Appeal No. UKEATS/0047/13/BI
UKEAT/0160/14/SM
UKEAT/0161/14/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 30 July – 1 August 2014
Judgment handed down on 4 November 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

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(1) BEAR SCOTLAND LTD & OTHERS UKEATS/0047/13/BI — APPELLANTS
(2) HERTEL (UK) LTD UKEAT/0160/14/SM
(3) AMEC GROUP LTD UKEAT/0161/14/SM

(1)MR DAVID FULTON AND OTHERS UKEATS/0047/13/BI — RESPONDENTS

(2) MR K WOODS AND OTHERS UKEAT/0160/14/SM

(3) MR LAW AND OTHERS UKEAT/0161/14/SM

JUDGMENT

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SUMMARY

WORKING TIME REGULATIONS: HOLIDAY PAY

DAMAGES FOR BREACH OF CONTRACT

UNLAWFUL DEDUCTION FROM WAGES

The EAT held that Article 7 of the Working Time Directive is to be interpreted such that payments for overtime which the employees in two appeals before it were required to work, though which their employer was not obliged to offer as a minimum, is part of normal remuneration and to be included as such in the calculation of pay for holiday leave taken under regulation 13 of the Working Time Regulations 1998. Those Regulations could be interpreted so as to conform to that interpretation.

An appeal by Bear Scotland was thus rejected, as were (on these issues) appeals by Hertel and Amec.

A further appeal by Hertel and Amec against the ET's findings that the Claimants could claim the consequent arrears of pay as being unlawful deductions from their pay under the ERA 1996 (on the basis that on each occasion holidays were not paid in accordance with the true interpretation of Article 7 and the WTR the deduction was one of a series of deductions) was allowed insofar as in any case a period of more than three months elapsed between such deductions. Their appeal against a conclusion that contractual payments for PILON should include payment for 44 hours per week (including 6 hours overtime) also succeeded, upon a construction of the relevant contractual provisions.

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A cross-appeal by the Claimants in Hertel and Amec succeeded against the ET's decision that taxable remuneration for time spent travelling to work did not fall within "normal remuneration" for the purpose of calculating holiday pay.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. These appeals arise in test cases concerning the calculation of holiday pay. The appeal by Bear Scotland is against a decision by Employment Judge Kearns, in Glasgow, who found that Bear Scotland (which carries out road construction and maintenance of Scottish roads) had made unauthorised deductions from the wages of two employees, David Fulton and Douglas Baxter, by failing to include overtime and other payments associated with their work in calculating the holiday pay due to them. The appeal by Hertel (UK) Ltd ("Hertel") and AMEC Group Ltd ("Amec"), two separate companies, is against a decision by Employment Judge Camp (corrected reasons for which were sent out on 11th. March 2014) that each had made unauthorised deductions from the wages of their employees working on a construction site at West Burton in England by failing to include overtime when calculating the holiday pay due to them, and failing in breach of contract to pay them full pay in lieu of notice ("PILON") when their employment ended. Since the central issues in the cases raised the same issues of principle, they were heard together.

2. A third appeal (**Freightliner v Neal**), against a third decision to similar effect, was conjoined with the two appeals, but settled shortly before the hearing. The Secretary of State for Business, Innovation and Skills intervened in the appeals to support the arguments of the Appellants. Mr Bowers QC and Mr Napier QC for Hertel, Ms Rose QC, Mr Napier QC and Mr Richards for Amec and Mr Napier QC and Mr de Silva for Bear Scotland helpfully provided a joint skeleton argument, and divided up the issues between them, each adopting the others' submissions on those issues they did not themselves address orally. Mr. Tolley QC appeared for

the Intervener. The Claimants in Hertel and Amec were represented by Mr. Ford QC and Mr. Whitcombe; Mr. Fulton and Mr. Baxter by Mr. Ed Morgan.

3. The right to a paid holiday is provided for by the **Working Time Regulations ("WTR") 1998**. These implement within the United Kingdom what is now provided for by the **Working Time Directive** of 4th November 2003 **(2003/88/EC, replacing Directive 93/104/EC**) (the **"WTD"**). Article 7 of the WTD provides:

> **"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 of entitlement to, and granting of such leave laid down by national legislation and/or practice.**
>
> **2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."**

4. In **British Airways plc v Williams** ("**Williams**") the Claimants, airline pilots, sought pay in respect of their annual leave which consisted of three elements: first a proportionate part of the fixed annual sum paid for their services, secondly a supplementary payment which varied according to the time spent flying, and thirdly an allowance in respect of time spent away from base, each element of which was separately and specifically remunerated when not on leave. Although the Employment Tribunal, and the Appeal Tribunal (at [2008] ICR 779) found in favour of the Claimants, the Court of Appeal (at [2009] ICR 906) took the view that under the **Civil Aviation (Working Time) Regulations 2004 (**which implement Council Directive 2000/79/EC, relating to mobile staff in civil aviation, which includes the same provisions on annual leave as does WTD) only the fixed annual sum, applied on a pro rata basis, was payable for periods of annual leave.

5. The Claimants appealed to the Supreme Court which referred the questions to the Court of Justice of the European Union whether under Article 7 of **Directives 93/104 and 2003/88** and clause 3 of the European Agreement annexed to **Directive 2000/79** (an agreement which related to mobile workers), and to what extent, if any, European law defined or laid down any requirements as to the nature and level of payments required to be made in respect of paid annual leave and to what if any extent Member States might determine how such payments were to be calculated.

6. The CJEU responded by saying (paragraph 19):

> **"…the Court has already had occasion to state that 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 R D Retail Services Ltd [2006] ICR 932… para. 50 and Stringer v Revenue and Customs Commissioners… [2006] ICR 932 para. 60"**
>
> **20. The purpose of requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work: see Robinson-Steele para. 58 and Stringer para. 60.**
>
> **21. As the Advocate General states in point 90 of her opinion, it follows from the foregoing 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. 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 his leave, will not satisfy the requirements of European Union Law.**
>
> **22. However, where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis. Such is the case with regard to the remuneration of an airline pilot as a member of the flight crew of an airline, that remuneration being composed of a fixed annual sum and variable supplementary payments which are linked to the time spent flying and to the time spent away from base.**
>
> **23. In that regard, although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practice governed by the law of the Member States, that structure cannot affect the worker's right**

> **referred to in para. 19 of the present judgment, to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.**
>
> **24. 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.**
>
> **25. By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave.**
>
> **26. In that regard, it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case law cited above…"**

7. The Court went on to observe that all the components of the total remuneration which related to the personal and professional status of an airline pilot had to be maintained during that worker's paid annual leave (paragraph 28).

8. In accordance with the judgment of the CJEU, on the resumed appeal before the Supreme Court the decision of the Court of Appeal was reversed and, in effect, those of the Employment Tribunal and Appeal Tribunal restored.

9. This appeal concerns whether Employment Tribunals applying the **Working Time Regulations** (as opposed to the **Civil Aviation (Working Time) Regulations 2004** and the **European Agreement ("the Aviation Agreement")** implemented by **Council Directive**

200/79/EC ("the Aviation Directive")) are bound to apply an identical approach to the Working Time Regulations ("WTR"). Regulation 16 of the WTR states:-

> **"(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 - 224 of the [Employment Rights Act 1996] shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation…"**

Sections 221 – 224 of the **Employment Rights Act 1996** distinguish between employees with "normal working hours" and those with "no normal working hours". As Employment Judge Camp put it at paragraph 38 of his judgment:

> **"Crudely: a week's pay for those with normal working hours is what they get paid for working those hours for one week; a week's pay for those with no normal working hours is their average actual weekly remuneration [**over, he might have added, a period of 12 weeks**]."**

10. That in turn takes the reader to the expression "normal working hours". For the purposes of the **Employment Rights Act 1996** they are defined in Section 234 as follows:

> **"(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or period, there are for the purposes of this Act normal working hours in his case.**
>
> **(2) Subject to Sub-section (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 of minimum number of hours (and not the number of hours without overtime)."**

11. In **Bamsey and Others v Albon Engineering and Manufacturing plc** [2004] ICR 1083 (CA) the Court of Appeal determined that Section 234 applied for the purpose of determining the amount of a week's pay under Regulation 16 of the WTR. If this is so, then any attempt to interpret the WTR so as to conform with such an interpretation of Art.7 of the Directive as adopted in **Williams** is met with the headwind that the Court of Appeal has already determined what the statute means, and it is not that which a proper application of Art.7 would require.

