Appeal No. UKEAT/0189/15/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 & 8 December 2015
Judgment handed down on 22 February 2016

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

BRITISH GAS TRADING LTD — APPELLANT

(1) MR Z J LOCK
(2) SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN CAVANAGH QC (of Counsel) Instructed by: Eversheds LLP Bridgewater Place Water Lane Leeds LS11 5DR
For the First Respondent	MR SIMON CHEETHAM (of Counsel) and MS VICTORIA WEBB (of Counsel) Instructed by: Unison Legal Services Unison Centre 130 Euston Road London NW1 2AY
For the Second Respondent	MR ADAM TOLLEY QC (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

WORKING TIME REGULATIONS - Holiday pay

Mr Lock was at the material time employed by British Gas as a salesman. His remuneration package included a basic salary plus commission which was based on the number and type of contracts he persuaded customers to enter into; in other words it was results-based commission and did not depend on how much work was done. He took a number of days' holiday to which he was entitled. However, the remuneration paid to him during holidays consisted only of basic salary and any commission which had been earned earlier but happened to be paid at that time. Since he was not working he could not earn any commission while he was on holiday. He complained to the Employment Tribunal that that method of calculating his holiday pay was contrary to the requirements of section 221 of the **Employment Rights Act 1996** and regulation 16 of the **Working Time Regulations 1998**, as amended. He submitted that the domestic legislation could be, and therefore had to be, interpreted in a way which conforms to the requirements of Article 7 of the European Union's **Working Time Directive**. There had previously been a reference made by the Employment Tribunal to the Court of Justice of the European Union, which held that Article 7 of the **Directive** requires results-based commission to be taken into account when calculating an employee's holiday pay. The Employment Tribunal then held that it was possible to interpret the domestic legislation in a way which conforms to the requirements of the **Directive** by reading words into regulation 16. British Gas appealed.

Held, the appeal would be dismissed. The Employment Appeal Tribunal had recently decided that the domestic legislation can be interpreted in a way which conforms to the requirements of the **Directive**: see **Bear Scotland & Others v Fulton & Others** [2015] ICR 221. The general principle is that, although the Appeal Tribunal is not bound by its own decisions, they are of

persuasive authority and it will follow them. The established exceptions to that general principle are:

(1) where the earlier decision was *per incuriam*, in other words where a relevant legislative provision or binding decision of the courts was not considered;

(2) where there are two or more inconsistent decisions of the Appeal Tribunal;

(3) where there are inconsistent decisions of the Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;

(4) where the earlier decision is manifestly wrong;

(5) where there are other exceptional circumstances.

The first three of those exceptions were not relevant in the present case. Despite the submissions made on behalf of British Gas, the decision in **Bear Scotland** was not manifestly wrong. Further, there were no exceptional circumstances such as to justify a departure from that decision in this case.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This appeal concerns whether it is possible to interpret domestic legislation in a way which is in conformity with European Union ("EU") law. The domestic legislation concerned is contained in the **Working Time Regulations 1998** and sections 221-224 of the **Employment Rights Act 1996**. The relevant EU legislation is contained in **Council Directive 2003/88/EC** (formerly **Council Directive 93/104/EC**).

2. In a judgment sent to the parties on 25 March 2015 the Employment Tribunal sitting at Leicester (Employment Judge Ahmed, sitting alone) held that the domestic legislation can be interpreted in a way which conforms to the requirements of the **Directive**, as interpreted by the Court of Justice of the European Union ("CJEU"). Although this appeal is brought by British Gas, for convenience I will refer to the parties either as they were in the Employment Tribunal (Claimant or Respondent) or by name.

3. When this case was previously the subject of a reference by the Employment Tribunal to the CJEU that Court held that Article 7(1) of the **Directive** requires that results-based commission paid to an employee which is not dependent on the amount of work done by that employee must be taken into account in the calculation of pay for annual leave: see Case C-539/12 **Lock v British Gas Trading Ltd** [2014] ICR 813. I will return to that judgment in more detail later. It is important to note that the issue of what the **Directive** requires as a matter of EU law is no longer in dispute and is not the subject of the present appeal: that has already been the subject of authoritative decision by the CJEU and is binding on the United Kingdom.

4. The only issue that now arises is whether, in the light of the judgment of the CJEU, domestic legislation can be interpreted in a way which is in conformity with the **Directive**. If that is possible then, as is common ground, that is the interpretation which the courts and tribunals of this country are required to give it. If it is not possible, then the courts and tribunals of this country must give effect to domestic legislation despite the incompatibility with EU law. Any remedy would then lie elsewhere.

5. I am informed that this claim has been selected as the lead claim for a large number of results-based commission cases. There are more than 60 such claims against this Respondent in the East Midlands region alone and some 918 claims against it around the country. I am also informed that there are many thousands of similar claims against other Respondents which have been stayed pending the outcome of this appeal.

6. A central part of the argument which has been made on behalf of British Gas is that I should not follow the earlier decision of this Appeal Tribunal in **Bear Scotland & Others v Fulton & Others** [2015] ICR 221, a decision of Langstaff J (President). That case concerned non-guaranteed overtime. I will return to that decision in due course.

Factual background

7. There is no dispute about the facts in this case. I take the relevant facts from the summary at paragraph 13 of the Employment Tribunal's judgment.

8. Mr Lock was employed by British Gas initially from 1 February 2010. After the case was referred to the CJEU he has found alternative employment elsewhere.

9. At the material time his salary was £14,670 per annum. In addition he was contractually entitled to the benefits of a commission scheme, to which I will return.

10. Mr Lock was entitled to 25 days' holiday per annum plus public and bank holidays. While on contractual leave he was paid at the rate of his basic salary of £1,222.50 per month.

11. His claim for unlawful deduction of wages before the Employment Tribunal related to holiday leave he took on 19-30 December 2011 and statutory holidays on 26-27 December 2011 and 2 January 2012.

12. Mr Lock was entitled to the benefit of a commission scheme which was designed to "provide an incentive to encourage and reward individual performance" if, and only if, sales which he had negotiated had "gone live", that is that the customer had begun to take gas from British Gas.

