) Mr Stocker in discussion with Dave Nelson, an MSO and union representative for the RMT, made it clear that beyond 7 hours, overtime was voluntary and that the business might welcome a move to a 7 hour roster. There was no evidence to suggest that anyone had been disciplined for refusing to work beyond 7 hours. The roster agreement did not constitute a variation of the claimant's terms and conditions. It was a collective consent given in advance on behalf of the OMLs at the Birmingham depot to work overtime. In the absence of any contractual obligation to offer or perform overtime then in accordance with Bamsey, section 234 of the ERA applied and it would not be taken into account.

Does Williams make a difference?

7.5 Firstly, on grounds of policy voluntary overtime should not be included because it would work contrary to the aim of the Directive by encouraging a longer hours culture. Secondly, if a worker volunteers to meet a particular business need why should he derive further benefit when away from work and that business need has gone? Voluntary overtime is generally treated differently from compulsory overtime as defined in Section 234 where it amounts effectively to a tier of pay if it is required by the contract of employment. Contrary to the position of Mr Ford, Mr Jones submits that Williams has nothing specific to say about voluntary overtime. The judgment in Williams was concerned with "performance of tasks which the worker is required to carry out under the contract of employment". Mr Jones refers to the judgment of the CJEU at paragraph 24 and the reference to "....performance of the tasks which the worker is required to carry out under his contract of employment....". In Williams it is flying pay which is a critical aspect of that employment. In contrast the claimant in this case cannot claim that the nature of what is done differs if he works a shift of only 7 hours as opposed to one for any greater period.

7.6 Although the Advocate General in her opinion with reference to overtime pay cites the case of Voss -v- Land Berlin (case C-300 / 06 [2007] ECR I – 10573), that was a case concerning a civil servant who was obliged to work without remuneration beyond his normal weekly working hours if mandatory job-related circumstances required him to do so. It was a case concerned with compulsory overtime. The nature of the overtime and the fact of it being a contractual obligation makes the circumstances significantly different to the claimant's case. The importance of the contractual commitment was considered in Bamsey in relation to domestic law and its compatibility with Article 7 at paragraph 40:

> "In particular there is no basis for reading article 7 of the Directive as requiring a broad equivalence in pay for work done, namely overtime, which the employer was not bound to provide under the contract of employment, with payment on annual leave for overtime work not done at all."

7.7| Mr Jones asserts that the criticism of the judgment in Bamsey is unfounded that the court wrongly assumed that the calculation of the payment for annual leave was a matter for national legislation and/or practice. Mr Jones points to the Advocate General's opinion in Williams at paragraph 55: "In the absence of express provisions in the Working Time Directives .... .the task of determining the method for calculating holiday pay itself falls within the competence of the member states, which, as has already been explained, have an obligation to adopt the detailed national implementing rules necessary".

7.8 The respondent's case is that Williams simply provides an outer limit for the discretion exercised by the member states. They need to maintain "normal remuneration in the calculation of holiday pay". That term does not require voluntary overtime earnings to be taken into consideration. The Advocate General does not go into detail to explain "normal remuneration"; it was considered by the Advocate General to be sufficiently clear not to require further definition. However, the fact that further on in the opinion, at paragraph 70, the Advocate General makes specific reference to "supplements normally due" denotes some contractual obligation being necessary. It cannot be said that the decision in Williams goes far enough or clearly enough to require a change to the domestic legislation.

7.9 The respondent does not take issue with the claimant's summary of the law on the extent to which the tribunal has power to interpret domestic legislation to be compatible with the provisions of the Directive. However, the respondent criticises the wording proposed by the claimant. Firstly Mr Jones asserts that the basis of the first draft provided by Mr Ford is circular in that it envisages Section 224 resulting in an underpayment but relies on the application of Section 224 to resolve it. Secondly, Mr Jones criticises the second draft – the proposed new Regulation 16(3)(a) - because it opens up the possibility of challenge in cases which do not involve voluntary overtime because the claimant could simply argue that the 12 week reference period did not produce a figure amounting to "normal remuneration". The second proposal of simply reading Article 16 as requiring reference solely to Sections 221-224 does not work because Section 223 makes specific reference to Section 234. In addition it would mean that one would have to then not consider provisions such as Section 229|because there would be no justification for their existence.