The Issues

12. The appeals raised five central issues. The first was to determine what Article 7 required by way of paid annual leave. Does it follow from the **Williams** decision, and the subsequent case of **Lock,** that non-guaranteed overtime and the other elements of remuneration which the workers in the present cases received had to be included in pay during and for the annual leave provided for by the Directive?

13. The second issue is whether the rule of conforming interpretation (the "**Marleasing** principle") permits an interpretation of Regulation 16 of the **Working Time Regulations 1998** and/or Sections 221-224, and Section 234 of the **Employment Rights Act 1996** so as to give effect to the requirement to Article 7. If so, then how should those provisions be interpreted?

14. The third issue arises in the appeals by Hertel and Amec in their respective cases. If the answers to the first two questions show that both underpaid workers in respect of annual leave to which they were entitled under Regulation 13 of the **Working Time Regulations 1998**, was

the Tribunal entitled to find that those underpayments constituted a "series of deductions" within the meaning of Section 23(3) of the **Employment Rights Act 1996**, so that the Tribunal had jurisdiction to consider them? The issue also arose in the Bear Scotland case, but was left by Employment Judge Kearns for later determination at a further hearing: no appeal arises in that case, therefore, though the issue is live.

15. The fourth issue again related to the Hertel and Amec appeals. For the purposes of assessing pay in respect of annual leave, payment in lieu of notice and/or any damages for breach of contract, was the Tribunal entitled or right to find that (i) the Claimants' normal working hours were those set out at paragraph 95 of its Reasons and/or (ii) that pay in lieu of notice should have been based on the weekly shift patterns they last worked before their contracts were terminated?

16. Finally, a fifth issue arose in the Hertel and Amec cases by way of cross-appeal. The Tribunal held that two allowances (radius allowance and travelling time payment) were not to be included in pay in respect of annual leave for the purpose of Article 7 of the Directive and/or leave under Regulation 13. Was it right to do so?

First Issue: the Scope of Article 7

17. The factual context in which the appeals arise is as follows. The Claimants in Hertel and Amec worked under the terms of the National Agreement for the Engineering Construction Industry ("NAECI"). Clause 7.1(a) of NAECI provided that the basic working week should consist of 38 normal working hours. Clause 7.1(b) provided that this basic working week was to be worked over 5 normal working days, Monday – Friday: 8 hours per day Monday to

Thursday, and 6 hours on Friday. Clause 7.1(c) provided for an alternative pattern, in which the basic working week might be worked over any four or five consecutive normal working days. There was scope (by clause 7.1(f)) for variation to the basic working week, which if proposed was to be submitted for approval to the National Joint Council ("NJC"). Shift working was provided for by clause 7.3 as an obligation of employment (as required by management "to meet the needs of the job"). The night shift working week was, by clause 7.3.2(a)(i), to consist of 38 normal hours worked over 4 or 5 consecutive nights. By 7.3.3, other shift systems and working patterns could be developed locally through consultation between the parties, with the proviso that "these proposals will then be submitted to the NJC for review and determination of the payments."

18. Under clause 7.4 there was an obligation to work overtime. As Mr Bowers QC pointed out, it was an obligation resting upon the employee. There was no corresponding obligation on the employer to provide overtime to be worked.

19. By clause 10.3, under the heading "**Payment for Holidays**" it was provided that payment was to comply with the relevant statutory provisions, covering the calculation of "a week's pay" for employment with normal working hours, contained in Sections 221-224 of the **Employment Rights Act 1996**. For the purposes of holiday pay calculation an employee's normal working hours were to be taken as 38 hours per week, and overtime hours and overtime pay were not to be taken into account.

20. The Claimants in the Hertel and Amec cases worked on the West Burton CCTG project, in respect of which a supplementary project agreement ("SPA") was entered into between the

Unions and employers. This provided at clause 2.3 that it was a condition of employment on the project that all employers and their employees accepted all of the obligations of NAECI and the SPA.

21. Clause 10 of the SPA provided not for "normal", but for "basic" working hours. They were to be 38 per week. A working pattern was to be worked, as described from clauses 10.2 to 10.4. The SPA provided (by clause 10.2) that:

> **"a working pattern in accordance with NAECI 7.1 will be introduced with an obligation to work overtime in accordance with NAECI 7.4…"**

and at clause 10.4 set out a working pattern of 10 hours per day Mondays to Thursdays, plus 6 hours on Fridays, which I was told amounted, after allowing for unpaid meal breaks of half an hour, to a 44 hour working week. It was specifically provided by SPA clauses 10.5 and 10.6 both that overtime would be required during the project, but that it was not guaranteed, nor covered by any guaranteed working hours provisions, and that it did not form part of the normal working hours. It was stated that "it will not form any part of the calculations on holiday pay entitlement".

22. The Appellants in the conjoined appeals argued that Article 7 does not require holiday pay to be calculated so as to equate to average pay actually received (including not only basic hours but also overtime) over the reference period applicable to the holiday, at least where there is no obligation on the employer to provide the overtime which is taken into account in the calculation. I shall call this "non-guaranteed overtime": the description "voluntary overtime" has been used, but is misleading, since overtime under NAECI is work which an employee if requested is obliged to perform, whereas "voluntary overtime" is work which the employer asks an employee to do but which the employee is free of any contractual obligation to perform

unless he agrees at the time to do so. "Non-guaranteed" overtime is to be distinguished from guaranteed overtime, since in the latter case the employer is obliged by contract to offer the work, as overtime, and therefore will be liable to pay for the work even if the employer has none available to offer at the time.

23. Pay for non-guaranteed overtime was not in issue in **Williams**. Moreover, the CJEU was dealing directly with hours of work in the Civil Aviation sector and not directly with the meaning of Article 7(1) of the WTD. Nonetheless, it is plain that the Court considered that what it had to say applied with equal force to the WTD, and this was accepted by the Appellants. The question therefore is whether the reasoning in that case is such that it applies to payment for non-guaranteed overtime where that has been received during the appropriate reference period.

24. **Williams** does not stand alone. In **Lock v British Gas Trading Ltd** [2014] ICR 813 the CJEU considered the case of a salesman whose remuneration consisted of two main components: basic salary and commission. Commission was payable on a monthly basis calculated by reference to sales achieved, and represented 60% of his pay. It was paid some months after conclusion of the sales contract. During periods of annual leave, there was no opportunity for commission to be earned. That lack of opportunity had adverse effects on the salary the Claimant received during the months following those periods of leave. The Court regarded the fact that the reduction in remuneration would occur after the period of leave was irrelevant (paragraph 23) and held that article 7(1):

> **"…must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in**

> **respect of his pay to annual leave, to remuneration composed exclusively of his basic salary."**

25. The referring Court (an Employment Tribunal at Leicester) had asked whether there were any indications in Article 7 concerning the methods of calculating the commission to which a worker was entitled in respect of his annual leave and if so what. The Court responded 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, at paragraph 26 adopting and quoting paragraph 21 of **Williams**. At paragraph 32 of the judgment the Court said this:

> **"…as the Advocate General observed at points 31 to 33 of his opinion, the commission received by Mr Lock is directly linked to his work within the company. Consequently, there is an intrinsic link between the commission received each month by Mr Lock and the performance of the tasks he is required to carry out under his contract of employment.**
>
> **33. It follows that such commission must be taken into account in the calculation of the total remuneration to which a worker, such as the Applicant in the main proceedings, is entitled in respect of his annual leave."**

26. Mr Napier QC, faced with the reiteration of the **Williams** principles in a case which was directly covered by Article 7, in which the Court applied **Williams** in the terms set out in the paragraphs cited, suggested that the Court might not properly have understood the decision in **Williams**.

27. I reject that particular submission, for three reasons. First, there is nothing in the judgment of **Lock** itself which is suggestive of this. Second, of the five Judges who determined the case of **Williams**, four (including the President of the Court) were part of the panel of five which determined the case of **Lock**. Third, the reasoning of both cases appears entirely consistent. It proceeded, in **Lock**, by citing passages from the judgment in **Williams**, and did

not apply those passages in a manifestly inappropriate way: indeed, it was asserted by the Appellants before me that the central paragraph in the reasoning in **Williams** was paragraph 24, where the Court spoke of the need for an intrinsic link between payments for inconvenient aspects and the work a worker was obliged to perform if they were to be taken into account in computing holiday pay, and in paragraph 32 of its judgment, as cited above, the court applied that very principle.