13. There were three methods of achieving a sale. First, there was "cold calling". Secondly, there were "hot leads", where a potential customer has already been contacted by British Gas. The conversion rate for that was much higher. Thirdly, there were "upgrades", which involve existing customers who are not under contract but are persuaded to enter into a contract. The conversion rate for upgrades was higher still.

14. The amount of commission earned by Mr Lock was greatly in excess of his basic salary. The commission element of Mr Lock's income was based purely on success, that is a sale which he had negotiated resulting in the customer beginning to take energy products from British Gas. Further, the amount of work done by him in normal working hours did not vary in

the sense that payment was not based on the amount of work done. Rather, payment of commission was based on the outcome of that work, whether or not it was due to good performance. The amount of the commission was not based on the amount of work he carried out during any particular period. It was simply dependent on the outcome of the work: that is the number and type of new contracts which customers entered into.

15. During the period covered by annual leave Mr Lock's pay included his basic pay and any commission which he had earned in previous weeks but which happened to be paid during that time. However, as he was on leave, he was not able to generate any new commission during that holiday period.

Material legislation

16. The **Directive** was enacted on 4 November 2003 by the European Parliament and the Council of the EU. Article 28 provided that it should enter into force on 2 August 2004.

17. Article 7, which is headed Annual Leave, provides:

> **"1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.**
>
> **2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."**

18. As I have already mentioned, there was a previous **Directive** dating from 1993. The **Directive** was given effect in domestic law by the **Working Time Regulations 1998 (SI 1998/1833)**. Those Regulations have been amended and the current version, which was in force from 1 October 2013, contains the following relevant provisions.

19. Regulation 13(1) provides that, subject to paragraph (5), a worker is entitled to 4 weeks' annual leave in each leave year.

20. Regulation 16 provides:

> **"(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 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this Regulation, subject to the modifications set out in paragraph (3).**
>
> **(3) The provisions referred in paragraph (2) shall apply –**
>
> > **(a) as if references to the employee were references to the worker;**
> >
> > **(b) as if references to the employee's contract of employment were references to worker's contract;**
> >
> > **(c) as if the calculation date were the first date of the period of leave in question; and**
> >
> > **(d) as if the references to section 227 and 228 did not apply.**
>
> **(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ('contractual remuneration') (and paragraph (1) does not confer a right under that contract).**
>
> **(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this Regulation in respect of that period; and, conversely, any payment of remuneration under this Regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period."**

21. The Regulations were made under section 2(2) of the **European Communities Act 1972**.

22. The reference in the Regulations to "the 1996 Act" is a reference to the **Employment Rights Act 1996**, which contains the following relevant provisions.

23. Section 221 provides:

> **"(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.**
>
> **(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.**

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

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

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

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

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

24. Section 222 provides:

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

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

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

(a) the average number of weekly hours is calculated by dividing by 12 the total number of the employee's normal working hours during the relevant period of 12 weeks, and

(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of 12 weeks.

(4) For the purposes of subsection (3) 'the relevant period of 12 weeks' means the period of 12 weeks ending –

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

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

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

25. The expression "normal working hours" requires consideration of section 234 of the **Employment Rights Act 1996**, which provides:

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

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

(3) Where in such a case –

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

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

The earlier reference to the CJEU

26. After the case had been referred by the Employment Tribunal, and after the hearing in Luxembourg, Advocate General Bot delivered an Opinion on 5 December 2013. The CJEU gave its judgment on 22 May 2014: [2014] ICR 813.

27. At paragraph 14 of its judgment the CJEU said that, according to the Court's settled case law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of EU social law from which there can be no derogation and whose implementation by the competent national authorities must be confined within the limits expressly laid down by **Directive 93/104** itself, a Directive now codified by **Directive 2003/88**. The CJEU also noted that that right is expressly guaranteed by Article 31(2) of the **Charter of Fundamental Rights of the EU**, which Article 6(1) of the **Treaty on the Functioning of the European Union** recognises as having the same legal value as the treaties.

28. At paragraph 15 the CJEU said that, in that context, Article 7 of **Directive 2003/88** must be interpreted in the light of its wording and of the objective pursued by it.

29. At paragraph 16 the CJEU said that, although the wording of Article 7 does not give any express indication as regards the remuneration to which a worker is entitled during a period of annual leave, the Court has already stated that the term "paid annual leave" in Article 7(1) means that, for the duration of such leave, remuneration must be maintained and that workers must receive their normal remuneration for that period of rest.

30. At paragraph 17 the CJEU said:

> **"Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of providing payment for that leave is to put the worker, during such leave, in a position which is, as regards his salary comparable to periods of work…"**

31. At paragraph 32 the CJEU said that, as the Advocate General had observed at paragraphs 31-33 of his Opinion, the commission received by Mr Lock was directly linked to his work within the company. Consequently, there was an intrinsic link between the commission received each month by Mr Lock and the performance of the tasks he was required to carry out under his contract of employment.

32. In its conclusion the Court (First Chamber) answered the relevant questions from the Employment Tribunal as follows:

> **"Article 7(1) of Parliament and Council Directive 2003/88 … concerning certain aspects of the organisation of working time 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 paid annual leave, to remuneration composed exclusively of his basic salary."**

33. As I have mentioned, that decision of the CJEU is binding on the United Kingdom. It sets out the authoritative interpretation of the **Directive**. As is common ground before me, what it does not do is settle the question of whether domestic legislation can be interpreted in a way which conforms to the requirements of the **Directive**, as authoritatively interpreted by the CJEU. That is the question which arises in the present case.

The decision of the Employment Tribunal

34. At paragraph 102 of its judgment the Employment Tribunal summarised its conclusions in the following way:

(1) To the extent that the EAT's decision in **Bear Scotland** is not binding on the Employment Tribunal, the answers to the objections against a conforming interpretation of the **Regulations** are broadly the same. For the same reasons as set out in **Bear Scotland** those objections were rejected by the Employment Tribunal and the Employment Judge adopted the reasoning of Langstaff J.