Interest: |

7.10 The starting position of Mr Jones is that under United Kingdom law compensation is not generally awarded for late payment of a debt. See London, Chatham & Dover Railway Co -v- South Eastern Railway Co [1893] AC 429 and [1893] AC 429 and President of India -v- La Pintada [1985] AC 104 at 115F. That general principle has been qualified in two ways: firstly by the recognition of the availability of a| right to claim compensation for special

damage- see the speech of Lord Brandon at 126F and following in the President of India case. Mr Jones also points to the provision of Section 24(2) ERA inserted by the Employment Act 2008 which provides that on making a declaration in respect of an unlawful deduction of wages the employer may also be ordered to pay "....such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of" which would embrace the recovery of interest incurred by the worker. Mr Jones also points to the provisions of Section 35A Senior Courts Act 1981 which provides a specific statutory power to award interest. It is not interest which applies to a specific statute but a general power. Mr Jones submits that the effect of Section 24(2) cannot have been intended by parliament to confer a general power to award interest as compensation in unlawful deduction claims without having said so explicitly.

7.11 Similarly Marshall No.2 does not clearly create a right to interest in an action for a liquidated sum. The position is stated clearly in the speech of Lord Walker in ILC -v- Ainsworth at 105G, that in the case of a claim for paid annual leave "....the remedy would be an order for payment of the liquidated sum due". The claimant's proposal is too vague. It would require specific legislation to identify the period and rate at which interest could be paid. The existing statutory provisions for the recovery of unlawful deductions provide an effective remedy which is no less favourable than remedies found in similar proceedings in accordance with the community law principle of equivalence.

8. Conclusions:

1a: What level of pay during the four-week period of annual leave is required by Article 7 of the Directive? In particular, must the level of pay under the Directive be based on the claimant's actual remuneration (including his overtime pay), or is it sufficient to base it on his basic pay only?

8.1 The starting point is the analysis by Auld LJ in the Bamsey case. The respondent relies on this case as the continuing authority for the proposition that the WTR are a proper transposition into domestic law of Directive 2003/88 and consistent with the underlying purpose of securing better protection of the safety and health of workers. The arguments employed by both counsel in that case have been adopted substantially in this case.

8.2 In considering the application of sections 221-224 ERA, Auld LJ concludes that section 234 provides a necessary aid to the interpretation of the other sections. Regulation 16 does not exclude the application of section 234 or modify the reference to it in section 223(3)(b). Sections 221-224,234 and 235 provide a clear scheme for the calculation of a week's pay and for the interpretation of "normal working hours." The Directive states the principle of entitlement but leaves the member states to provide the conditions of entitlement within their

margin of appreciation. The Directive does not " ..require member states in its implementation to ensure that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn, and did earn, while at work" (para.35). Unless it could be said that regulation 16 negated or frustrated the purpose of the Directive, then the court must look solely at the regulation unassisted by the Directive.

8.3 Having been satisfied that regulation 16 clearly intended to apply the definition of a week's pay in the ERA, subject to the express exclusion of sections 229 (maximum amount of a week's pay) and section 228 (method of assessing a week's pay where less than 12 weeks data available), Auld LJ concludes that there is "...no basis for reading article 7 of the Directive as requiring a broad equivalence of pay for work done, namely overtime, which the employer was not bound to provide under the contract of employment, with payment on annual leave for overtime work not done at all" (para 40).

8.4 In addition Auld LJ rejected the broader, policy–based arguments that his interpretation would encourage unscrupulous employers to set the basic contractual commitment at such a low level, it would discourage workers from taking their holiday entitlement. The consequence would be that the employer would have to pay the worker for increased overtime over the remaining 11 months of the holiday year. In addition the interpretation for which the claimants contended was rejected as an encouragement to long and unhealthy working hours for 11 months as a carrot for the equivalent in holiday pay (para.41).