28. The Advocate General was different in the two cases: it was Trstenjak in **Williams**, Bot in **Lock**. However, Advocate General Bot quoted extensively from **Williams** (paragraphs 20 to 29 of his opinion) before himself reaching the conclusion that that case law and "…the trend which is apparent from the criteria hitherto defined by the Court…" meant that commission must be included in the remuneration to which a worker was entitled during paid annual leave. At paragraph 31 of his opinion he regarded the earning by Mr Lock of commission as "directly linked" to the work he normally carried out. His opinion in this respect was reflected, perhaps, by paragraph 32 of the judgment of the Court in which it appeared to regard a "direct link" as being equivalent to an "intrinsic link" ("linked intrinsically" being the phrase adopted in **Williams**). I do not regard this difference of word as a real difference, nor does it indicate to me any misunderstanding: it is the same concept, expressed in only slightly different language.

29. Finally, since the decision is one of the CJEU I must treat it as of the highest authority. I see no reason why I should not regard **Williams** and **Lock** as together representing a settled view expressed by the CJEU as to the meaning of Article 7. Moreover, the approach taken in **Williams** and **Lock** is a natural development of the points adopted in the earlier cases of **Robinson-Steele v R D Retail Services Ltd** [2006] ICR 932, CJEU and **Stringer v Revenue**

and Customs Commissioners [2009] ICR 932. **Robinson-Steele** related to holiday pay. It did however, contain at paragraph 58 the following general words:

> **"…the Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker during such leave, in a position which is, as regards remuneration, comparable to periods of work."**

30. **Stringer** related to the relationship between absence on annual leave and absence whilst sick. In paragraph 78 of her opinion Advocate General Trstenjak noted that a distinction between payment whilst on sick leave and payment under Article 7 was that the latter envisaged the continued payment of wages without any reduction, whilst the former might under national rules be only a fraction thereof, and in dealing with the amount of payment in lieu of actual holiday (paragraph 90) thought that a worker's entitlement was one "in the amount of his normal pay". In its judgment the Court used similar, but not identical language: at paragraph 58:-

> **"…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…"**

and at 61: -

> **"… with regard to a worker who has not been able to exercise his right to paid annual leave before termination of the employment relationship the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship."**

31. The difference in wording does not seem to me to be material. The Advocate General and Court are both articulating the same concept: that the pay to be received during a holiday is a natural continuation of the pay which has been received before the holiday began: as

demonstrated by paragraph 77 of Advocate General Trstenjak's opinion in **Williams**, pay for these purposes includes the same elements as would be the case in a claim in respect of equal pay under what was then Article 141. In her view, therefore, allowances which rewarded a worker's readiness to work at different times, such as overtime pay, had been recognised as pay within that category, and logically the category would necessarily include pay supplements for overtime, shift allowances, and comparable payments. She commented (paragraph 78):

> **"The similarity of the – not exhaustively listed – payments mentioned above to the supplements at issue here is obvious, since they are all ultimately linked to the pilot's readiness to make himself available for work for as long as the employer considers this necessary."**

32. At the start of paragraph 79, she expressed the view that supplements in the pilots' case, similar to overtime payments, also formed part of "normal remuneration":

> **"which in accordance with the Court's case law, must continue to be paid to the worker during his leave. A worker is therefore, in principle, entitled to the supplements normally due to him also in respect of periods of annual leave."**

33. Mr Napier QC sought to argue that those opening words were not a generally applicable statement, particularly since the opinion itself was carefully limited (see paragraph 90(3)) to "a situation such as that in the main proceedings", and was therefore case specific. Returning, then, to **Williams**, Mr Napier argued that the central expression of principle was that at paragraph 24. It referred to "…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…". The expression "inconvenient aspect" was what he termed a "clunky translation". It was better understood as "inconvenience", as pointed to by the French version of the same text: a payment to compensate a worker for inconvenience when linked intrinsically to tasks performed under contract. It followed that in its central expression of principle, the Court was not concerned with overtime. This was because overtime is not an inconvenience

especially if, he submitted, it could be refused as where it was truly voluntary. The components of remuneration to which the Court referred related to the particular supplements of the kind identified in **Williams**, and not to overtime which was not guaranteed. At paragraph 32, in **Lock**, the Court had missed making a link between the payment and inconvenience: it had simply misread the analysis in **Williams**. Overtime hours of the type worked in the Bear Scotland case were special hours attracting special remuneration, or time off in lieu, but were not part of "normal remuneration". Moreover, to include overtime in the calculation of holiday pay would create an incentive for employees to work more overtime because it would lead not only to more work at enhanced rates, but also to the payment of enhanced rates whilst on holiday, an incentive which would work contrary to the underlying health and safety purpose of the Directive. The payment of overtime on a voluntary or non-guaranteed basis was not intrinsically linked to the worker's tasks, because a worker had a right to refuse it. It was not payment for carrying out duties under the contract. The word "intrinsically" was strong. It suggested an unqualified link between the payment under consideration and the work. A standby payment for work which could be refused was not intrinsically linked.

34. Mr Napier QC's submissions were adopted by leading Counsel for Hertel and Amec. They were supported by Mr Tolley QC for the Secretary of State, intervening. He submitted that **Williams** was not concerned with any element of pay arising from overtime, and that nothing which the CJEU said could possibly be read as though it was directed to an overtime case. The view that the Advocate General in **Williams** thought that overtime payments were to be included in the amount of "normal remuneration" was based on the most slender of inferential foundations. There was nothing more than two references: one in paragraph 77 of her opinion to overtime being included in the concept of pay for the purposes of Article 141 (as

was) and another at her paragraph 79 to such a worker being entitled to "supplements" normally due to him during a period of paid annual leave. Employment Judge Kearns in Bear Scotland had thought that pay must fall either within the category identified at paragraph 24 of the judgment of the CJEU in **Williams**, or that at paragraph 25: either "inconvenient aspects linked intrinsically to the performance of tasks" (paragraph 24) or payments to cover occasional ancillary costs arising at the times of the performance of the tasks (paragraph 25). To adopt such a binary approach was too restrictive, and wrongly failed to consider the possibility of a third category. What was "inconvenient" in **Williams** related to what an employee could be required to carry out. The question was not that, but what "normal remuneration" actually was. In this respect he referred to **Lange v Schünemann GmBH** [2001] IRLR 244. That considered a different Directive: 91/533/EEC of 14 October 1991, on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. Article 2 required the information to cover at least the length of the employee's "normal working day or week". It was not concerned with overtime: a point made clear in paragraph 16 of its judgment in which the Court observed that "the characteristic feature of overtime, as the word indicates, is that it is performed outside normal working hours and is additional thereto." (Nonetheless, I note, the Court went on to hold that what was an essential element of the contract, or employment relationship of which it formed a part, and which had to be notified to an employee applied in particular to a term under which an employee was obliged to work overtime whenever requested to do so by his employer.) Mr Tolley submits that a relevant contrast between the present case and **Lock** was that in the latter the commission payments amounted to some 60% of the remuneration, whereas in the present cases the overtime payments represented a much smaller proportion.

35. Whereas Mr Napier QC considered that the matter was *acte clair* such that no reference was required, Mr Tolley thought that the question of whether overtime payment was included in Article 7 was a necessary and appropriate case for a reference to the CJEU if I were not satisfied with his analysis that neither **Williams** nor **Lock** dealt with the issue. The Court of Justice of the European Union could then deal with any implications of the case, and any tension between the cases of **Williams** and **Lock**.

36. In resisting these submissions, Mr Ford QC, for the Claimants and Cross-Appellants in Amec and Hertel, and Mr Morgan on behalf of the Claimants in Bear Scotland submitted it was plain from **Williams** and **Lock** that "normal remuneration" had the meaning which the Employment Judges in each case adopted. As Mr Ford submitted, Recital 6 to the Directive said that account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time. The ILO adopted the Holidays with Pay Convention in 1936, now replaced (as C132) with effect from 1970. Article 2 of that applied the Convention to all employed persons, and its Article 7 required an employee to receive, in respect of the full period of the holiday, "at least his normal or average remuneration". That was the source of the expression "normal remuneration". In **Stringer** the second question addressed to the Court had asked how allowances in respect of holiday were to be paid. All the Member States who made submissions argued that was a matter to be prescribed by their national legislation and practice. The Advocate General, however, referred specifically to ILO Convention 132 at paragraphs 49 and 64 of her opinion, leading her to speak in paragraph 78 of the continued payment of wages "without any reduction". At paragraph 90 she had proposed an answer that insofar as workers were in principle entitled to an allowance in lieu (in respect of untaken holiday leave for which such an allowance could be claimed) account had to be taken,

when assessing the amount of that entitlement, of the fact that the worker had originally acquired an entitlement in the amount of his normal pay. That gave rise to the requirement on the Member States under Article 7(2) of Directive 2003/88 to ensure that the amount of the allowance in lieu that the worker received was equivalent to that of his normal pay.