(2) There is no difference in principle between payment for non-guaranteed overtime and payment in respect of commission so far as annual leave pay is concerned.

(3) It is permissible and indeed necessary to imply words into the **Regulations** to comply with EU law.

(4) The intention of Parliament when enacting the **Regulations** was to comply with the **Directive**, the central feature of which is that holidays should be paid.

(5) The arguments against a conforming interpretation were not a barrier to adopting a conforming interpretation in relation to non-guaranteed overtime and the Employment Tribunal could see no reason why they should be so for the purposes of commission.

(6) To apply a conforming interpretation would be in line with the guidance of the CJEU and the principles established in domestic case law.

(7) The Employment Tribunal was not bound by the decision of the Court of Appeal in **Evans**[1], having regard to the interpretation given to Article 7 of the **Directive** by the CJEU.

(8) It is possible to read words into the **Regulations** in order to overcome the incompatibility between domestic law and EU law.

[1] **Evans v The Malley Organisation Ltd** [2003] ICR 432.

35. The Employment Tribunal then considered three possible suggestions as to the drafting of any words to be read into the **Regulations**. In the result the Employment Tribunal adopted the following wording and read that into Regulation 16(3)(e):

> **"As if, in the case of the entitlement under Regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration which varies with the amount of work done for the purpose of section 221."**

The parties' submissions in outline

36. On behalf of British Gas it is submitted by John Cavanagh QC that the Employment Tribunal was wrong in law to conclude that it is possible to interpret the **Regulations** in a way which is in conformity with the **Directive**.

37. On behalf of the Claimant, Mr Lock, it is submitted by Simon Cheetham and Victoria Webb that the Employment Tribunal arrived at the correct conclusion in law.

38. On behalf of the Secretary of State for Business, Innovation and Skills it is submitted by Adam Tolley QC that the decision of the Employment Tribunal should be upheld. It has been emphasised by him that this Appeal Tribunal, while not bound by its previous decisions, should follow its own recent decision in **Bear Scotland**.

39. Before I address the submissions in this case in more detail, I will set out some of the background case law, since the interpretation of the relevant domestic legislation has been considered previously, both before and after the reference to the CJEU.

Evans v The Malley Organisation Ltd

40. **Evans** concerned the same underlying issue as the present case, since it too was about the impact of the relevant domestic legislation on an employee who earned part of his income by

way of results-based commission. The Court of Appeal held that the situation was governed by subsection (2) of section 221 of the **1996 Act** and not subsection (3). This is because the Court was of the view that the employee's remuneration in such a case does not vary with the amount of work done in the normal working hours but varies with the result of that work (whether a contract from a customer is obtained).

41. As Pill LJ put it at paragraph 23:

> **" ... The distinction between subsection (2) and subsection (3) of section 221 turns on whether or not the employee's remuneration does or does not vary with the amount of work done in the normal working hours. I am unable to conclude that it does. Work is done and the amount of work does not depend on the number of contracts obtained. Time spent attempting unsuccessfully to persuade a client to sign a contract is as much work as a successful encounter with the client. I am not able to read the expression 'amount of work done' as meaning that amount of work and that part of the work which achieves a contract. The amount of work resulting in a contract may vary, but the result achieved by the work is a different concept from the act of working."**

42. Judge LJ agreed with the judgment of Pill LJ: see paragraph 34. At paragraph 35 he continued:

> **"… taken on their own, admirable though they are, hard work and skill which produced no contracts entitled him to no more than his basic salary."**

43. At paragraph 36 he said:

> **"For the purposes of section 221 of the Employment Rights Act 1996 Mr Evans' remuneration did not vary with the amount of work he did during his working week. Any commission due to him was payable by virtue of earlier success, usually many months previously. It was unconnected with the amount of work he did during the 12-week period before his employment came to an end, which forms the basis of any calculation made under section 221(3) …"**

44. At paragraph 40 Hale LJ agreed with the other members of the Court. At paragraph 43 she said:

> **"…**
>
> **(i) … 'work done' would ordinarily mean tasks undertaken … it would not mean 'success achieved'. …**
>
> **(ii) The ordinary meaning of the 'amount' of work done would refer to its quantity and not to its quality or its results. …"**

45. It is common ground before me that the decision in **Evans** is not binding in favour of British Gas because the Court of Appeal gave an interpretation to the domestic legislation which did not consider, and was not therefore influenced by, the requirements of the **Directive**.

Bamsey v Albon Engineering and Manufacturing plc

46. **Bamsey v Albon Engineering and Manufacturing plc** [2004] ICR 1083 concerned the impact of the relevant legislation on the situation where an employee has a contractual obligation to work not only the standard hours of work in a week but also overtime if so required. In **Bamsey** the Court of Appeal held that section 234 of the **1996 Act** applies for the purpose of determining the amount of a week's pay under regulation 16 of the **1998 Regulations**. Unlike in **Evans**, the issue of the compatibility of domestic legislation with the **Directive** was considered by the Court of Appeal in **Bamsey**. At that time the relevant Directive was the **Working Time Directive 93/104/EC**.

47. From paragraph 31 onwards, Auld LJ considered the interpretation of the domestic legislation and said:

> **"*Whether regulation 16 incorporates section 234***
>
> **31. The next and central issue is whether regulation 16 in its incorporation of sections 221 to 224 for the purpose of determining 'a week's pay' for its purposes, also incorporates the definition in section 234 governing those sections for the purposes of the Act.**
>
> **32. As I have already noted, neither regulation 2, which makes comprehensive provision for interpretation of the Regulations, nor regulation 16, which creates the entitlement to payment for annual leave 'at the rate of a week's pay' for each week of leave, defines either a 'week' or 'a week's pay' by reference to 'normal working hours' or otherwise. As I have also noted, those are surprising omissions unless the draftsman considered that both definitions were incorporated by the express reference in regulation 16(2) to sections 221 to 224 of the Act. In my view, regulation 16 clearly incorporates, for the purpose of determining a week's pay, not only sections 221 to 224, as it expressly provides, but also the interpretation of 'normal working hours' in respectively sections 234 and 235, which sections 220 to 224, by necessary implication and, in the case of section 234, by express reference in section 223(3), incorporate for the purpose. The critical connector in the Act is section 220, which provides that the amount of 'a week's pay' is to be calculated 'for the purposes of this Act in accordance with this Chapter'. This clearly subjects sections 221 to 224 and other provisions in other chapters of the Act, in so far as they require calculation of a week's pay, to the all-Act-purpose interpretation in section 234 of 'normal working hours', if and to the extent that the work in question includes overtime.**
>
> **33. There is nothing in regulation 16 to the contrary. For example, although the draftsman, in paragraph (3) of the regulation, expressly modified sections 221 to 224 for its purposes,**

including references in them to other provisions of Chapter II, he did not expressly exclude the application of section 234, or modify the provision in section 223(3)(b) making express reference to it."