8.5 The position following the judgment in Bamsey was that an authoritative judgment had been given by the Court of Appeal which decisively rejected the contention that holiday pay should be based on anything other than the hours which the contract of employment required the employer to provide and the employee to do. It was *acte clair* asserts Mr Jones. The respondent's contention is that the subsequent case law which considered the Directive and the WTR did not alter the position.

8.6 The case of Robinson-Steele-v-RD Retail Services Limited concerned the incorporation in the hourly or daily rate of pay of an element intended to be payment in part of holiday pay, so-called rolled up holiday pay. Whilst the claimant was paid at different rates for day and night shift work and in the conjoined case of Caulfield-v-Hanson Clay Products Limited an enhanced rate was paid for overtime work, there was no consideration of the basis for calculation of the entitlement to holiday pay. The judgment of the First Chamber of the CJEU referred to workers receiving their normal remuneration during annual leave (para.50). The judgment also refers to workers during annual leave being "...put in a position comparable to periods of work" (para.58), a phrase reiterated by the Grand Chamber in the Ainsworth case(para.85).

8.7 In the Ainsworth case the CJEU was primarily concerned with the right to paid leave whilst off sick and to a payment in lieu on termination for untaken holiday pay during a period of sickness absence. It did not explore the calculation of the rate. Nor was this considered when the case returned to the House of Lords. The Advocate General made reference to the amount of the entitlement for a payment in lieu being equivalent to that of his normal pay (para.s 90 & 91). In its judgment the Grand Chamber repeats the mantra of the need during annual leave for remuneration to be maintained: "...workers must receive their normal remuneration for that period of rest" (para.57). The reference to the receipt of normal remuneration is also applied to the payment in lieu (para.61). This paragraph is also quoted by Lord Rodger (para.12) in his speech following the return of the case to the House of Lords.

8.8 If the claimant's attack on Bamsey is to succeed it must be dependant on the judgment in Williams. It is instructive to consider the opinion of Advocate – General Trstenjak, the judgment of the CJEU and the judgment of the Supreme Court. Having reviewed the legislative history of the 2004 Aviation Regulations, set out the questions referred by the Supreme Court and considered the provisions of EU law concerning the nature and extent of the right to paid annual leave, the Advocate-General emphasises the obligation of member states, when setting out in domestic legislation the conditions for the exercise of the right to paid annual leave, not to impose any preconditions (para.38). Further the Advocate-General points the distinction between determining the level of holiday pay and its calculation, which is a matter for member states to determine, and the provision of guidance on the requirements which must be fulfilled by holiday pay under EU law (para.45).

8.9 At paragraph 47 the Advocate-General cites Robinson-Steele and (at para. 48) Stringer and quotes with approval references in both cases to maintaining during periods of annual leave not simply "remuneration" but also "*normal* remuneration." In Stringer the ILO Convention C132 Holidays with Pay at article 7(1) is cited which refers to pay during periods of holiday "at least his *normal* or average remuneration." The Advocate-General summarises the position (at para.51) as:
"... it is necessary to ensure, by way of a teleological interpretation of article 7(1) of the Working Time Directives, that the aims of those Directives are not frustrated by improper implementation. In particular, it is necessary to ensure in this regard that the worker does not suffer any disadvantage as a result of deciding to exercise his right to annual leave. A prime example of such a disadvantage is any financial loss which, depending on the initial situation, would deter him from exercising that right."

8.10 The Advocate-General analyses the meaning of pay within European Union law. Having concluded that the" maintenance of remuneration" is not achieved if holiday pay is calculated solely by reference to an amount which is just enough to ensure that the worker is not prevented from exercising his right to paid annual

leave (para.53), member states are free to make provision in their national law to allow remuneration to be divided into basic pay and a number of supplements which workers receive depending on the work which they perform (para.66).

