Appeal No. UKEAT/0102/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 October 2017
Judgment handed down on 6 March 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MRS L BRAZEL — APPELLANT

THE HARPUR TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

PART TIME WORKERS

The Appellant (Claimant below) was a part-time music teacher working mostly during term-time. She had a contractual right to 5.6 weeks holiday pay, mirroring her statutory right. Rather than calculating the basis for holiday pay by the methodology set out in section 224 **Employment Rights Act 1996**, the Respondent calculated it on the basis of 12.07% of her total pay over a year.

The Employment Tribunal upheld this, holding that a principle of pro-rating should apply such and/or that the statutory scheme by which a week's pay was computed should, in the case of part-time workers who work fewer than 46.4 weeks per year, be read down such that holiday payment should be capped at 12.07% of annualised hours.

The Employment Appeal Tribunal upheld the appeal. The **Part-time Workers Regulations 2000** have as their the overriding principle the concept that part-time workers are not to be treated less favourably than full-time workers. There is no principle to the opposite effect, and thus no basis for the judicial amendment of a statutory scheme, the provisions of which are unambiguous.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal from the Decision of the Employment Tribunal ("the Tribunal") sitting at Bury St Edmunds (Employment Judge Laidler, sitting with lay members Mr G Mathias and Ms M Lee). Written Reasons, which I will refer to as "the Reasons", were sent to the parties on 13 January 2017.

2. I shall refer to the parties as they were below. The appeal is brought by the Claimant, who was and is a visiting music teacher engaged by the Respondent, which runs Bedford Girl's School ("the School") where the Claimant works. She worked on what is known as a "zero hours" contract, more precise provisions of which, so far as they are relevant to the appeal, are set out below. For obvious reasons, her work takes place mainly during school terms.

3. The case is concerned with the computation of statutory holiday pay. As will be seen, the Claimant's contract of employment provides for her to have 5.6 weeks annual leave. This is the same as her statutory entitlement, and the contractual term was, no doubt, intended to reflect that.

4. The Respondent's case, which succeeded before the Tribunal, is that the statutory entitlement to 5.6 weeks holiday pay per annum should, in the case of an employee who works during fewer weeks than a "standard" 46.4 week working year (i.e. 52 weeks less 5.6 weeks statutory leave) be pro-rated so that the entitlement to holiday pay is based on the number of weeks actually worked as a proportion of 46.4 weeks. In the present case, a school year varies and can be between 32 and 35 weeks long.

5. To do otherwise, the Respondent contends, unfairly rewards those who work fewer weeks during the year than those who work the full number of weeks.

6. The point can be illustrated by a simple example. A part-time worker works irregular hours throughout each week of the year. His or her holiday pay is calculated based on the statutory provision in section 224 of the **Employment Rights Act 1996** (set out below), namely his average earnings over a 12 week period, immediately before leave is taken. That is defined as a week's pay. Assuming that the calculation results in his having worked an average of 20 hours per week, his holiday pay will be based on his pay for those 20 hours.

7. Now take another part-time worker who works similar irregular hours but for only 32 weeks of the year. This would be typical for a term-time only employee in an educational establishment. When he or she wishes to take leave, the provisions of section 224 will result in a similar payment, even though that worker has worked for a smaller proportion of the year.

8. In practical terms, and assuming a similar working pattern throughout the year, the first employee would receive approximately 12.07% of his or her annual earnings as holiday pay, while the "term-time only" employee would receive 17.5% of annual earnings.

9. By contrast, the Claimant's case, in a nutshell, is that the existing statutory regime already has built into it a mechanism which has regard to the fact that part-time workers work fewer weeks. All relevant European and domestic legislation is aimed at ensuring that part-time workers receive "at least" as much as full-time workers, and there is no lawful basis for "writing down" clear and unambiguous provisions.

10. The Respondent's argument is based principally on recitals 2 and 5 to the **Working Time Directive** 2003/88/EC ("WTD"), and on dicta in two decisions of the CJEU, **Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol** C-468/08 [2010] IRLR 631 ("Land Tirol") and **Greenfield v The Care Bureau Ltd** C-219/14 [2016] IRLR 62 ("Greenfield").