48. Auld LJ then considered the interpretation of the domestic legislation in the light of the **Directive** as follows:

> ***"Construction of regulation 16 in the light of the Working Time Directive***
>
> **34. In my view, there is nothing in the Directive to suggest that construction of the term 'a week's pay' in the 1998 Regulations so as to give it the same meaning for their purposes, where overtime is involved, as that in sections 221 to 224 of the 1996 Act would offend its main or any of its purposes so as to require, as Mr Hendy suggested, a purposive construction to the contrary.**
>
> **35. The clear purpose of the Directive, as I have said more than once, is to encourage a climate of protection for the working environment and health of workers. So much is clear from its recitals, some of which I have mentioned. And article 7, in its provision for member states to ensure that workers are entitled to at least four weeks' annual leave, clearly has their health in mind. But I do not see upon what basis it can be said that it requires member states, in its implementation, to ensure that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn, and did earn, while at work.**
>
> **36. First, article 7 expressly qualifies its declaration of workers' entitlement to at least four weeks' paid annual leave to the qualification that such paid leave is to be 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'. Such conditions necessarily include definition of the basis upon which payment is calculated for such period of leave.**
>
> **37. Second, and consistently with that qualification, article 7 is silent as to the level of payment for annual leave to which a worker is entitled. It does not, for example, provide that payment during such leave should equate with a normal week's pay when the worker was at work, or that it should be calculated by reference to 'working time' as defined in article 2(1). Thus, the European Union has laid down the principle of an entitlement of four weeks' paid annual leave, but has left the conditions of entitlement for implementation by member states. In leaving member states that margin of appreciation, it is not for domestic courts to venture a means of calculation that would be contrary to the clear terms of such implementation effected within the margin of discretion allowed by the Directive."**

49. On behalf of British Gas Mr Cavanagh places particular reliance on paragraph 40 of the judgment of Auld LJ:

> **"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 draftsman clearly 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. As I have mentioned, section 223 is capable of producing in individual cases a 'week's pay' that may be more or less than an employee actually earned over the 12 week period." (Emphasis added)**

50. It is clear from the above passages that the reason why the Court of Appeal considered that the **Marleasing** obligation of interpretation could not "bite" was that, in its view, the **Directive** did not require a different result from the one which the Court would give the domestic legislation. Subsequent decisions of the CJEU (including its decision in **Lock** itself) have taken a different view as to what the **Directive** requires. It was against the background of those legal developments that Langstaff J had to consider the case of **Bear Scotland**, to which I now turn in detail.

Bear Scotland

51. **Bear Scotland** also concerned the impact of the relevant legislation on the situation of non-guaranteed overtime. As I have mentioned, in **Bamsey** the Court of Appeal held that section 234 of the **1996 Act** applies for the purpose of determining the amount of a week's pay under regulation 16 of the **1998 Regulations**. At paragraph 11 of his judgment Langstaff J said:

> **"… if this is so, then any attempt to interpret the Regulations so as to conform with such an interpretation of Article 7 of the Directive as adopted in *Williams*[2] 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 Article 7 would require."**

52. At paragraph 12 Langstaff J noted that the appeal before him raised five central issues. The first issue was to determine what Article 7 requires 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?"**

53. The second issue before Langstaff J was:

> **"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 of Article 7. If so, then how should those provisions be interpreted?"**

[2] Case C-155/10 **British Airways plc v Williams** [2012] ICR 847 (CJEU) and [2012] ICR 1375 (SC).

It will be noted that the second issue in **Bear Scotland** is similar to the issue before me in the present case.

54. Langstaff J addressed the second issue before him at paragraphs 46-69 of his judgment. Having set out at some length the arguments which were advanced on behalf of the employers in that case at paragraphs 46-61, Langstaff J set out his conclusions on the second issue at paragraphs 62-69.

55. He rejected the submissions made on behalf of the employers. First he rejected the "bold submission that the interpretative obligation under section 3 of the **Human Rights Act 1998** is wider than that required by **Pfeiffer** [2005] ICR 1307." At paragraph 64 he next rejected the submission that the interpretation contended for "goes against the grain of the legislation". First, he said, the **Working Time 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."

56. Langstaff J recognised in this context that this produces a result contrary to that which the Court of Appeal decided in **Bamsey**. However, he went on to observe that the principles in that case were expressed in a case which had been argued in November 2003 and in which judgment was delivered in March 2004. This was before any of the relevant decisions of the CJEU and before the decision of the Supreme Court in **Williams**. He continued:

> **"The foundations for the view expressed by Auld LJ, para 40 of *Bamsey* (that there was nothing in Regulation 16 of the 1998 Regulations on which the *Marleasing* principle could bite) were that Directive 93/104/EC 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.'"

57. Langstaff J was of the view that:

"Neither foundation remains a solid support for the conclusion drawn."

Having discussed both foundations, he continued:

"Although *Bamsey* demonstrates what the interpretation of the 1998 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 the other view that it could not be adopted."

58. At paragraph 68 Langstaff J accepted that there are practical consequences which would flow from the interpretation that he would give the **Regulations**. He continued:

"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."

59. Finally, at paragraph 69 of his judgment, Langstaff J said:

"Neither legal certainty nor its alter ego, the principle of non-restrospectivity, assists to determine the construction to be adopted."