8.11 In the absence of a definition of " pay" in the Working Time Directives, reference is made to article 141(2)EC which defines pay as:
" the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."
It makes no difference whether the payment is received under a contract of employment, by virtue of a legislative provision or on a voluntary basis (see North Western Health Board-v-McKenna (Case C-191/03) [2006] ICR 477,para.29). The Advocate-General identifies the risk that an excessively narrow interpretation of the meaning of pay will give the employer an incentive to declare that individual components do not form part of the remuneration and/or fragment the remuneration further in order to pay as little as possible by way of holiday pay and thereby deter the worker taking paid annual leave (para.72).

8.12 The definition is interpreted as including bonuses, supplements and allowances, concessions granted by the employer and ex gratia payments. More specifically reference is made to allowances which reward the worker's readiness to work at different times e.g. an allowance for inconvenient working hours (see Jämställdhetsombudsmannen-v-Örebro Läns Landsting (Case C-236/98) [2001]ICR 249) and overtime pay (see Voss, previously cited). In summary the Advocate-General includes in the category of pay any supplements for overtime, supplements for working on public holidays, shift allowances and any comparable payments (para.77). Further these supplements constitute " any other consideration" within article 141(2)EC and/or components of " normal remuneration" which must continue to be paid to the worker during his period of leave (para.79).

8.13 "Normal remuneration" is a temporal component as it refers to something which has existed over a period of time and provides a reference point for comparison. Where remuneration fluctuates, then the calculation of " normal remuneration" requires a *sufficiently representative reference period*(para.82). The concept is similar to the reference in the ILO Convention C132 to " average remuneration."

8.14 The conclusion of the Advocate-General in response to the questions referred by the Supreme Court is that holiday pay must correspond to the worker's normal remuneration, which is not satisfied if holiday pay is just sufficient to ensure that there is no serious risk that the worker will not take his annual leave. Where the remuneration varies, holiday pay should correspond to an average earnings based on a sufficiently representative reference period. The calculation of the average must take account of supplements usually due to the worker as part of his remuneration (para.90).

8.15 In its judgement the CJEU recognises that the relevant provisions of the European Agreement which applies to airline pilots are in essence identical to article 7 of Directive 2003/88. Both Stringer and Robinson-Steele are cited with reference to a worker's entitlement to receive normal remuneration during annual leave so that he is in a position as regards remuneration which is comparable to periods of work. That requirement is not satisfied if the amount is just sufficient to ensure that there is no serious risk that the worker will not take his leave (para.21).

8.16 Where remuneration comprises several components, a specific analysis is required to determine normal remuneration which is identified that is:
" Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave" (para.24).
It is a matter for the national court to carry out the analysis of the intrinsic link between the various components comprising total remuneration and the performance of the tasks required to be carried out under the worker's contract of employment.

8.17 The judgment of the CJEU was then considered by the Supreme Court whose judgment was delivered by Lord Mance with whom the rest of the Court agreed. Lord Mance identifies the three elements of airline pilots remuneration: a fixed annual sum plus two supplementary payments: an additional payment per flying hour (the flying pay supplement) and an additional hourly payment known as the time away from base allowance which historically was intended to compensate for certain previous allowances for various sundries and which was held by HMRC to be overly generous and of which a proportion was treated as remuneration and taxed.

8.18 The argument before the Supreme Court on the part of British Airways did not suggest, as previously contended, that paid annual leave should be limited to basic pay. They contended that the requirements of the Directive as now understood required a detailed legislative scheme which did not exist and which an employment tribunal could not provide. This situation had arisen because "... no one conceived that paid annual leave could, under the Regulations, mean anything other than basic pay..." (para.19). However this argument was rejected by the Court which found that the sophisticated assessment now required to determine the correct basis for payment of holiday pay could be addressed firstly by British Airways proposing a reasonable reference period or, if necessary, a court or tribunal doing so (para.21). Any question concerning the appropriateness of including the time away from base allowance, in the absence of sufficient detail

for the Court to determine the matter, was referred to the employment tribunal. The essential guidance on what might constitute the appropriate elements of holiday pay remained as stated in the judgement of the CJEU.