37. The judgment of the Court adopted references to the ILO Convention at paragraph 37 and 38, and at paragraph 61, stated that the workers' "normal remuneration" was that which had to be maintained during a rest period corresponding to a paid annual leave.

38. There were similar references in **Williams**. The argument of the employer in that case was that it was for contract to lay down the level of holiday pay, and that European Union law laid down no requirements with respect to the nature and level of payments to be made. These submissions were plainly rejected, in an analysis by the Advocate General beginning at paragraph 44. In the course of that (paragraph 47) she thought it had been clear after the decision in **Robinson-Steele** that the level of holiday pay must correspond exactly to that of normal remuneration; at paragraph 50, she repeated the provision of the ILO Convention as to normal or average remuneration, and thought, in respect of **Stringer** (paragraph 51) that it was necessary to ensure that a worker did not suffer any disadvantage as a result of deciding to exercise his right to annual leave. A prime example of such disadvantage was any financial loss which would deter him from exercising that right.

39. As to the composition of holiday pay, she opined at paragraph 68 that, since the concept of "holiday pay" was linked to that of "pay"

> **"…the latter must also, correspondingly, in principle be maintained without reduction during the period of leave".**

"Pay" had been extensively and repeatedly shaped by European Union law. This led her to apply a definition of "pay" in the context of "holiday pay" which was consistent with that adopted for other purposes, such as in considering the right to equal pay.

40. It was then that she went on to consider what pay meant, and that the expression included overtime (paragraph 71). Her definition of pay was consistent with ILO Convention C100, as including ordinary, basic or minimum wages or salary and any additional emoluments whatsoever, payable directly or indirectly, whether in cash or in kind, arising out of the worker's employment. She thought it necessary (paragraph 72) to add here to the broad interpretation given to the meaning of pay in the equal pay context. The opening words of paragraph 78 of her opinion captured perfectly the concept of work which was required, though not guaranteed, by an employer. At paragraph 85 she considered that within the phrase "normal or average remuneration" the alternative to "normal remuneration" was that of "average remuneration", clearly intended to take into account specific employment relationships in which workers did not receive "normal remuneration". It was in respect of the method of calculating "average remuneration", and the reference period, that national states had competence.

41. These views were adopted by the Court of Justice: at paragraph 21 it thought that remuneration must be determined "in such a way as to correspond to the normal remuneration received by the worker."

42. Mr. Ford QC submitted that the absence of any reference to "inconvenient aspect" in the answer given at paragraph 31 to the question addressed to the Court, but instead merely to all components over and above basic salary which were intrinsically linked to the performance of

the task which an employee was required to carry out as constituting (together with that basic salary) the entitlement of a worker in respect of holiday pay, demonstrated that Mr Napier QC placed too great a weight upon the "inconvenience".

Conclusion on First Issue

43. I have already rejected Mr.Napier's submission that the Court in **Lock** misunderstood the reasoning in **Williams**. Nor do I accept the arguments of the Appellants and Intervener as to the scope of Article 7. I accept Mr Ford's submissions.

44. Despite the subtlety of many of the arguments, the essential points seem relatively simple to me. "Normal pay" is that which is normally received. As Advocate General Trstenjak observed in **Williams**, there is a temporal component to what is normal: payment has to be made for a sufficient period of time to justify that label. In cases such as the present, however, where the pattern of work is settled, I see no difficulty in identifying "normal" pay for the purposes of European Union Law, and accept that where there is no such "normal" remuneration an average taken over a reference period determined by the Member State is appropriate. Accordingly, the approach taken in **Williams** is unsurprising. The Court in **Lock** looked for a direct link between the payment claimed and the work done. In the Hertel and Amec cases, the work was required by the employer. On the evidence, the Employment Tribunal was entitled to think it was so regularly required for payments made in respect of it to be normal remuneration.

45. Insofar as the test seeks an intrinsic or direct link to tasks which a worker is required to carry out (stressing those last four words) it would be perverse to hold that the overtime in these

cases was not. In my view, therefore, Article 7 requires and required non-guaranteed overtime to be paid during annual leave. I see no scope for any such uncertainty as would persuade me to make a reference to the Court of Justice of the European Union.

The Second Issue: Is conforming interpretation possible?

46. Given that Article 7 is to be interpreted such that the Claimants should have been paid during holidays in respect of their overtime, the question arises whether the domestic legislation can be interpreted to provide for this result. As between citizens, the Directive is not directly effective. The obligation resting upon a domestic court when interpreting national legislation which implements a Directive is to do so "as far as possible" in the light of the wording and the purpose of the Directive in order to achieve the result by the latter: sometimes known as the Marleasing principle, after **Marleasing v La Comercial Internacional de Alimentaciòn S A** (1992) 1 CMLR 305, the most recent authoritative re-statement of which is in **Pfeiffer v Deutscher Rotes Kreuz Kreisverband Waldshut eV** [2005] ICR 1359. ("**Pfeiffer**"). It is presumed that the Member State intended to fulfil entirely its obligations under the Directive in question: see **Pfeiffer** paragraph 112.

47. Ms Rose QC, who led the submissions for the Appellants on this issue, argued that this interpretative obligation was subject to three important limitations. First, it cannot serve as the basis for an interpretation "contrary to national law" (**Adeneler v Ellinkos Organismos Gallaktos** (ELOG) [2006] IRLR 716 at paragraph 110.) Directives have no horizontal direct effect and thus cannot override contrary provisions of national law. National law cannot be overridden under the pretext of interpretation. Second, legal certainty and non-retroactivity restrict its effect (**Adeneler**). Third, whether a conforming interpretation is possible within the

meaning of **Pfeiffer** is a question of domestic statutory construction for the national court, and depends upon "the application of interpretative methods recognised by national law" (**Pfeiffer** at 116).

48. Though recognising that the point had not been fully developed previously, she argued that the **Marleasing** principle required a narrower approach than that used under Section 3 of the **Human Rights Act 1998** ("HRA"). Although an interpretation which "goes against the grain of the legislation" or which is contrary to the underlying thrust of the legislation cannot be adopted, since to do so would not be to interpret legislation but to legislate, nonetheless by Section 3 of the **HRA.** Parliament had authorised the Court to distort the meaning of legislation from that which had been intended by the legislature when it was enacted (**Ghaidan v Godin-Mendoza** [2004] UKHL 30, [2004] 2AC 557.) Section 3 has in effect been held to give the court an enduring statutory mandate to construe legislation in a way which achieves compatibility with Convention rights even in a manner which departs from the legislative intention of the instrument in question and which would, but for Section 3, be contrary to law. There is no equivalent to this when construing domestic legislation enacted to implement a Directive: Section 2(1) of the **European Communities Act 1972** does not contain it. The principle which operates is simply a presumption that Parliament intended to legislate compatibly with its obligations under EU law. That presumption is, however, rebuttable. She maintained, therefore, that it was impermissible in domestic law to adopt a construction which distorted the meaning of the domestic legislation in order to implement a Directive, even if this were possible under Section 3 of the **HRA** if the relevant obligation had fallen within its scope. Thus in **Duke v GEC Reliance Ltd** [1988] AC 618, the Court did not permit an interpretation which would distort the meaning of statute. The meaning cannot exceed that which the

instrument is capable of bearing: see **Pickstone v Freemans plc** [1989] 1 AC 66, per Lord Keith at 111G to 112A, per Lord Templeman at 121E and 123C to D, and per Lord Oliver at 127C to 128A.

49. Ms Rose QC accepted that this argument had not been addressed to the Employment Tribunals in the appeals before me. Mr Ford QC however took no objection on behalf of the Claimants in the Hertel and Amec appeals, and I allowed it to be advanced.

50. Ms Rose recognised that there are dicta to the contrary. Thus observations in **Vodafone 2 v Revenue and Customs Commissioners** [2009] EWCA Civ 446, **Attridge v Coleman** [2010] ICR 242; **Rowstock Ltd v Jessemey** [2014] ICR 550 CA and **Usdaw v Ethel Austin** [2013] ICR 1300 (at paragraph 49) suggest there is no difference between the two approaches, or that the only limits on the **Marleasing** approach are identical to those identified in **Ghaidan** in respect of the interpretative obligations under Section 3 of the **HRA**. She submitted nonetheless that the point had not been the subject of argument in any of those cases. The Appeal Tribunal was thus not bound by authority to reject it.

51. There were some dicta which left space for a distinction to be drawn. Thus in **Revenue and Customs Commissioners v IDT Card Services Ireland** [2006] EWCA Civ 29, Arden LJ stated that **Ghaidan** could "in general" be applied as a "helpful guide" in **Marleasing** cases; and Lord Mance in **Assange v Swedish Prosecution Authority** [2012] UKSC 22 said that the Courts in **Marleasing** cases had drawn an "analogy" with Section 3.

