Appeal No. UKEAT/0285/19/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 10 March 2020

Before

THE HONOURABLE MR JUSTICE LINDEN

(SITTING ALONE)

ECON ENGINEERING LIMITED APPELLANT

MR P DIXON AND OTHERS RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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For the Respondent	MR JAMES MCHUGH (of Counsel) INSTRUCTED BY: Thompsons Solicitors LLP Maybrook House 27-35 Grainger Street Newcastle Upon Tyne Tyne and Wear NE1 1TH

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

WORKING TIME REGULATIONS

The issue in the appeal was whether a profitability bonus, which was paid to the claimants monthly in arrears, should be included in the calculation of a week's pay pursuant to section 221 (2) Employment Right Act 1996.

Held: the employment tribunal erred in law in holding that the profitability bonus should be included. Section 221 (2) requires the inclusion of sums which are "payable by the employer under the contract of employment….. if the employee works throughout his normal working hours in a week." Completion of the normal working hours must be both a necessary and a sufficient condition for the entitlement to the relevant payment. Whether the profitability bonus was payable depended on a monthly calculation of the respondents profit rather than on whether the employee had worked their normal working hours. Indeed, if the business was insufficiently profitable no profitability bonus would be payable notwithstanding that the employee had done so. Completion of a given hour of work was therefore necessary but not sufficient, of itself, to give rise to an entitlement to the bonus payment.

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THE HONOURABLE MR JUSTICE LINDEN

Introduction

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1. This is an appeal from a decision of Employment Judge Cox sitting at the Leeds Employment Tribunal ("the Tribunal"). Her Judgment and Reasons were sent to the parties on 9 May 2019 and there was then an application for reconsideration by the Respondent. EJ Cox reconsidered and confirmed her decision with a Judgment with Reasons which was sent to the parties on 31 July 2019. I will refer to this as the Reconsideration Judgment.

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2. In very brief summary, the appeal raises a short point on the construction of Section 221(2) of the **Employment Rights Act 1996** ("ERA"), which determines "the amount of a week's pay" in cases where the employee has normal working hours and their remuneration does not vary with the amount of work done in the relevant reference period. It is common ground that the Claimant's case falls within this section and the question is whether, as a result, "a week's pay" in their case is simply a week's basic salary, or whether it includes an enhancement by way of a bonus to which they are contractually entitled. This question arises in the context of the claim for holiday pay under Regulation 13A **Working Time Regulations 1998** ("the 1998 Regulations"), but the answer to it will apply to any case in which the amount of a week's pay requires to be calculated under Section 221(2) of the **ERA**.

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Factual background

3. The Respondent manufactures and hires out winter maintenance vehicles such as gritters and salt spreaders. There are currently six Claimants. They work in various roles and departments on the production side of the Respondent's business and they have a basic working

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week of 39 hours in the case of some Claimants and 40 in the case of others. Nothing turns on this difference, however.

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4. Weekly in arrears the Claimants are paid a wage based on an hourly rate of pay, as well as shift allowances and pay for overtime, which is worked on a voluntary basis. Monthly in arrears they are also paid a bonus which takes the form of an hourly supplement in respect of each hour they worked in the preceding month, whether as part of their basic hours or as overtime.

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I will call this "the profitability bonus".

5. The calculation of the profitability bonus by the Respondent was carried out as follows.

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Each year the Respondent set target figures for "contribution per day" for the coming 12 months, on a sliding scale, and identified the hourly rates which would apply depending on what level of contribution per day was reached on that sliding scale. At the end of each month the actual contribution per day was calculated by:

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a. Assessing the "total profit" which the business had made in that month. Total profit was income from sales of new machines and spare parts, less the cost of materials and

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production labour costs, plus the value of stock produced for hire less the level of any parts that had to be scrapped or remade/reworked.

b. Dividing total profit for the month by the number of production days in that month.

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6. The applicable bonus figure was then identified by reading across from the target figures on a sliding scale. For example, in November 2016 contribution per day was £29,099.32. This was higher than the target point of £28,770.00 and it therefore led to a bonus of £1.16 per hour

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for that month. If contribution per day for November 2016 had exceeded the next point on the sliding scale, the applicable bonus rate for that month would have been £1.20 per hour.

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7. The final step in the process was to apply a discount to the hourly rate. Until January 2018 the way in which this worked was that the production manager made a broad-brush assessment of the productivity of each team involved in the production process. If he considered that the team had worked at expected levels of productivity, the hourly bonus rate would be multiplied by 0.8. If he considered that the team was working above or below expectations, the hourly bonus figure would be multiplied by one or two percentage points above or below 80% as the case may be.

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8. This part of the process caused discontent amongst the workforce as a result of which, from January 2018, the Respondent simply paid bonus at 80% of the applicable hourly rate for all production employees. The Tribunal found that the Claimants were contractually entitled to whatever supplement was produced by this calculation. However, self-evidently, at least in principle, the Claimants would not necessarily be paid any supplement if contribution per day was not high enough in a given month. The supplement could also vary from month to month. In this connection, Ms Millns drew attention to the finding of the ET at paragraph 27 of its original Judgment:

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> **"27. If the business did not meet the target contribution, then no bonus was paid to the production staff for that month. There were occasions in February and March 2018, on the other hand, when the Directors decided to increase the applicable bonus rate above that indicated by the sliding scale because the company had had a profitable year."**