8.19 Question 1a: What level of pay during the four-week period of annual leave is required by Article 7 of the Directive? In particular, must the level of pay under the Directive be based on the claimant's actual remuneration (including his overtime pay), or is it sufficient to base it on his basic pay only?
It is quite clear from the judgement of the CJEU in Williams at paragraph 31 that the claimant in the instant case is entitled during his annual leave to receive holiday pay which is not based solely on his basic salary. He is entitled to have other components taken into account provided that they are intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment. As the claimant's duties were to perform his contractual obligations as an MSO, then the work which he carried out as overtime and at weekends was at all times the performance of tasks which he was required to carry out under his contract of employment. The fact that he may have volunteered to perform these tasks at times outside those which he contracted to do did not mean that the performance was at those times no longer " intrinsically linked." Provision was made for payment as part of the claimant's remuneration as is apparent from his payment records. Furthermore the shift premia which attached to these additional hours reflect the " inconvenient aspect" element referred to in paragraph 24 of the CJEU judgment which provides an additional link to the performance of his tasks and their inclusion as part of normal remuneration for the purposes of the calculation of holiday pay.

8.20 Mr Jones submits that a more generous basis for assessing holiday pay than by reference to basic pay would be wrong as a matter of policy as it would encourage workers to work excessive hours in the reference period for the establishment of normal remuneration. Mr Ford on policy grounds argues to the contrary that the use of basic pay would seriously disadvantage workers with very limited, or even zero, contracted hours of work. In my judgment the policy argument is in favour of not restricting the calculation of holiday pay to basic pay. The employer controls the terms upon which work is offered at the outset of employment and subsequently with regard to overtime. Consequently the employer can prevent excessive hours being worked. Furthermore the normal remuneration basis for calculation accords with the development of case law in the CJEU culminating in the conclusions reached in Williams at para.90. In answer to Question 1a the correct basis of calculation will take into account all the claimant's earnings for which he was remunerated by the respondent i.e. pay for all shifts including shift premia.

8.21 Question 1b.Depending on the answer to (a), can the provisions of WTR and/or ss221-224 ERA be interpreted to achieve the result required by the Directive?
Having concluded that the correct application of the Working Time Directive

2003/88 entitled the claimant to his average remuneration over the reference period, the effect of Regulation 16(3)(d) of the Working Time Regulations 1998 in applying the provisions of sections 221-224 of the Employment Rights Act 1996 would result in the claimant receiving less than the average remuneration to which he would be entitled. The effect of section 223(3) would be to reduce the average remuneration by reducing the rate of pay for work done outside normal working hours (i.e. overtime premia) to the normal hourly rate. The effect of section 234 would be to reduce the actual number of hours worked for the purposes of calculating average remuneration by taking out of account non-contractual overtime hours. It is Bamsey revisited. However Bamsey predates Robinson-Steele, Stringer and Williams. The consequence is that as now understood the wording of Regulation 16(3)(d) does not give effect to the Directive. I accept the criticisms of Mr Jones with regard to the first two options suggested by Mr Ford. However I conclude that the third suggestion provides a concise amendment which overcomes the difficulty. In consequence Regulation 16(3)(d) of the Working Time Regulations should be construed to read, by the addition of the words in italics: "(d) as if references to sections 227 and 228 did not apply *and, in the case of the entitlement under regulation 13, sections 223(3) and 234 do not apply.*"

8.22 Question c. Is the respondent entitled to credit for the Annual Leave Premium formerly paid to employees? Mr Jones did not pursue this claim.

8.23 Questiond. In the event that the claimant was not paid the correct level of paid annual leave under WTR:

i. What is his remedy under regulation 3 WTR?
The remedy is under Regulation 30(1)(b) of the WTR for which Regulation (2) provides that an employment tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date on which it is alleged the payment should have been made for such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint be presented before the end of the period of three months. The claim was presented on 12 October 2012. In further and better particulars of claim the claimant limited his claim under regulation 30 to an unquantified amount which would have been paid in the three months prior to presentation of his claim. He is entitled to an order under Regulation 30(5).