The submissions for British Gas in more detail

60. In the present appeal Mr Cavanagh submits, first, that the decision in **Bear Scotland** is distinguishable, because it concerned non-guaranteed overtime, which is the subject of specific legislative provision in the **1996 Act**.

61. If he is wrong about that, he submits, secondly, that **Bear Scotland** was wrongly decided because this Appeal Tribunal is bound by the decision of the Court of Appeal in **Bamsey** and that Langstaff J was wrong not to apply that decision.

62. Thirdly, he submits that, in any event, the decision in **Bear Scotland** is not binding on this Appeal Tribunal and should not be followed. This requires in turn some consideration of the grounds on which this Appeal Tribunal will decline to follow one of its own decisions, to which I will return later.

Is *Bear Scotland* distinguishable?

63. Mr Cavanagh submits that the decision in **Bear Scotland** is distinguishable from the present case because it concerned non-guaranteed overtime, about which there is express statutory provision, in section 234 of the **1996 Act**. Since there is no similar statutory provision which applies to results-based commission cases, such as the present, he submits that I should reach a different conclusion from the one reached by Langstaff J in **Bear Scotland**.

64. I do not consider that it is possible to distinguish **Bear Scotland** as suggested. What section 234 does is to define the term "normal working hours" to include the situation where an employee is entitled to overtime pay when employed for more than a fixed number of hours: see subsection (1). Subsections (2) and (3) then go on to define what those normal working hours are taken to be. However, what section 234 does not do is state what the legal significance of the concept of "normal working hours" is. To know what its significance is, one needs to go back to sections 221-223: see section 221(1), which provides that sections 221-223 apply where there are normal working hours for an employee. Furthermore, regulation 16 of the **Working Time Regulations** in turn refers to sections 221-224: see paragraph (2) of that regulation. Those provisions are as relevant in the present case as they were in **Bear Scotland**.

65. It is significant that in **Bear Scotland** Langstaff J noted at paragraph 11 that, in **Bamsey**, the Court of Appeal determined that section 234 applied for the purpose of determining the amount of a week's pay under regulation 16.

66. It is also notable that in **Bear Scotland** Langstaff J clearly considered that the decision of the CJEU in **Williams** was of a piece with its decision in **Lock**: see, for example, paragraphs 12, 24-29 and 60 of his judgment. Of course the decision in **Lock** is of direct relevance in the present case. Nor is there anything in that part of Langstaff J's judgment in which he addressed the second issue before him (whether a conforming interpretation of the domestic legislation was possible) which turned on the express statutory language of section 234 or in any way which distinguishes a case concerning non-guaranteed overtime from a case concerning results-based commission: see paragraphs 46-69 of his judgment.

67. In my judgment there is no basis in the terms of the relevant legislation which means that **Bear Scotland** is distinguishable from the present case. When pressed during the hearing before me, as I understood his submissions, Mr Cavanagh was unable to proffer any basis in the statutory language that would lead to different results in the two contexts.

Is *Bamsey* still binding on this Appeal Tribunal?

68. The submission made by Mr Cavanagh is based on the decision of the Court of Appeal in **Bamsey**. He submits that that decision is binding on this Appeal Tribunal and that it was wrongly held by Langstaff J in **Bear Scotland** that it was not.

69. As I have already mentioned, in **Bear Scotland** Langstaff J had submissions based upon **Bamsey** made to him: see paragraphs 55-57 and 60, where paragraph 40 of the judgment of

Auld LJ was quoted. Langstaff J held that the decision of the Court of Appeal in **Bamsey** was no longer binding because it was based on a premise that had since been proved to be incorrect in the light of decisions of the CJEU and the Supreme Court of the United Kingdom: that premise was that there was nothing in the **Directive** on which the **Marleasing** principle could bite.

70. Mr Cavanagh submits that Langstaff J was wrong in the view that he took of **Bamsey**. It is important to note that Mr Cavanagh's submission is not that the decision in **Bear Scotland** was reached *per incuriam*, in other words that a relevant and binding decision of a higher court was not considered by this Appeal Tribunal. Rather what he submits is that, although it was considered at length by Langstaff J, he reached the wrong conclusion as to whether **Bamsey** is still binding on this Appeal Tribunal in the light of subsequent developments in the law.

71. It seems to me that this is all part and parcel of the fundamental attack on the correctness of **Bear Scotland** which lies at the heart of Mr Cavanagh's submissions before me. It is therefore necessary for me to turn to Mr Cavanagh's third main submission. Before I do so I must consider the circumstances in which this Appeal Tribunal will, and when it will not, follow its own earlier decisions.

The relevance of previous decisions of this Appeal Tribunal

72. In **Secretary of State for Trade and Industry v Cook** [1997] ICR 288 this Appeal Tribunal said at p. 292:

> **"The appeal tribunal is not bound by its previous decisions, although they will only be departed from in exceptional circumstances, or where there are previous inconsistent decisions."**

73. It seems to me that one logical extension of that last situation is where there are conflicting decisions, not of this Appeal Tribunal itself, but of this Appeal Tribunal and other courts or tribunals. This can readily be seen to be analogous to the situation where there are inconsistent decisions of this Appeal Tribunal itself, at least where there is said to be an inconsistent decision of a court of co-ordinate jurisdiction to this Appeal Tribunal. That seems to me to have been the position in **Timothy James Consulting Ltd v Wilton** [2015] ICR 764, which was a decision of mine: see paragraphs 61-90, which concerned the issue of whether an award of compensation for injury to feelings in a discrimination case is liable to income tax. I held that it was not. I preferred the reasoning of this Appeal Tribunal in **Orthet Ltd v Vince-Cain** [2005] ICR 374 to that in the decision of the First-tier Tribunal (Tax Chamber) in **Moorthy v Revenue and Customs Commissioners** [2014] UKFTT 834 (TC). It was argued before me that the decision of this Appeal Tribunal in **Orthet** was wrong and should not be followed because it was inconsistent with an earlier decision of the High Court in **Horner v Hasted** [1995] STC 766, which had not been cited in **Orthet**. I note in passing that, since the hearing in the present appeal took place before me, the decision of the First-tier Tribunal in **Moorthy** has been upheld by the Upper Tribunal (Tax and Chancery Chamber), which came to the conclusion that **Horner v Hasted** should be preferred to the decisions of this Appeal Tribunal in **Orthet** and **Timothy James**, which should not be followed: [2016] UKUT 13 (TCC). Be that as it may, that does not affect the underlying principles which are material for present purposes.