52. In **Ghaidan**, **Duke** had not been cited nor had **Webb v Emo** nor **White v White**. Though the House of Lords recognised the parallels between the Section 3 approach and the **Marleasing** principle that did not mean that the approaches were identical.

53. The interpretative approach would not be appropriate where there were practical consequences. An example was that in **Innospec Ltd and Others v Walker** [2014] ICR 645 the Appeal Tribunal recognised that to interpret legislation in line with the Directive would be to disturb deliberate policy choices and thus enter the realm of legislation rather than interpretation.

54. Even if no meaningful distinction were to be drawn between the approach to the interpretation of legislation so as to conform with European Union law, and that to be taken when applying section 3 of the **HRA**, **Ghaidan** in any event did not permit interpretation contrary to the grain of the legislation. In that case Lord Rodger observed (at paragraph 110) that however powerful the obligation in sub-section 3(1) of the **HRA** might be it did not allow the Courts to change the substance of a provision completely, "to change a provision from one where Parliament says that *X* is to happen into one saying that *X* is not to happen". To interpret Article 7 as asked in the present case would be inconsistent with fundamental choices made by the legislature as to how much a worker should be paid.

55. There were two fundamental questions in determining holiday pay: how much should be paid, and for what period. The domestic regulations distinguished between overtime which was not guaranteed, which was not to be taken into account in assessing "how much", and overtime which was guaranteed, which was. As the decision in **Bamsey** demonstrated, Parliament

prescribed a very clear menu of choices. This decision precluded an interpretation which would ride roughshod over it.

56. Moreover, the policy choice as to the amount of holiday pay which was recognised in **Bamsey** was Parliament's foundation for making a further policy choice, when Regulation 13A was introduced as such into the **Working Time Regulations**. The choice was deliberate, designed to reduce the costs to employers of funding holiday pay on the one hand, whilst ensuring that workers enjoyed a longer holiday than was provided for as a minimum under European legislation. Parliament could have drawn a distinction between pay in respect of the Section 13 obligation (assuming it to be the European obligation) and that in respect of Regulation 13A holidays (an additional, right, purely domestic in origin). Alternatively, it could have provided for the same pay regime for both, in accordance with the interpretation of Article 7 I have adopted. Thirdly if it had appreciated that Article 7 was to be interpreted as I have held (above) that it should be, it could have decided that because of the increased costs arising from such an interpretation it would shorten the additional domestic period of leave provided for by Regulation 13A or abolish it entirely.

57. To interpret the provisions as having to give effect to Article 7 (as I have interpreted it) would be to upset this careful balance, and the deliberate choice between the various options which Parliament has made. Regulation 13A rights remain subject to **Bamsey**, being entirely domestic entitlements. It went against the grain of the legislation to produce a dichotomy between those entitlements and those in Regulation 13. This was not required by the decision in **Williams**, where there was no applicable domestic legislation.

58. The problems to which such an interpretation would give rise included that of liability falling retrospectively upon Amec, supposedly on the basis that the last deduction before legal action was taken was the last in a series of deductions. To establish a series, however, involved showing that each of the deductions had features in common with each of the previous deductions said to be made. Yet it could not be said in respect of any particular period of holiday taken by an employee that it was taken in respect of Regulation 13A rights or under Regulation 13. Different amounts would be payable dependent on which applied. How was it to be determined which it would be? Averaging actual payments made in the period preceding a holiday from work during which the actual payments made to a worker fluctuated considerably over the course of a working year gave rise to a risk of fortuitous gain, or shortfall, for the worker, and unpredictable expense for the employer. These serious practical consequences require legislative action. It cannot be for a Court to determine them.

59. Legal certainty was compromised: an employer could not have reasonably anticipated that he would be exposed to retrospective liability. The interpretation asked for would distort the scheme of the Act and fall foul of the principle expressed in **Duke v Reliance**.

60. Finally, Ms Rose submitted that in any event the decision of the Court of Appeal in **Bamsey** was binding. In paragraph 40, Auld LJ said:-

> **"In my view, there is nothing in Regulation 16 on which the Marleasing principle of construction can bite, especially where, as I have concluded, the content and framework of the Regulations, when read with the Act, show that their draftsmen merely intended to apply the Act's well established domestic definition of "a week's pay" save in the immaterial respects for which he specifically provided in Regulation 16(3). In particular, 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. And, in any event, Sections 221 to 224 with or without Section 234, will not necessarily achieve that."**

61. Ms Rose argued that the Court of Appeal was there saying that, even if Article 7 had the meaning I have held it does, it did not require a different interpretation to be given to domestic legislation from that which the Court of Appeal was giving in the appeal before it. The **Marleasing** principle of construction would be excluded: it would be contrary to the intention of the draftsmen.

Conclusion on Second Issue

62. I do not accept these submissions. First, I reject Ms Rose's bold submission that the interpretative interpretation under Section 3 HRA is wider than that required by **Pfeiffer**. There are so many references to the approach in respect of each being informative as to the other, without the assertion of any difference between them, as to call the submission into question. For instance, in **IDT** Lady Justice Arden at paragraphs 82 said:

> **"In the context, however, of legislation which requires to be construed in a way which is compatible with European Union law or with the rights conferred by the European Convention on Human Rights, the English Courts can adopt a construction which is not the natural one. The process, however, remains one of interpretation: the obligation imposed by the Court of Justice is only to interpret national law in conformity with a directive so far as possible".**

She was thus equating the two approaches.

63. At paragraph 85 she observed:

> **"…further guidance is now provided by Ghaidan v Godin Mendoza. As I have explained above, this was a case under Section 3 of the Human Rights Act 1998 and is thus not a case in which the House had to consider the interpretation of legislation so as to make it compatible with the wording and purpose of the Directive. However, under Section 3 of the 1998 Act, the Court has to interpret legislation "so far as possible" in a manner which is compatible with convention rights. The case is therefore in my judgment authority as to what is "possible" as a matter of statutory interpretation. The similarities in this regard between interpretation**

> **under section 3 of the 1998 Act and under the Marleasing principle are illustrated by the fact that Lord Steyn traced the origin of the interpretative obligation in section 3 to the Marleasing case…"**

64. Next, I cannot accept that the interpretation contended for goes against the grain of the legislation. First, the Regulations were specifically made to implement the Working Time Directive. It can be presumed that the intention of Parliament was to fulfil its obligation to do so fully and accurately. If, seen through a modern lens, the words do not achieve that, then to adopt a conforming interpretation is not doing violence to the intention of Parliament but instead respecting it. True it is that it produces a result contrary to that which **Bamsey** states, but the principles in that case were expressed in a case argued in November 2003, and in which judgment was delivered in March 2004, before any of **Robinson-Steele**, **Stringer**, **Williams** and **Lock** were decided by the CJEU, and before the Supreme Court in **Williams** had recognised that the principles applicable to paid holiday for airline pilots were those applicable in respect of Article 7 more generally (paragraph 20, per Lord Mance). The foundations for the view expressed by Auld LJ at paragraph 40 of **Bamsey** (that there was nothing in regulation 16 on which the **Marleasing** principle could bite) were that the Directive left it to the member states to decide how to calculate the amount of remuneration payable, including whether it would be paid at basic or enhanced overtime rates; and that "unless the conditions of entitlement laid down by regulation 16, as I have construed it, are such that they can be said to negate or frustrate the very purpose of the Directive, the court must look at the regulation unassisted in this respect by the Directive". Neither foundation remains a solid support for the conclusion drawn. As to the first, see the discussion above when I was considering Issue 1, of the decision in **Stringer**, in which the Advocate General rejected the submissions by Member States that it was for each State individually to prescribe the amount of holiday pay under Article 7, save only as to defining the arrangements for and period over which pay averaging

was to be calculated. As to the second, it is now accepted before me that the result in **Bamsey** does not accord with the proper interpretation of Article 7 as I have held it to be. Although **Bamsey** demonstrates what the interpretation of the regulations should be if untrammelled by European Union law, it does not purport to identify a cardinal feature, guiding purpose or "grain" of the legislation which would preclude a different interpretation, such that it could confidently be said that Parliament had so set its face against that other view that it could not be adopted. I also adopt Employment Judge Camp's reasons as he set them out at paragraphs 53.1 – 3 of his judgment.