11. I am told that, although the sums involved in this particular claim are small - something over £100 per annum - the subject matter of this appeal will potentially affect many visiting music teachers and, similarly, many schools which employ them. It is, therefore, a point of some importance.

12. This appeal is concerned with only with the Tribunal's decision in respect of the computation of holiday pay. This finding, at page 1 of the Judgment and Reasons, is that:

> **"1. There has been no unlawful deduction of wages as a result of the application of the 12.07% calculation for the purposes of the [Claimant's] paid annual leave."**

13. There is no appeal from the other findings.

14. In the course of the hearing of the appeal Mr Lachlan Wilson, for the Claimant, indicated that the appeal was not being pursued in respect of any contractual finding: this is because no additional contractual benefit would accrue to the Claimant above and beyond the application of the statutory approach which he advocates. The appeal therefore hinges solely on the proper construction of the **Working Time Regulations 1998** ("WTR") and associated provisions of the **Employment Rights Act 1996** ("ERA") and whether additional words fall to be read into regulation 16(3)(d) of the **WTR** in order to reach a conclusion consistent with the **WTD**.

The Tribunal's Relevant Findings of Fact

15. The relevant terms of the Claimant's employment were as set out paragraph 26 of the Reasons:

> **"26. The agreement between the parties seen by the Tribunal in the bundle was dated 11th April 2011. This was between the Trustees of the Bedford Charity and the Claimant and confirmed her role as a Visiting Music Teacher. She would be employed at Bedford Girl's School with effect from 1st September 2011 but it acknowledged that her continuous employment commenced with the charity on 1st September 2002. The following clauses are relevant from that agreement for the purposes of this Hearing:-**
>
> > **"11. *Duties*: Your duties include, but are not limited to, providing individual personal tuition in your subject/instrument in accordance with a timetable to be agreed with the school. In addition, you are required to carry out all duties of a visiting music teacher as reasonably directed by the Director of Music. Your duties will include but are not limited to the description at Schedule 1 entitled *Role of the Visiting Music Teacher* …**
> >
> > **17. *Working hours*: As a visiting teacher, requirements for your services will depend upon a varying level of demand for individual personal tuition in your subject/ instrument. Demand may vary from term to term. There are no minimum hours of work guaranteed to you and you have no normal hours of work.**
> >
> > **18. *Other employment*: you are entitled to accept other employment or to work on your own account when your services are not required by the Charity but you may not undertake any activities which would, in the reasonable opinion of the charity, be likely to interfere with the discharge of your duties in the School or be prejudicial to the interests of the Charity and/or the School …**
> >
> > **22. *Rate of pay*: You will be paid the current hourly rate of £28.77 per hour. The Charity has the right to alter the rate from time to time and any such [alteration] will be effective from the date notified to you.**
> >
> > **23. *Payment*: You will be paid monthly in arrears at the end of the month directly into a bank account or building society account nominated by you …**
> >
> > **Holidays**
> >
> > **27. *Entitlement*: The holiday year runs from 1 September to 31 August each year. During the holiday year you will be entitled to 5.6 weeks paid holiday. Holiday must be taken during the normal School holidays or at such other times as are convenient for the School.**
> >
> > **28. *Unused holiday*: You may not carry forward any unused holiday entitlement to a subsequent holiday year. There is no pay in lieu for unused holiday.**
> >
> > **29. *Payment on termination*: In the event that your employment terminates during the academic year you will be entitled to be paid in lieu of any accrued but untaken holiday based on your minimum holiday entitlement under the Working Time Regulations 1998 only and not on your entitlement under the clause above. For these purposes any paid holiday that you have taken will be deemed first to be statutory paid holiday. If your employment is summarily terminated by the Charity, you will not be entitled to pay in lieu of unused accrued holiday up to the date of your departure, save for your working time annual leave entitlement." "**