74. Further guidance is to be found in **Commissioners of Inland Revenue v Ainsworth and Others** (unreported, UKEAT/0650/03/TM, 4 February 2004), a decision of Burton J (President), sitting with lay members. At paragraph 9 of his judgment Burton J observed that counsel for the Revenue did not put forward any case that the earlier decision in **Kigass** [2002]

ICR 697 was either "manifestly wrong" or *per incuriam*. Rather counsel simply (i) invited this Appeal Tribunal to reconsider the same scenario and come to a different conclusion; and (ii) submitted that he had different arguments, not apparently run in **Kigass**, which might persuade this Tribunal where different or similar arguments failed to persuade a differently constituted Tribunal two years earlier. As Burton J made clear at paragraphs 15-16 of his judgment, he was not prepared to accede to that invitation. Rather he said at paragraph 16:

> **"It appears to us quite plain that it would be quite inappropriate for there to be … further consideration by an Employment Appeal Tribunal of this case at this level. Even if we might be persuaded that there are arguments, and we plainly are persuaded, on both sides, this would be a re-argument, contrary to our practice, of a persuasive recent decision of the Employment Appeal Tribunal, and possibly of three such recent decisions. If *Kigass* is to be changed, it must, in our judgment, be done by the Court of Appeal …"**

75. In the light of the authorities to which I have referred it may be helpful if I summarise the applicable principles when this Appeal Tribunal is invited to depart from an earlier decision of its own. Although this Appeal Tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:

(1) where the earlier decision was *per incuriam*, in other words where a relevant legislative provision or binding decision of the courts was not considered;

(2) where there are two or more inconsistent decisions of this Appeal Tribunal;

(3) where there are inconsistent decisions of this Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;

(4) where the earlier decision is manifestly wrong;

(5) where there are other exceptional circumstances.

76. In the present case it seems to me that none of the first three categories is relevant. Therefore the question is whether the decision in **Bear Scotland** is "manifestly wrong" or there are "exceptional circumstances" such as to justify departure from it.

77. I would not wish to add any further gloss to the concept of "manifestly wrong": it means a decision which can be seen to be obviously wrong ("manifest"). If the error in the decision is manifest it should not be necessary for there to be extensive or complicated argument about the point.

78. As for the concept of "exceptional circumstances" it is inherently one that it is flexible and dependent on the circumstances. It is deliberately not defined by reference to an exhaustive list or in some other way because one cannot predict what circumstances will arise in the future and which may justify departure from an earlier decision. In this way courts and tribunals retain the flexibility required to do justice in the case before them. On the other hand it is also important to recall that certainty in the law is also a fundamental value: indeed it lies at the root of the concept of legal certainty which is well-established in EU law and on which reliance has been placed by Mr Cavanagh in the course of his submissions albeit in a different context.

Should this Appeal Tribunal follow or depart from the decision in *Bear Scotland*?

79. Mr Cavanagh submits that the decision in **Bear Scotland** was either manifestly wrong or that there are exceptional circumstances which justify my refusing to follow it.

80. I say at once that I reject the submission that the decision in that case was manifestly wrong. The suggested errors in that judgment are not manifest at all.

81. A number of cases were cited to me in which this Appeal Tribunal has departed from an earlier decision of its own, in order to persuade me to take a similar approach in the present context. Particular emphasis was placed by Mr Cavanagh on the decision in **Ministry of Defence v Hunt** [1996] ICR 554 (Maurice Kay J, sitting with lay members). In that case this Appeal Tribunal departed from its earlier decision in **Ministry of Defence v Bristow** [1996] ICR 544 (Tucker J, sitting with lay members). At pp. 566-567 Maurice Kay J said:

> **"Although we are not bound by previous decisions of this appeal tribunal, we would not depart from one except after the most careful consideration. With due respect to the constitution of this tribunal in *Bristow,* we are satisfied that we have received far fuller submissions on this matter than our colleagues did in that case. We do not share the equanimity of the Ministry of Defence to which we have just referred. In our judgment, its approach to the issue is potentially productive of injustice."**

82. Pausing there, Mr Cavanagh submits that, in the present case too, the reasoning of Langstaff J in **Bear Scotland** is "potentially productive of injustice". However, it seems to me that, when Maurice Kay J used that phrase in **Hunt**, he was not intending to lay down some general principle: he was simply observing that that was the assessment of this Appeal Tribunal in the circumstances of that case and that was a factor to be taken into account in deciding whether there existed the exceptional circumstances which justify a departure from an earlier decision.

83. Furthermore, it does not seem to me that Mr Cavanagh can realistically submit that this is a case in which I have received "far fuller submissions" than Langstaff J did in **Bear Scotland**. On my reading of that judgment and the summary of the arguments made by the parties, there was very full argument about the very issue which I have to decide in this appeal: namely whether the domestic legislation can be interpreted in a way which conforms to EU law. Mr Cavanagh emphasised before me that the focus of counsel's submissions in **Bear Scotland** was on a different point: namely whether the interpretative obligation in section 3 of the **Human Rights Act** is stronger than the obligation in EU law. However, in my judgment, it is clear that

very similar arguments were also made in **Bear Scotland** as have been made before me as to the question of substance: namely whether it is possible to give a conforming interpretation to the domestic legislation. I do not accept Mr Cavanagh's submission that I have received far fuller submissions on this substantive issue than Langstaff J did.