65. It further appears to me that there is a conceptual difference between "normal remuneration" on the one hand, and "normal hours of work" on the other. Though both relate to work done, one looks at the money received by a worker, the other at time spent by him, rather than directly at its financial rewards. Although the Directive does not use the expression, the case law of the CJEU has interpreted it as providing for the former: the legislation, though intended to reflect the Directive, emphasises the latter.

66. There is nothing intrinsic to the regulations which requires holiday pay to exclude payment for overtime which a worker has actually worked prior to holiday being taken, where the worker is contractually obliged to work if asked, though his employer is not contractually bound to ask. The essential feature of the Regulations is that holidays should be paid. That is not in issue. What is in question is, rather, the principle by which the amount of that payment is to be calculated. The obligation to construe legislation "as far as possible" to conform is a powerful one. I cannot accept that the form, nature and purpose of the Regulations makes it impossible to construe it as the Claimants contend.

67. Though it is the effect of the interpretation rather than the precise words which matters, a conforming interpretation is best expressed by amending regulation 16(3)(d) of the Working Time Regulations to insert the following italicised words, as the Tribunal in **Freightliner v Neal** thought appropriate, and as the Secretary of State for Business Innovation and Skills regards as permissible, namely:

> **"(d) as if the 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"***

68. I accept that there are practical consequences, some of which Ms Rose points out. For instance, it may be that the legislature has to consider whether to adjust the provisions in respect of **"Bamsey"** payments for the additional leave for which regulation 13A provides. However, there is only a limited scope within which the fear of consequences may legitimately influence construction; and in this field it will always have balanced against it the consequence that to decide otherwise would be to accept that the legislature deliberately set its face against fulfilling its Treaty obligation to implement a Directive in full.

69. Neither legal certainty nor its alter ego, the principle of non-restropectivity, assists to determine the construction to be adopted. This is not a case – such as **Innospec** or **O'Brien v Ministry of Justice** [2014] ICR 773, EAT (Sir David Keene) - in which there was no legislation at the relevant time which provided for liabilities which were first identified much later, nor is **Williams** a ruling of such a wholly exceptional sort as was **Barber v Guardian Royal Exchange Assurance Group** (C-262/88) [1990] ICR 616. In passing, though, I note that resolution of the third issue in these appeals, to which I now turn, may affect considerably

the extent of any retrospective liability arising from the construction of Article 7, and hence regulations 13 and 16 of the Working Time Regulations, which I have adopted.

The Third Issue

70. The Claimants asserted that sums due to them had unlawfully been deducted from the wages paid. Section 23 of the Employment rights Act 1996 materially provides:

> **"Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—**
>
> **(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…….**
>
> **(3)Where a complaint is brought under this section in respect of—**
> **(a)a series of deductions or payments…….**
> **the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.**
>
> **(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."**

Similar provisions are contained within regulation 30 of the **Working Time Regulations 1998**, which Mr. Ford QC argued constituted a self-contained code. Though I note that in that regulation there is no reference to a "series of deductions", nothing turned on this in the argument presented for the Appellants.

71. Employment Judge Camp in Hertel and Amec distinguished between sums paid under regulation 13 and sums paid under regulation 13A. The latter provision is, following **Bamsey**,

subject to section 234 of the **1996 Act**. It follows from the decision I have reached in respect of issues 1 and 2 that the amounts due under the respective regulations differ, since those under regulation 13 must correspond to the normal remuneration received by an employee in the reference period appropriate to the leave in respect of which it is payable, whereas the latter is subject to the regime provided for by sections 220 – 4 and 234.

72. Where there has been a failure to pay the sum due under Article 7 (as understood in this judgment) in respect of annual leave taken under regulation 13 more than three months before an application to the Tribunal making a claim that an employee has not been paid the full amount of holiday pay due, it is only if the failure forms part of "a series of deductions" that a claim may validly be brought in respect of it, without at any rate consideration whether time should be extended if it was not reasonably practicable to bring the claim earlier.

73. This raises the question as to what constitutes "a series of deductions". Ms Rose QC submitted that there had to be a linked group of payments. Yet, here, she said it was impossible to identify on the evidence before the Tribunal whether any one particular period of leave was taken under regulation 13 or under 13A. There had been no reason to distinguish between them at the time: the pay was thought to be exactly the same, that was the way the Regulations appeared to treat the issue, and paid leave granted under regulation 13A was merely treated as additional days of leave to which the same rate of pay applied as would apply under regulation 13.

74. Before Employment Judge Camp there was no dispute that in principle a failure to pay holiday pay over a period could constitute a series of deductions. He recorded submissions

made by Hertel and Amec at paragraph 85 of his Reasons that, logically, it was to be assumed that in each leave year an employee would first take regulation 13 leave, and then later in the leave year would take the balance of days leave due, which would be regulation 13A leave. Given that it is now appreciated that there should have been a higher rate of pay in respect of regulation 13 leave, there would thus have been a series of deductions followed by a period in which pay was paid at an appropriate rate, followed again by a series of deductions, and then again by a period of appropriate payment. This amounted to two or more series of deductions, punctuated by non-deductions, rather than one self-contained series. In the context of the Regulations, therefore, there was no series continuing until the last of these short series, after which a claim was made.

75. At paragraph 86 of his written Reasons the Judge rejected this. He held that deductions of a similar type could form a series, even if they occurred at irregular intervals and the series was interrupted by instances of correct payment. Nor did he accept that the Claimants should retrospectively be deemed to have taken their holiday in alternating "blocks" consisting of 4 weeks regulation 13 leave, and 1.6 weeks additional regulation 13A leave. He concluded:

> **"I think what type of leave is being taken should, prospectively or retrospectively and in the absence of any agreement with their employers to the contrary, be a matter for employees themselves to choose – after all, it is their leave"**

76. At paragraph 86.4 he said he preferred to regard what had happened as a series of deductions from holiday pay relating to the same matters – overtime and IBA (as to which, see below) – or a series of deductions from regulation 13 pay which had been made each and every time regulation 13 pay fell to be paid.

77. Ms Rose QC argued that there was no warrant for the Judge deciding that the employee had a choice, to be exercised retrospectively, as to whether the leave was covered by regulation 13 or 13A. On the logic he adopted, an underpayment in respect of holiday pay in 2009 could be regarded as part of a series even if the next underpayment was not until 2013: and on this basis, the fact of later underpayment would suddenly have the effect that a deduction, in respect of which for some years a Tribunal would not even have had jurisdiction to consider a claim, became justiciable. The deductions here could not be regarded as a series. The phrase "series of deductions" had to be interpreted in the light of the purpose and context of the provision of which it formed part. The general policy of the WTR and **1996 Act** was for claims to be made within 3 months, and the exception in the Act for a series of deductions was intended to operate to the benefit of employees as a limited derogation from that policy where an employer consistently and repeatedly made a "contiguous sequence of unlawful deductions", in which case time ran from the last of them. Where an employer ceased to do so, and for a while paid the full entitlement, then the series was broken, and the last deduction in that series made before the next series began. If an employer began again at a later date to make unlawful deductions, then the series began anew at that point. To hold otherwise would defeat promptness, and render the date at which time started to run not only uncertain, but perhaps impossible to ascertain.

78. Mr. Ford QC's first answer to this in his written Skeleton argument was that a claim in respect of a series of deductions from holiday pay is an additional remedy required to satisfy the EU principle of equivalence (see **Stringer** at paragraphs 32, 62-3, 88-9). This does not seem to me to answer the question as to what constitutes a series, even if it sufficiently explains why no point arises in respect of the difference in wording between regulation 30 and section 23 to

which I drew attention above. As to that question, he argued that a "series" is a term of ordinary usage, capable of covering events which are similar in kind and in type. A series of payments made on the Tuesday of each week is no less a series because a similar payment is not made on any intervening day; there is no requirement that payments be contiguous if they are to amount to a series. The Judge was right in his conclusion, since the theme underlying Part II of the ERA is that of providing enhanced protection for workers.

Conclusion in respect of Series of Deductions

79. Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link.

80. I accept Ms Rose QC's submission that the precise force of the word, common though it is, has to be understood in the legislative context. That is one in which a period of any more than three months is generally to be regarded as too long a time to wait before making a claim. The intention is that claims should be brought promptly. I doubt, therefore, that the draftsman had in mind that a deduction separated by a year from a second deduction of the same kind would satisfy the temporal link. It would have been perfectly capable of justifying a claim at the time, and within three months of it. Whereas when considering a series, as when considering whether there has been "conduct extending over a period" (the analogous provision

in the Equality Act 2010) some events in the series may take colour from those that come either earlier or later, or both, so that the factual similarities can only truly be appreciated when a pattern of behaviour is revealed, the essential claim here is for payment in a sum less than that to which there is a contractual entitlement. The colour of such a deduction is, though not inevitably, at least likely to be clear within a short time after it occurs, if not at the time.