16. The Tribunal described the method by which payment was to be made at paragraph 28 of the Reasons:

> **"28. By letter of 17th June 2011, the Claimant was advised that there was to be a revised method of payment for Visiting Music Teachers. It was proposed that from 1st September 2011 this would be based on the number of lessons actually provided during the reporting period. They wished to move to a practice of each peripatetic teacher submitting a monthly timesheet which recorded the number of hours that had been worked each month. That would be submitted to the respective Bursar by the appropriate payroll deadline each month. It would result in a monthly payment reflecting the hours worked each month. It would not then be necessary to estimate, in advance of each term, the number of lessons to be taught nor require a reconciliation at the end of each year to ensure that the correct sums had been paid. It might result in a fluctuating monthly payment depending on a number the lessons [sic] taught in a particular month. It was recognised that January, May, August and September were likely to be lower as they are periods when fewer lessons are taught. Payments received in the other months would be correspondingly higher. As a result, it was proposed that accrued holiday payments would be made in those quieter months. What is not in dispute in these proceedings is that the Claimant was paid three times a year at the end of April, August and December."**

17. The genesis of the dispute, and the way in which the figure of 12.07% came to light is set out at paragraphs 29 to 37 of the Reasons:

> ***"Correspondence between the Incorporated Society of Musicians (ISM) and the Respondent***
>
> **29. Mr Peter Lapin, Legal Advisor of the ISM, started corresponding with the Respondent on 19th December 2013. In that letter he raised other matters with which this Tribunal is not concerned but also questioned whether the Claimant was receiving 5.6 paid holiday a year and asked for an explanation as to exactly how her holiday pay was calculated.**
>
> **30. Mr Hodgkin replied on 7th January 2014 confirming that all Visiting Music Teachers were paid statutory leave based on the number of hours worked. They paid 12.07% of the term's accrued hours at the end of each term and consequently the VMT's received their holiday pay in their March, August and December pay packets.**
>
> **31. By letter of 4th February 2014 Mr Lapin challenged this position. He accepted that the Claimant was entitled to 5.6 weeks' holiday pay per year but asserted that the school had not and did not pay holiday pay in accordance with the statutory provisions. He relied on the Working Time Regulations as stating that each week's holiday should be paid at the normal rate of pay. Where the employee's pay varied that should be an average of 12 week's payable immediately prior to the relevant holiday being taken. As the school dictated that holidays are taken outside term time holiday entitlement would be taken in three equal periods, Christmas, Easter and Summer. That equated to 1.867 weeks for each of the holiday periods and that should be paid at the average weekly pay for the previous 12 weeks of each period. That, he asserted was not the same as paying 12.07% of the amount earned during each period and that very different results were achieved by doing so. He enclosed a breakdown of the Claimant's holiday entitlement since 2011 compared with the actual holiday pay made and asserted that the Claimant had been underpaid by a total of £1,360.72. He requested the school adjust the method by which it paid the Claimant to ensure that she was paid in accordance with the Working Time Regulations and requested the school pay all outstanding holiday without delay.**
>
> **32. Mr Hodgkin replied on 5th March 2014 confirming that the holiday pay was paid at 12.07% of hours worked having followed ACAS guidance. He was confident that the Claimant had been paid the correct amount and in accordance with the Regulations and that there was, in fact, no shortfall.**
>
> **33. Mr Lapin was not satisfied with this response on behalf of the Claimant and by letter of 2nd April indicated the Claimant's desire to lodge an appeal against Mr Hodgkin's decision with regard to the payment of holiday pay. He asserted that the application of the ACAS guidance provided in the case of term time workers for "inaccurate results".**
>
> **34. Mr Hodgkin replied on 23rd April 2014 confirming that he was prepared to treat the previous correspondence as the Claimant's first stage of the grievance procedure even though a formal grievance hearing had not taken place. If Mr Lapin was content they would move**

straight to the appeal. Mr Lapin confirmed that he was content to deal with the matter on that basis and it was confirmed to him to him that David Russell, the Chief Executive of the Trust, would hear the appeal with Peter Milburn, the Finance Director. The appeal hearing was scheduled for 29th May 2014. Following that hearing a very detailed letter of 10 pages was sent to the Claimant in which Mr Russell set out in detail his reasons for not upholding the appeal. It was confirmed in that letter that Mr Lapin had provided the appeal panel with a copy of the legal opinion prepared by Mr Nigel Griffin, QC, dated 18th February 2010. That opinion has not been seen by this Tribunal. It is noted it was four years old at the date of the appeal. The appeal panel also confirmed that they had been referred to three cases being:

1. *Gibson v East Riding of Yorkshire* [2000] CA ICR 890

2. *R v Secretary of State for Trade and Industry ex parte BECTU* [2001] IRLR 559

3. *Stringer v HMRC* [2009] [ECJ] IRLR 214

35. The letter went on to set out the appeal panel's view of the legal position and also its view of the case law that had been referred to. They had taken legal advice with regard to their decision but did not waive privilege in respect of that. However, they did refer to and sent a copy of the case of *Land Tirol* which has been referred to at this Hearing. In coming to its decision not to uphold the appeal, the panel could not agree with the ISM's position on the entitlement to holiday pay. That was because the Court of Justice had explained that the law is the opposite of that which was asserted [on] behalf of the Claimant, namely that pro-rating is allowed by the Directive.

36. Mr Russell was satisfied that the practice adopted by the School was a 'practical approach to the drafting of the Regulations and in accordance with them'. It accorded with the guidance provided by ACAS and, indeed, also with the guidance published by UNISON. The school it had concluded appeared to have made a determination that working 32 weeks out of a 52-week year is a part time arrangement and so holiday pay should be pro-rated. That was a common sense approach and the alternative, with fewer working weeks to be labelled as full time, could lead to extreme cases, of say someone working only 12 weeks per year and arguing that they were entitled to a full 5.6 weeks paid annual holiday entitlement per year. That in his view could not have been intended and would be a perverse reading and interpretation of the Regulations.

37. It is to be noted that in the notes of the actual appeal hearing, when Mr Lapin stated that if someone was employed for 1 week per year and the contract stated they are entitled to 5.6 weeks that, in Mr Lapin's words, would "produce an absurd result" but VMT's, were, he had argued, entitled to 5.6 weeks and not pro-rated."

18. The figure of 12.07% is contained in ACAS guidelines (which have no statutory force) and reflects the percentage which statutory holiday entitlement bears to the remainder of the working year. As the ET said at paragraph 56 of the Reasons:

"*Relevant Law*

56. It is the Respondent's case that it has paid the Claimant holiday pay in accordance with the ACAS guidelines which provided as follows.

"What leave to casual workers get?

If a member of staff works on a casual basis or very irregular hours, it is often easiest to calculate holiday entitlement that accrues as hours are worked.

The holiday entitlement of 5.6 weeks is equivalent to 12.07 per cent of hours worked over a year.

The 12.07 per cent figure is 5.6 weeks' holiday, divided by 46.4 weeks (being 52 weeks - 5.6 weeks). The 5.6 weeks are excluded from the calculation as the worker would not be at work during those 5.6 weeks in order to accrue annual leave …

What leave to term-time workers get?

There is no specific calculation for working out the holiday entitlement for term-time workers. You may find it useful to look at the calculations that are used for annualized hours or casual/irregular hours (see the table on page 12 or use the 'ready reckoner' calculator at www.gov.uk)." "

19. The entitlement to leave is contained in the **WTR**. At paragraphs 59 to 64 of its Reasons the Tribunal set out the relevant provisions of the **WTD**, the **WTR** and the **ERA** (I have excluded paragraph 63 as it concerns only contractual claims):

"59. Regulation 13 of the Regulations enacts the Directive and provides that:

(1) … a worker is entitled to four weeks' annual leave in each leave year …

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

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

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

60. Regulation 13A of the Regulations granted workers an extra 1.6 weeks, 8 days, per year. This is merely a domestic rather than EU measure. Accordingly, the 20 days are subject to review by the CJEU and to the precepts of European law but the extra domestic days are not.

61. Regulation 14 takes advantage of the exception set out in subparagraph (2) of Article 7 of the Directive, as follows:

(1) This regulation applies where -

(a) a worker's employment is terminated during the course of his leave year; and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) …

62. 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 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

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

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

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

under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

…

64. The Employment Rights Act 1996 (ERA) Section 224 provides:

Employments with no normal working hours

(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending -

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

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

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

(4) The section is subject to sections 227 and 228."