84. It is also telling in my view that there was another aspect to this Appeal Tribunal's reasoning in **Hunt**, to which I now return. Following the passage quoted earlier, Maurice Kay J said that:

> **"We are also mindful of the fact that in *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No. 2)* (Case C-271/91) [1993] ICR 893, 932, para. 26, the European Court of Justice specifically stated of compensation for a discriminatory dismissal:**
>
> **'it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full accordance with applicable national rules.'**
>
> **It seems to us that if the law were as submitted on behalf of the Ministry of Defence on this issue it would fall short of providing 'full' compensation. Accordingly, in our judgment the percentage should be applied after and not before the subtraction of the mitigation earnings."**

85. In other words what was clearly an important part of this Appeal Tribunal's reasoning in **Hunt** was the consideration that the decision in **Bristow** would lead to a result which was inconsistent with a requirement of EU law. That was another reason why there were the "exceptional circumstances" which warranted a departure from a previous decision of this Appeal Tribunal.

86. A similar concern, to avoid a result that would be contrary to the UK's obligations in EU law, lay behind the decision of this Appeal Tribunal in **Cook** itself. In that case this Appeal Tribunal took the view that, if it were to follow its earlier decision in **Photostatic Copiers (Southern) Ltd v Okuda** [1995] IRLR 11, there would be a breach of EU law: see the judgment of Morison J at pp.294 and 295-296.

87. There is no such concern which could arise in the present case. On the contrary, if the submissions of Mr Cavanagh are accepted, there will be a resulting incompatibility between the domestic legislation and the requirements of EU law. If that is the correct analysis, then of course it must be adopted. However, Langstaff J did not think that it was the correct analysis in **Bear Scotland**.

88. As I have said, it is clear from the judgment of Langstaff J in **Bear Scotland** that a large number of authorities were cited to him and considered by him. They are very largely the same authorities as have been cited before me, although inevitably there have been some more recent ones that were not available at that time. However, in my judgment, they do not add anything to the relevant fundamental principles, which were well known to Langstaff J. Many of the cases simply provide illustrations of the fundamental principles at work in specific contexts.

89. Furthermore it is of some significance that Langstaff J was also the judge sitting in this Appeal Tribunal in the case of **Innospec Ltd v Walker** [2014] ICR 645. That case has since been decided by the Court of Appeal: see [2016] ICR 182, where it is reported alongside and under the name of **O'Brien v Ministry of Justice**, with which it was heard. The Court of Appeal dismissed the appeal from the decision of Langstaff J. Before me it was submitted by Mr Cavanagh that, whereas Langstaff J correctly understood and applied the relevant principles relating to the interpretation of domestic legislation so as to make it conform, so far as possible, with EU law in **Innospec** (see in particular paras. 50-57 and 60 of his judgment in that case), he did not do so in **Bear Scotland**. Although one always has to bear in mind that even Homer nodded on occasion, it seems to me that it is unlikely that Langstaff J would have fallen into error as submitted by Mr Cavanagh. To the contrary, it seems to me that he well understood the relevant principles as to a conforming interpretation in both cases and then proceeded to apply

them to the specific contexts of each case. The fact that he reached different conclusions in the two cases means only that the application of the relevant principles led to a different outcome in each case, not that he misunderstood those principles in **Bear Scotland**.

90. The relevant principles were conveniently and authoritatively set out by the Court of Appeal in **Vodafone 2 v Revenue and Customs Commissioners** [2010] Ch 77, at paras. 37-38 (Sir Andrew Morritt C):

> **"37. We were referred in the parties' respective written arguments and orally to a number of reported cases on the principles to be observed in looking for a conforming interpretation in either the European Community or Human Rights contexts. In chronological order they are *Pickstone v Freemans plc* [1989] AC 66; *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR 1-4135; *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546; *Imperial Chemical Industries plc v Colmer* (No 2) [1999] 1 WLR 2035; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252; *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209 and the *Fleming/Condé Nast* cases [2008] 1 WLR 195. The principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:**
>
> > **'In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p 126B and per Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32): (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48-49; per Lord Rodger of Earlsferry, at paras 110-115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's* case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H-121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone case*, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114).'**
>
> **38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:**
>
> > **'The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at para 110-113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.'"**

91. That case was cited to Langstaff J in **Bear Scotland** and, in my judgment, he correctly understood and set out the relevant principles.

92. A large part of Mr Cavanagh's submissions before me was based on the decision of the House of Lords in **Duke v GEC Reliance Ltd** [1988] ICR 339. That case arose under the **Sex Discrimination Act 1975**. As was common at that time, the employers had a policy whereby the normal retirement age was different for men and women: for men it was 65 and for women it was 60. The complainant was a female clerk who was dismissed shortly after she attained the age of 60. She complained that this was unlawful sex discrimination, contrary to section 6(2)(b) of the **1975 Act**. The Act at that time also contained the following provision in section 6(4):

> **"Subsections (1)(b) and (2) do not apply to provision in relation to death or retirement."**

93. On the face of it that provision would have been the end of the matter, certainly as a matter of domestic law. However, that was not the end of the matter because of the impact of European Union (at that time European Community) law. **Council Directive 76/207/EEC** (the **Equal Treatment Directive**) was adopted on 9 February 1976 and had to be complied with by Member States by 12 August 1978. As Lord Templeman explained in **Duke** at pp. 344-346, the Government and Parliament of the United Kingdom must have considered that the **Equal Pay Act 1970** and the **Sex Discrimination Act 1975** complied with the obligation of the United Kingdom to observe Community law. Although the **Equal Treatment Directive** was adopted after the **Sex Discrimination Act 1975** had been enacted by Parliament, it is not uncommon for Member States to have legislation in place already which they consider complies with a later **Directive** and so, at least in their opinion, no change in domestic law is required. However, as is well known, what subsequently happened was that the European Court of Justice decided to the contrary in **Marshall v Southampton & South West Hampshire Area Health Authority**

(Teaching) [1986] ICR 335. The Court of Justice interpreted the **Equal Treatment Directive** to prohibit discriminatory ages of retirement on grounds of sex.

94. The United Kingdom then gave effect to the **Directive** as it had been interpreted by the Court of Justice by enacting the **Sex Discrimination Act 1986**. However that Act was not retrospective and therefore did not avail the Appellant in **Duke**.