81. Since the statute provides that a Tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (sections 23(2) and (3) ERA 1996 taken together) (unless it was not reasonably practicable for the complaint to be presented within that three month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.

82. It is unnecessary therefore for me to consider whether Employment Judge Camp was in error at paragraph 86.3, in thinking that the type of leave being taken was a matter for the employee to choose. However, in case this issue goes further, I shall deal with it. I think his reasoning (that the choice was theirs because it was "their leave") is unsustainable. First, it might equally be said that it is the employer's obligation to pay for it, so the choice should be its: this is equally unsatisfactory as a basis for deciding who should determine the character of

leave, but demonstrates that there are two sides to the same coin. Second, in the absence of detailed contractual provisions the power of an employer to exercise control, which is inherent in every contract of employment, means it is entitled (within reasonable bounds, and following the procedure laid down by Regulation 15(3) of the **Working Time Regulations**) to direct when holiday should be taken. It therefore has the power to direct when, within a leave year, Regulation 13 holiday should be taken (albeit subject to Regulation 15). Third, Regulation 13A is described in the Regulations as "additional leave". That suggests that the dates of it should be the last to be agreed upon during the course of a leave year.

83. Though I disagree with Employment Judge Camp on his reasoning, I suspect that this may have little practical effect since in many cases my conclusion as to what constitutes a series for the purposes of holiday pay, within the context of the applicable legislation, will make it unnecessary to consider retrospectively whether the pay is to be calculated on the higher (Article 7) or the lower (**Bamsey)** basis.

The Fourth Issue

84. This issue is one of contractual construction. It arises in the Hertel and Amec cases alone, and it is agreed must be resolved by the application of section 234 of the ERA. No issue of conforming construction arises.

85. In **Tarmac Roadstone Holdings v Peacock** [1973] ICR 273, employees worked subject to conditions which provided for a normal working week of 40 hours actual work, but that all workers "shall work overtime in accordance with the demands of the industry during the normal week and/or at weekends". They regularly worked 57 hours a week, over seven days. The

Court of Appeal reversed a tribunal decision that the national agreement had been varied by consent such that the workers were bound as a matter of contract to work 57 hours, rather than 40 as before. Overtime could not be counted for the purpose of calculating the amount of the redundancy payments they claimed unless a fixed amount of overtime had been agreed as obligatory on both sides, and had become a term of the contract of employment. Where overtime was not guaranteed, even if the employee was obliged to work it if asked, it did not count in computing what were normal hours of work, by reference to which a redundancy payment was calculated under Schedule 2 to the **Contracts of Employment Act 1963**.

86. Lord Denning M.R. said (at 278G – 279C):

> **" First, where there is a fixed number of compulsory working hours, and thereafter overtime is voluntary on both sides — so that the employer is not bound to employ the man for any overtime and the employee is not bound to serve it — then, although the overtime is worked regularly each week, nevertheless, being voluntary, it does not count as part of the normal working hours. Such a situation is covered by paragraph 1(1) [of the Schedule].**
>
> **Second, when there is a fixed number of compulsory working hours and in addition a fixed period of overtime which is obligatory on both sides — so that the employer is bound to provide that overtime and the employee bound to serve it — then that fixed period of overtime is added to the fixed period of compulsory working hours so that the total number counts as the normal working hours. Such a situation is covered by paragraph 1(2). In short, "guaranteed overtime" counts as part of normal working hours.**
>
> **Third, where there is a fixed number of compulsory working hours, and overtime is obligatory on the man if asked but not on the employer — so that the employer is entitled to call on the man to work overtime but is not bound to call upon him to do so, then the overtime does not come within the normal working hours. Such a case seems to me to come within paragraph 1 (1). It comes within the words "the employee is entitled to overtime pay when employed for more than a fixed number of hours in a week …" It does not come within the words of paragraph 1 (2), because the contract of employment does not "fix" the number of hours of employment. The overtime is not fixed but is at the option of the employer."**

87. In **Lotus Cars Ltd. v Sutcliffe and Stratton** [1982] IRLR 381, CA a company handbook prescribed a basic working week of 40 hours, but it was "necessary that works staff work a 'standard week' of 45 hours, the additional 5 hours being regarded as 'normal extra time' and being paid at a slightly higher rate". Although both the Tribunal and Appeal Tribunal had upheld the claim that redundancy payments should be calculated on the basis of normal working hours of 45 per week, the Court of Appeal held that they had erred in finding that an obligation rested on the employer to provide more than 40. It was not enough to show that an employee regularly worked (and was obliged to work) the extra hours, but also that it was obligatory for the employer to provide them. As a matter of construction of the particular terms of the contracts of employment in that case, there was no such obligation, and therefore the claim failed.

88. The question here was whether the contractual arrangements were such as to provide for a fixed period of overtime: to adopt the principle expressed in **Lotus Cars**, whether on a fair reading of the contractual provisions, the employer was obliged to provide for (and therefore to pay for) the working of 44 hours in each week, however many other hours he might in any one week also have asked an employee to work.

89. Employment Judge Camp found that they were. He relied on clause 10.4 of the SPA, which he found provided for a 44 hour week, trumping the provision fixing a 38 hour week contained in NAECI. It referred to a pattern of work, specifically set out, which both parties to the contract plainly intended should be worked.

90. Mr. Bowers QC relied on both **Tarmac** and **Lotus Cars** as well as **Bamsey**. He drew attention to clause 7 of NAECI, and that clause 7.4 imposed an obligation of an employee to work overtime if required, but imposed no corresponding obligation on the employer to provide it. The SPA (by clause 2.2) made it a condition of employment on the West Burton project that all employers of labour and their employees should accept all of the obligations of NAECI as well as the SPA; clause 9.3 of the SPA referred back to clause 7.4 of NAECI; and by clause 10.1 the SPA reiterated the provisions of NAECI that "basic working hours" on the West Burton project would be 38 per week. This was taking pains to spell out what was a fixed element of the working week. More than 38 was thus not fixed by contract, and though obligatory for the employee to work more if required, it was not obligatory of the employer to require it.

91. As a matter of fact, he maintained that the evidence of Mr. Davies for the employer showed that on occasion less than 44 hours was actually worked by an individual worker during a week, and argued that the Judge at paragraph 27 had wrongly rejected this evidence when there had been no challenge to it in cross-examination.

92. Mr. Ford responded that these submissions missed the purpose of clause 10.1. That provision seen in context was necessary in order to identify the point beyond which hours became payable at an overtime rate. It referred to basic, not to normal, hours. Clause 10.2 stated that a "working pattern ***will be*** introduced", thus making it a matter of mutual obligation. The word "pattern" was significant – it was providing for the hours to be worked during the duration of the project, unless varied by agreement between the parties after approval by the National Joint Council: it could not be varied unilaterally, as would be the case if there were no

obligation on the employer to offer the hours. Prior consultation would be needed to do that: see clause 9.4, requiring at the very least a process of prior consultation with the Trades Unions. None was in evidence.

93. On this approach, the references in clause 10.5 to "Overtime, which is not guaranteed, will be required during the project…" is to be read as being in distinction to overtime which is guaranteed, for which the "pattern" of hours set out at clause 10.4 provides – overtime being the number of hours in excess of the 38 for which basic pay would be earned.

94. The Judge encapsulated his views at paragraph 91.2. He thought a distinction was to be made between overtime which was part of the pattern of work, and that which was "additional overtime". In reaching that view he referred to the relevant clauses by number, save one: clause 10.6.

Conclusions on Issue 4

95. The interpretation to be adopted is that which would accord with the reasonable understanding of the parties concerned, as at the time of entering the agreement, assessed objectively and in context. Initially, I was attracted to Mr. Ford's submissions, which the Judge adopted. The fact was that almost without fail the employees actually worked 44 hours per week, and may well also have worked additional hours which could not count towards either holiday pay or pay in lieu of notice ("PILON").