20. At paragraphs 65 to 68 of the Reasons the Tribunal set out certain provisions of the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTWR") and Council Directive 97/81/EC:

"65. Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

Regulation 2 deals with the meaning of full and part time worker and sub paragraph (4) provides:

A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place -

(a) both workers are -

(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

66. Regulation 5 sets out the definition of less favourable treatment of part-time workers

5. - Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker -

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if -

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

(4) A part-time worker paid at a lower rate of overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.

67. Council Directive 97/81/EC (applied to the UK by Directive 98/23) concerning the Framework Agreement on part-time work provides, under Clause 4, for the Principle of non-discrimination that, where appropriate, the principle of pro rata temporis shall apply. The pro rata principle in British law is defined as meaning that

Regulation 1(2)

Where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker.

68. "Weekly hours" are dealt with in Regulation 1(3)

In the definition of the pro rata principle and in regulations 3 and 4 "weekly hours" means the number of hours a worker is required to work under his contract of employment in a week in which he has no absences from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of such hours."

21. The citations in references in paragraphs 67 and 68 are to the **PTWR**. The Employment Tribunal's statement at paragraph 67 that "*the pro rata principle in British law is defined as meaning* …" should, in my judgment, be qualified with the proviso that regulation 1 (a definitions section) begins "*In these regulations* -". To say, therefore, as the Tribunal seems to, that this is a statement of principle of "British law" beyond the application of the **PTWR** may well be an overstatement.

22. Of course, the Employment Tribunal dismissed the claim under the **PTWR**, although as the question of pro-rating was central to the Tribunal's decision on the point under appeal it is appropriate to consider paragraphs 67 and 68 in this Judgment.

The Tribunal's Decision

23. The Tribunal expressed its decision on the point in issue the following paragraphs:

> **"97. With regard to the claim under the Working Time Regulations all of the cases, including *Greenfield* establish that pro-rating is appropriate and again, this is achieved by applying the 12.07 per cent.**
>
> **98. The Tribunal agrees that it is necessary to read into the Regulations the wording as suggested by Counsel at paragraph 72 which is again set out as follows:**
>
> > **That Regulation 16(3)(d) should be amended as follows:**
> >
> > **as if reference to sections 227 and 228 did not apply and in the [sic] and, in the case of the entitlement under regulation 13 where a worker has no normal hours and works 46.4 weeks per year any such payment should be capped at 12.07 per cent of annualised hours.**
>
> **99. If the Tribunal were wrong in its above conclusion, then it accepts the Respondent's secondary case that the entitlement to 5.6 weeks is pro-rated. That would entitle the Claimant to the following leave depending on the amount of weeks worked in the year.**
>
> | Weeks worked | Weeks holiday | 1/3 |
> |---|---|---|
> | 32 weeks is 0.69 of 46.4 | 3.86 | 1.29 |
> | 33 weeks is 0.71 | 3.98 | 1.33 |
> | 34 weeks is 0.73 | 4.09 | 1.36 |
> | 35 weeks is 0.75 | 4.2 | 1.4 |
> | 46.4 weeks | 5.6 | 1.87" |

24. Mr Caspar Glyn QC (who appeared for the Respondent before the EAT and below) and Mr Wilson agreed with me that, to make sense, the words "fewer than" have to be inserted in paragraph 98 between the word "works" and "46.4 weeks".

25. Mr Glyn recognises that upholding the first of these two bases is not without its difficulties, and has focussed the force of his submissions on upholding the Tribunal's alternative finding. The findings are of identical practical effect.

The Law as before the Tribunal

26. The Tribunal was taken to a number of decisions concerning the interpretation of holiday pay provisions. The first, **Williams v British Airways plc** [2012] ICR 1375, concerned the entitlement of aircrew (who fall outside the provisions of the **WTR**) to holiday pay. The equivalent of the **WTR**, the **Civil Aviation (Working Time) Regulations 2004**, do not contain an equivalent to the 12 week reference period specified at section 244 of the **ERA**. The employer had been calculating such pay on basic salary alone. It was held by the ECJ that such additional payments as were not aimed solely at reimbursement must be included. The reference period by which this should be calculated was a matter for the domestic Courts. The matter having returned to the Supreme Court, Lord Mance said that the representative reference period was to be resolved by an Employment Tribunal. In essence, as correctly identified by the Employment Tribunal at paragraph 79 of its Judgment, the legal position is that payment for leave must put the worker in the same position with regards to remuneration as during periods of work.