95. In her appeal to the House of Lords the Appellant submitted that the **Sex Discrimination Act 1975** had to be interpreted in a manner which was compatible with the **Equal Treatment Directive** as construed by the Court of Justice in **Marshall**. That submission was based on the decision of the Court of Justice in Case 14/83 **von Colson & Kamann v Land Nordrhein-Westfalen** [1984] ECR 1891. In that case the Court of Justice held that the provisions of the **Equal Treatment Directive** do not require a Member State to legislate so as to compel an employer to conclude a contract of employment with a woman who has been refused employment on the grounds of sex. But the Court also said, at p. 1910:

> **"… It is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."**

The ruling of the Court of Justice did not constrain the national court to construe German law in accordance with Community law but held that, if under German law the German court possessed the power to award damages which were adequate and which fulfilled the objective of the **Equal Treatment Directive**, then it was the duty of the German court to act accordingly: see **Duke** at p. 353.

96. The House of Lords was not prepared to accept the Appellant's submission in **Duke**. At p. 352 Lord Templeman said:

> **"… The words of section 6(4) are not reasonably capable of being limited to the meaning ascribed to them by the Appellant. Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British court to distort a meaning of a British statute in order to enforce against an individual a Community Directive which has no direct effect between individuals."**

97. It will be observed that, as is common ground between the parties in the present case, and as is well established, a **Directive** such as that in issue here does not have "horizontal" direct effect, in other words direct effect between individuals as distinct from "vertical" direct effect, that is effect against the State.

98. At p. 54 Lord Templeman also said:

> **"The *von Colson* case is no authority for the proposition that the German court was bound to invent a German law of adequate compensation if no such law existed and no authority for the proposition that a court of a Member State must distort the meaning of a domestic statute so as to conform with Community law which is not directly applicable."**

99. On the same page Lord Templeman said:

> **"It would be most unfair to the respondent to distort the construction of the 1975 Sex Discrimination Act in order to accommodate the 1976 Equal Treatment Directive as construed by the European Court of Justice in the 1986 *Marshall* case. As between the appellant and the respondent the Equal Treatment Directive did not have direct effect and the respondent could not reasonably be expected to reduce to precision the opaque language which constitutes both the strength and the difficulty of some Community legislation. The respondent could not reasonably be expected to appreciate the logic of Community legislators in permitting differential retirement pension ages but prohibiting differential retirement ages."**

That reference to differential pension ages was a reference to the provisions of **Council Directive 79/7/EEC** (the **Social Security Directive**), Article 7 of which did permit Member States to exclude from its scope the determination of pensionable age for the purposes of granting old age and retirement pensions.

100. It is to be noted that in **Bear Scotland** this Appeal Tribunal was made well aware of **Duke**: see paragraph 48 of the judgment of Langstaff J. It must be acknowledged that the submissions advanced on behalf of the employers in **Bear Scotland** were based, in part, on the

"bold submission" that the interpretative obligation imposed by section 3 of the **Human Rights Act 1998** is wider than that required by EU law: see paragraph 48, where the submission was made, and paragraph 62, where it was rejected by Langstaff J. It was in that context that reference was made to **Duke** at paragraph 48. Nevertheless, it is also plain that **Duke** was relied upon by the employers in **Bear Scotland** in the context of the argument that legal certainty would be compromised if their interpretation of domestic legislation were rejected. I note that at paragraph 59 it was specifically submitted that:

> **"The interpretation asked for would distort the scheme of the Act and fall foul of the principle expressed in *Duke* …"**

101. In my judgment, it cannot be said that Langstaff J was unaware of, or had insufficient attention drawn to, the decision of the House of Lords in **Duke**. It is a well-known decision in this field. It is no doubt correctly decided in its particular context and must be followed by lower courts and tribunals. However, in my judgment, it does not have the effect that the decision in **Bear Scotland** was wrong or that it should not be followed for this reason.

102. The main authority that was cited to me but was not cited to Langstaff J in **Bear Scotland** is the decision of the House of Lords in **Imperial Chemical Industries plc v Colmer (No. 2)** [1999] 1 WLR 2035. However, I note that that case was among those considered by the Court of Appeal in **Vodafone 2**: see para. 37. Taken by itself that case does not seem to me to add to or detract from the fundamental principles which were summarised in **Vodafone 2** and applied by Langstaff J in **Bear Scotland**.

103. After the hearing in the present appeal had been concluded, Mr Cavanagh sent through a more recent decision of the Court of Session (Inner House) in **Advocate General for Scotland v Barton** [2015] CSIH 92. It is not submitted that the decision in that case is decisive in the

present appeal. It concerned a different legislative regime, concerned with part-time workers. It is relied upon by Mr Cavanagh because it is a recent example of the application of the principle that a conforming interpretation will not be adopted if to do so would go against "the grain" of the domestic implementing legislation: see paragraphs 18-21 and 34. As I have already said, Langstaff J was well aware of the relevant principles in this field and had himself applied them to reach different outcomes in different cases but that merely illustrates the point that everything depends on the particular legislative context. The decision in **Barton** is just one more example of that and does not lead me to take a different view from the one that I would otherwise have taken in the present appeal.

104. In my judgment the present case does not fall into any of the established exceptions to the general principle that this Appeal Tribunal will normally follow one of its own earlier decisions. I have come to the conclusion that it would be inappropriate for me to reconsider the merits of the substantive argument, considered recently and at length by Langstaff J in **Bear Scotland**. If I were to accede to the invitation extended by Mr Cavanagh, however eloquently put, there would be nothing to prevent this Appeal Tribunal, if differently constituted, taking yet again a different view in a third case, perhaps in a year's time. Furthermore it would in the meantime merely create uncertainty for everyone who has to apply the relevant legislation, including the Employment Tribunal, which is bound by decisions of this Appeal Tribunal. I agree with the submission made on behalf of the Secretary of State by Mr Tolley that, if **Bear Scotland** was wrongly decided, then it must be for the Court of Appeal to say so, not for me sitting in this Appeal Tribunal.

Conclusion

105. For the reasons I have set out this appeal is dismissed.