8.24 ii. Can the claimant claim any under-payments of holiday pay as a series of deductions from wages under Part II of ERA?
The claimant is entitled to rely on the judgement in Revenue and Customs Commissioners-v-Stringer [2009] ICR 985. The House of Lords found that the wording of section 27, Employment Rights Act 1996, was sufficiently wide to include claims for annual leave under Regulation 16. Consequently the claimant can pursue as a series of arrears of payment the occasions throughout his employment since its commencement in 2007 when he was paid holiday pay at an underpayment which did not reflect his average remuneration as explained

in this judgment.

8.25 Question e. In the event the claimant is successful in his claim:
i. Should the tribunal make an award under s.38 EA 2002 owing to the failure to provide details of the calculation of holiday pay as required by s.1(4)(d) ERA? (The respondent concedes that it failed to give the claimant the details of how his holiday pay is calculated for the purpose of s.1(4)(d) ERA).
The respondent has conceded that the claimant is entitled to such an award in the light of the respondent's failure to comply with s.1(4)(d) ERA.

8.26 ii. Is the claimant entitled to interest either in accordance with the principle in ***Marshall No.2*** [1994] QB 126 or under s.24(2) ERA?
In the judgment in Marshall No.2 the ECJ was considering the question of compensation in a claim of sex discrimination and the effectiveness of the remedy provided at national level. Its finding (at para. 31) that the award of interest was an essential component of compensation for the purposes of restoring real equality treatment does not expressly extend the scope for the award of interest to debt claims such as the failure to pay the full amount of holiday pay.

8.27 Mr Ford relies on Marshall No 2 as demonstrating that interest was an essential component of compensation. This is to extend the scope of a specific finding on an issue of discrimination compensation to another field without more ado. However in the later case of IRC-v-Ainsworth HL [2009] ICR 1005 which also concerns the failure to pay holiday pay ,Mr Jones points out that,in his speech, Lord Walker specifically states: " in each case the remedy would be an order for payment of the liquidated sum due."
Although provision is made in domestic law for the calculation of interest in discrimination cases, there is no similar provision with regard to debt cases.
Mr Ford refers to Regulation 30(5) WTR which simply provides for an order that the employer pays to the worker the amount which it finds to be due to him. There is no suggestion that interest is payable. As to the claim under the ERA the provisions for compensation are found at section 24 which provides for a declaration that the claim is well-founded and for an order for the employer to pay to the worker the amount of the deduction. Subsequently a new subsection was added in 2009 giving the tribunal a discretion to order payment of an additional amount which the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss which is attributable to the matter complained of. Mr Jones suggests by reference to a passage in *Harvey* (section B1, para.379) that its purpose is to provide for consequential losses such as bank charges rather than the introduction of interest on the sum awarded.

8.28 Mr Jones relies further on President of India-v-La Pintada Compania HL 1 AC 1985 in support of the contention that the law of the United Kingdom does not generally award compensation for late payment of debt. See the speech of Lord Brandon at p.131D : " ...Parliament has consistently regarded the award of interest on debts as a remedy to which creditors should not be entitled as of right...That

being the manifest policy of the legislature." Two inroads are identified by Mr Jones: the right to claim compensation for special damage i.e. specific financial loss caused by the breach of the duty to make the payment, which he suggests is analogous to the new s.24(2) provision in the ERA, and a specific statutory power to award interest as under s.35A, Senior Courts Act 1981. Given the reluctance of the legislature to grant the right of debtors to interest Mr Jones submits that a right to interest would have been specifically spelled out in s.24(2) if that had been Parliament's intention. I accept Mr Jones submission that the authority of Marshall No.2 and of s.24(2) or Regulation 30(5) are insufficient grounds for the award of interest.

8.29 Both counsel wished to have the opportunity to resolve any award by agreement following promulgation of this judgment. At this stage I make no award. The parties are directed to notify the tribunal in writing whether they have reached agreement – whether or not subject to appeal – within 28 days of the date of promulgation.

Signed by _____ on 12. July. 2013
Employment Judge van Gelder

(Reserved Judgment)

Judgment sent to Parties on

12. 7. 2013