27. **Bear Scotland Ltd v Fulton and Another** [2015] ICR 221 is a decision of this Tribunal, one of a series of test cases, in which Langstaff P (as he then was) held that holiday pay should include sums earned in the reference period referable to "*such non-guaranteed overtime as was regularly required by the employer*". The Employment Tribunal cited part of paragraph 67 of Langstaff P's judgment, which I reproduce in full:

> **"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 1998 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.*"**

28. **British Gas Trading Ltd v Lock** [2017] ICR 1, was a case which returned to the Court of Appeal following a reference to the CJEU. That Court had held that commission earnings

were to be taken into account when calculating holiday pay, in addition to basic pay. In a wide-ranging review of the jurisprudence relating to the ability of the Courts to provide a conforming interpretation to legislation introduced for the purpose of implementing a Directive, Sir Colin Rimer concluded that the Employment Tribunal had been right to add words to regulation 16(3) so as to include commission.

29. At this stage I note, parenthetically, that when these cases were cited to me, and the point made by me that they were all cases which *increased* the amount payable to a worker from an otherwise lower base point, Mr Glyn's response was that the line of authorities was relevant to this extent: what is sauce for the goose (worker) must be sauce for the gander (the employer) - in essence, they point towards a need for fairness and balance.

30. Of greater importance to the ET's decision are the cases of **Land Tirol** and **Greenfield v The Care Bureau**.

31. In **Land Tirol** the Court was concerned with the interpretation of provisions of the Law of the Province of Tyrol on contractual public servants.

32. So far as relevant to the issue on this appeal, the relevant provision of the Tyrolean Law in issue was paragraph 55(5) (see page 4 of the CJEU's judgment) which reads:

> **"(5) If the number of working hours is changed, the annual leave which is not yet been taken is adjusted proportionally to the number of hours in the new contract."**

33. At paragraph 27 of its judgment, the Court phrased the question upon which it was asked to rule in the following way:

> **"27. By its second question the National Court is essentially asking whether relevant European Union law, and in particular Clause 4.2 of the framework agreement on part-time work, must be interpreted as precluding a national provision such as paragraph 55(5) [see above] …**

> **under which, in the event of a change in the working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who changes from full-time to part-time employment suffers a reduction in the right to paid annual leave which he has accumulated while working full-time, or he can take only take that leave with a reduced level of holiday pay."**

34. Having reiterated (at paragraphs 30 to 31) that the purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure, and pointed out that the positive effects of paid annual leave for the safety and health of the worker continues to be of significance if it is not taken in the reference period but during a later period, the Court said as follows:

> **"32. It follows from the above that the taking of annual leave in a period after the reference period has no connection to the hours worked by the worker during that later period. Consequently, a change, and in particular a reduction, of working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the period of full-time employment.**
>
> **33. On the other hand, it is indeed appropriate to apply the principle of pro rata temporis, set out in Clause 4.2 of the framework agreement on part-time work, to the grant of annual leave for a period of employment on a part-time basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds. However, that principle cannot be applied ex post to a right to annual leave accumulated during a period of full-time work."**

35. **Greenfield** was a case referred to the CJEU by an Employment Tribunal. The Claimant was entitled, as a matter of both statute and contract to 5.6 weeks paid leave. She took seven days leave in July 2012. In the 12 week period prior to the taking of leave she had worked one day per week. From August 2012 she began a new working pattern which was 12 days on and two days off, an average of 41.4 hours per week. In November 2012 she sought further leave, but was told that the seven days taken in July was the equivalent of seven weeks paid leave, based on her working pattern at the time of one day per week and therefore she was not entitled to further leave. On leaving her employment, she argued that leave already accrued and taken should be retrospectively recalculated and adjusted following an increase in working hours, for example, following a move from part-time to full-time work, so as to be proportional to the new number of working hours and not the hours worked at the time leave was taken.