96. I have difficulty however in reconciling this approach, however much it may have represented what happened after the contract was entered into, with that which the contract meant when construed as above. In particular, clause 10.6 reads;

> **"Overtime, (including Saturday), is not covered by any guaranteed working hours provisions and does not form part of the normal working hours. It will not form any part of the calculations on holiday pay entitlement"**

97. If the intention of the parties was to distinguish between three classes of case, namely normal hours, guaranteed overtime, and non-guaranteed overtime, the first two of which would be guaranteed, then the agreement nowhere makes this clear. Instead it uses the word "overtime" in both the latter two senses, without any attempt to qualify the wording so as to show they refer to different concepts. It is difficult to think that the reader would understand that the same word was being used in two distinct senses, with significantly different practical effects, in one and the same clause. If the opening words in 10.5 - "Overtime (including Saturday), which is not guaranteed, …" is meant to read as if it referred to the category of non-guaranteed overtime, ignoring the parenthesis (as the readership well might), then clause 10.6 runs contrary to that, for it deals with a general proposition – that overtime is not guaranteed and forms no part of normal working hours – which is not obviously limited to "non-guaranteed overtime" and would be tautologous if it were. Mr. Ford argues that this should and would be understood as a reference to clause 8 of NAECI which provides "guaranteed hours provisions" – that is, a guarantee that 38 hours per week will be paid. The provision was necessary because the SPA could be amended by agreement to change the working pattern – but the effect of this was to reinforce the agreement that nonetheless 38 hours would remain guaranteed as a minimum, whatever else may from time to time have been fixed. However, clause 10.6 goes beyond that which would be necessary to achieve this. There is thus no reason to think that the

"overtime" referred to here is in a different category to that at 10.2, which sees overtime as part of the working pattern for which clause 10.4 goes on to provide.

98. This leaves the word "pattern" in clause 10.4 with too much work to do if it is to be construed as creating a distinction between guaranteed hours (including overtime) on the one hand and non-guaranteed hours (including overtime) on the other such that the former is outwith the generality of clause 10.6.

99. Though I have reached this conclusion only somewhat reluctantly, since it seems clear to me that any observer of what happened in practice would think that the employees could expect to work 44 hours (or 42 in Mr. Baines' case), and that those hours were "normal" in any usual sense of the word, I have to approach it as a matter not of asking what happened after the contract was made, but what the agreement was when made. This is because **Tarmac**, **Bamsey** and **Lotus** all show that it is a matter of construing the terms that had been agreed. Indeed, that is how Employment Judge Camp approached it, though I regret I differ from his conclusion whilst adopting that approach. I am fortified in this conclusion by the fact that the contracts of the parties themselves reflect this understanding, for the contract of the Amec employees I understand to be materially identical to that of Adam Smythe in the court bundle. Mr Smyth's contract provided that annual holidays were to be paid in accordance with NAECI 10, clause 10.3 of which provides that for the purposes of holiday pay calculation "normal working hours shall be taken to be 38 hours per week.".

100. Accordingly, the appeal on this discrete point of contractual construction succeeds.

The Fifth Issue

101. This arises on a cross-appeal, again only in respect of the Hertel and Amec employees.

102. It concerns allowances: Radius Allowance ("RA") which was payable to all employees, and Travelling Time Payment ("TTP") paid (so far as this appeal is concerned) only to Mr. Law among the lead Claimants. The issue before Employment Judge Camp related solely to RA and TTP, it being conceded that IBA was payable, because authority bound the Tribunal (though the Appellants challenged the correctness of that authority): in any event, no challenge was made before me to the Judge's conclusions that IBA was payable as part of normal remuneration.

103. RA was paid to any employee who travelled daily between his or her home and a site over 8 miles away. The allowance was for travelling time, and fares, and was payable only if a full day was worked. HMRC treated some of the payment as a reimbursement of travelling costs, but the balance as taxable remuneration. The claim relates purely to the taxable element.

104. TTP entitled employees to be repaid for time spent travelling at the rate of one hour of basic rate pay for the first 30 miles travelled, and half an hour for each subsequent 20 miles, in each case considering a one-way journey. There is no point of principle relevant to TTP in the current appeals which does not also apply to RA, and I need not consider them separately further.

105. IBA was a composite payment, reflecting two elements – a fixed productivity allowance, and performance based payments. The Judge set out the relevant provisions at paragraph 16 of his decision.

106. The Judge rejected the submissions of Hertel and Amec in respect of IBA, since **Williams** effectively precluded it succeeding. He thought such payments were "intrinsically linked" to the performance of the tasks which the Claimants were required to carry out under their contracts of employment.

107. He did not take a similar view of RA and TTP, which he considered neither "linked intrinsically" to the work done, nor related to the Claimants' personal or professional status. However, he recognised that they were not in the category of payments intended exclusively to cover occasional and ancillary costs arising at the time of performance of the relevant tasks. Since **Williams** established that what was to be paid during holidays as "normal remuneration" were components of pay which were intrinsically linked to the work done, but set the limits to the category of what could be regarded as "intrinsically linked" by excluding from within it any payment made exclusively to cover occasional and ancillary costs, the payments here fell somewhere in the middle.

108. He concluded in Paragraph 83 as follows:

> **"Of all the issues I have had to decide in this case, I have found this one the most difficult, but on balance I think [the taxable part of] RA and TTP are not to be included within holiday pay. They were not paid because of anything to do with the work workers did or to their status; they were paid solely because of where workers happened to live. As such, RA and TTP are most closely analogous to sums paid for travelling (and other) expenses. I don't think it stretching things unduly to think of travel time as a kind of expense – after all, time is money as the cliché has it – and it is not an 'expense' incurred when on holiday so there is no good logical and/or policy reason to include it within holiday pay."**

109. Mr. Ford argues that the sole issue is whether these payments fell within the scope of Article 7 of the Directive. In deciding this issue as he did, the Judge misdirected himself, misapplied **Williams,** and/or reached a perverse conclusion.

110. The payments were plainly not intended merely to cover costs; and provided remuneration to the employee, hence becoming taxable as such.

111. Amec and Hertel argue that the categorisation of these payments as not intrinsically being linked to the performance of the tasks the workers were required to carry out is a conclusion of fact, and was permissible. When a worker did not attend a site to work (as when he was on holiday) he would not incur the time expense of travelling to it. RA and TTP had nothing to do with the actual work the Claimants did. The decision accorded with the CJEU's approach in **Williams** to the partly taxable time-away-from-base allowance, which was one of the benefits there in issue. It was right to say that there was no policy reason for including it within holiday pay. The fact that the payments were not an exact match for actual expenses incurred was irrelevant – the provision provided a broad brush approximation to those costs.

Conclusions on Fifth Issue

112. I cannot accept Amec and Hertel's arguments.

113. It seems plain to me that a worker on site is paid for his time, which he would not otherwise be obliged to spend there. When on holiday, he would not spend time on site, but it is plain that the pay he receives as calculated by reference to the hours spent when at work forms part of holiday pay. When on holiday, neither would he spend time travelling to work.

But just as time on site is paid, so time spent travelling is remunerated, albeit by reference to categories of distance and on terms as to working a full day, by RA and TTP. The bands of distance which lead to differential payments to workers broadly equate to the different times they are likely to spend in the process. In my view, time spent travelling is not, and cannot sensibly be thought to be, an expense ancillary to travel such as train ticket or bus fare would be. It is not a cost, as the Judge thought. It is time spent which is linked to work – to work, a person has to travel to the place of work – and the necessity that the time should be spent is indicative of the strength of the link.

114. The Claimants "normally" worked the agreed shift patterns, worked weekend overtime, and were paid RA and TTP, so that the permanency test applied by AG Bot in **Lock** was met. The payments were directly linked to work (adopting the word "directly" from **Lock**.) In my view, the Tribunal did not properly approach the question posed by the **Williams** test; in any event, it was wrong to think that the payment was made purely because of where a worker lived. It was made for time spent by that worker. Time ordinarily is remunerated in the workplace, and is all the more likely to be so away from a construction site itself where the work may involve travel from a home base to one of a number of sites, as is familiar in the construction industry. The money received is payment for time, not for the place of abode. As such, the taxable element of RA and TTP formed part of the worker's normal remuneration.

Summary

115. The appeals of all Appellants fail on the first two issues. Article 7 of the Directive provides for non-guaranteed overtime to be reckoned as part of normal remuneration when

calculating holiday pay; and it is possible for the Working Time Regulations to be construed so as to conform.

116. The appeals of Hertel and Amec succeed in respect of the third and fourth issues.

117. The cross-appeal against Hertel and Amec in respect of RA and TTP succeeds.

Disposal

118. The consequential orders have been agreed between Counsel.

119. The claims against Bear Scotland are remitted to the Employment Tribunal for further procedure in the light of the findings set out in this judgment.

120. The parties to the Hertel and Amec appeals are agreed that each party should have permission to appeal to the Court of Appeal on all points on which they lost. I am content to grant the permission: though I do not consider that an appeal on the first two grounds has a reasonable prospect of success, I recognise that the issues in these cases are of some importance. They have attracted considerable publicity in the media, and will benefit from a definitive resolution. On that basis, leave should be given. I consider the third ground arguable as well as of public importance; and the other grounds should follow.