36. The Court observed (at paragraph 32) that the entitlement to *minimum* paid annual leave must be calculated by reference to the days, hours or fractions of days or hours worked and specified in the contract of employment. At paragraph 35 (having noted, among other cases, **Land Tirol**), the Court observed that:

> **"35. It follows that, as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately."**

37. That conclusion was not affected, said the Court, by the application of the pro rata temporis principle laid down in clause 4.2 of the framework agreement on part-time work.

38. I have found paragraphs 38 and 39 of the CJEU's judgment of assistance in determining this appeal. They read:

> **"38. However, whereas the provisions of clause 4.2 of the Framework Agreement on part-time work and those of Article 7 of Directive 2003/88 do not require Member States to make a new calculation of entitlement to annual leave already accumulated where a worker increases the number of hours worked, neither do they preclude the Member States adopting provisions more favourable to workers and making a new calculation.**
>
> **39. As is apparent from clause 6.1 of the Framework Agreement on part-time work and Article 15 of Directive 2003/88, those two instruments, which only establish a minimum protection of certain rights of workers, do not restrict the power of the Member States and the social partners to apply, or to introduce, provisions that are more favourable to workers, and to provide for such a recalculation of the entitlement to paid annual leave."**

39. I turn finally to the recitals of the **Working Time Directive** to which Mr Glyn referred me:

> **"(2) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.**
>
> **…**
>
> **(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.**
>
> **(5) All workers should have adequate rest periods. The concept of 'rest' must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours."**

40. I reject the suggestion - albeit not advanced with great enthusiasm - that favouring the interpretation sought by the Claimant would engage the last sentence of recital 2. Relatively small sums of money are in issue here. I also find recital 5 of limited value in support of the pro-rating argument.

41. Having considered the provisions and authorities cited to me on behalf of the Respondent, which I have set out at length, I can state my conclusion very shortly. I am unable to distil from them any support for the proposition accepted by the ET that there is a requirement to carry out an exercise in pro-rating in the case of part-time employees, so as to ensure that full-time employees are not treated less favourably, or to avoid a "windfall" for term-time only workers. Indeed, the whole purpose of the EU and domestic provisions to which I have referred in this Judgment is to ensure that part-time workers are not treated in a less favourable manner than full-time workers. This is not a case such as **Greenfield** and **Land Tirol** which required application of the pro-rata principle in circumstances when there had been changes to work patterns.

42. The exercise which the ET had to carry out was a relatively simple one. The Claimant's entitlement to holiday pay was set out clearly in her contract, but in any event mirrored her statutory right. As someone working irregular hours, the straightforward application of section 224 of the **Employment Rights Act 1996** enabled a week's pay to be computed in a simple and straightforward manner.

43. It is true that the application of section 224 may have its anomalies, such as to favour someone who does not work throughout the year, but I cannot see how that justifies either words being read into the **WTR**, as the ET found at paragraph 98 of the Reasons, nor (its

secondary conclusion at paragraph 99) that the entitlement to 5.6 weeks' pay should be pro-rated. Indeed, I simply do not understand the rationale for the pro-rating set out in paragraph 99, if not by operation of the re-wording set out at paragraph 98.

44. In my judgment the ET, in its conclusions, overlooked the overriding principle that part-time workers are not to be treated less favourably than full-time workers. There is, as yet, no principle to the opposite effect. To impose a limitation which reads down primary legislation - those sections of the **ERA** which enable a week's pay to be computed - to the disadvantage of part-time workers, ostensibly to redress a potential grievance that *might* be brought by full-time workers is, in my judgment, to stand the logic and purpose of the **Directive** and the domestic statutory scheme on its head.

45. Consequently I allow the appeal and direct that the case be remitted to the same ET for computation of the sums due to the Claimant by application of section 224 **ERA**. It should do so on the basis that, should the resulting sum be greater than the sums actually paid, and subject to any limitation points that may be live, there will have been a deduction from wages.

46. The previous paragraph is not intended to limit the scope of the remission, in respect of all remaining live issues which should be the subject of directions from the ET for the preparation and fixing of a remedies hearing.

47. As the exercise is likely to be largely arithmetical, I direct that the case may be remitted to the same Tribunal or, if more convenient, to a differently constituted Tribunal.