9. Ms Millns also drew attention to the finding of the Tribunal at paragraph 28 of its original Reasons:

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> **"28. In summary, the bonus rates were set annually and depended upon the overall performance of the company and in particular the sales it had achieved. Sales depended on the level of demand for the business's products, which was affected by market conditions, the weather and the effectiveness of the company's sales and marketing activity. Although**

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> **each individual Claimant's efforts contributed to the generation of the products that enabled the Respondent to deliver on the sales that contributed towards the target 'contribution per day', the bonus depended on the performance of the company overall. The work of an individual Claimant might affect the value of parts that needed to be scrapped or re-worked in any month, but that was an insignificant element in the calculation of the "contribution per day" and hence the bonus calculation. Whilst until January 2018 the bonus depended to a very minor degree on the performance of the team in which an individual worked, that was also an insignificant element in the bonus calculation. There were employees working in the production department who made no direction contribution to producing the business's products who nevertheless received the bonus."**

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10. In relation to paragraph 28, Ms Millns emphasised that the driver of the profitability bonus was found by the Tribunal to be sales by the company, whereas the Claimants do not work in sales and marketing. She also highlighted the finding by the Tribunal that the work of an individual Claimant might affect the value of parts that needed to be scrapped or reworked in any month, but that this was an insignificant element in the calculation of contribution per day and therefore in the calculation of the profitability bonus.

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The proceedings before the ET

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11. In September, and then November 2018, the Claimants brought unlawful deduction of wages claims which raised various issues in relation to the calculation of their holiday pay for the purposes of Regulations 13 and 13A of the **1998 Regulations** and under their contracts of employment. In very brief summary, the relevant issues for present purposes were resolved as follows:

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a. The Tribunal decided that the Claimants' contractual terms as to holiday pay did not get them home. For many years the practice had been to calculate holiday pay at the level of the Claimants' basic salary and there was no basis for concluding that the parties had agreed anything other than this. The resolution of the issues therefore turned on the Claimants' statutory rights.

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b. The Respondent conceded, in respect of Claimants who were entitled to shift allowances, that those allowances should be taken into account for the purposes of calculating holiday pay under Regulations 13 and 13A of 1998 Regulations as well as contractual leave. That, I understand, was because those sums were fixed amounts that were inevitably paid upon completion of a shift by reference to relevant Claimants' normal working hours.

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c. The Respondent also conceded that pay for voluntary overtime should be included in the calculation of holiday pay for the purposes of Regulation 13 of the 1998 Regulations given the recent decisions of the Court of Justice of the European Union ("CJEU") in relation to Article 7 of the Working Time Directive, which I will refer to as "the Article 7 cases". These cases are well-known. They include **British Airways Plc v Williams** [2012] ICR 847, and more recently **British Gas Trading Limited v Lock** [2014] ICR 813.

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d. The Respondent argued, however, that this approach to voluntary overtime payments did not apply in relation to additional leave under Regulation 13A given that this provision is not required by the Working Time Directive and therefore is not subject to EU law (see the decision of the Court of Appeal in **British Gas Trading Limited v Lock** [2017] ICR page 1 at paragraph 19) and given the terms of Section 234 of the **ERA** as interpreted by the Court of Appeal in **Bamsey v Albon Engineering & Manufacturing Plc** [2004] ICR 1083. In effect, under domestic law overtime is only included in the calculation of a week's pay if it is both guaranteed and compulsory. The Tribunal accepted that argument and the Claimants have not challenged this aspect of its decision.

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12. However, the Tribunal also held that the profitability bonus was required to be included in the calculation of the Claimants' holiday pay under both Regulations 13 and 13A. As far as Regulation 13 is concerned, the ET reached this conclusion on the basis of the Article 7 cases:

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a. At paragraph 32 of its original Reasons the Tribunal noted that under Article 7 of the Working Time Directive, as interpreted by the CJEU, a worker must be paid the equivalent of their "normal remuneration" for any period of annual leave and that this must include any remuneration that has an "intrinsic link" with "the performance of the tasks which he is required to carry out under his contract of employment."

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b. At paragraph 33 the Tribunal noted the Respondent's argument that there was no such intrinsic link between the Claimants' work and the profitability bonus payments "as the bonus payments depended on the performance of the company overall or, to an insignificant degree, on the work of their team, not on their own work.". But it said that "the Claimants invariably received these bonus payments as an enhancement to their pay for each and every hour that they worked. It is difficult to see how the bonus could be viewed as anything other than part of their normal remuneration."

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13. At paragraph 34, the Tribunal went on to hold that in any event the application of Section 221(2) of the **ERA** led to the conclusion that the profitability bonus should be included in the calculation of pay for annual leave under both Regulations 13 and 13A.

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The Appeal

14. The Tribunal's conclusion in relation to the inclusion of profitability bonus in the calculation of pay for leave to which Regulation 13 of the 1998 Regulations applies is not challenged by the Respondent in this appeal, but on the express basis that it accepts that this is

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A the effect of the Article 7 cases in the CJEU. The Respondent does challenge the Tribunal's conclusion as to the effect of Section 221(2) or the 1996 Act, but this is only relevant in relation to the entitlement to additional leave under Regulation 13A given the Respondent's concession based on the Article 7 cases. For their part, the Claimants accept that the position under Regulation 13A is governed by domestic law and not by the Article 7 cases.

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The relevant legislative provisions

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15. Regulation 13A of the **1998 Regulations** provides as follows:

> **"13A Entitlement to additional annual leave**
>
> **(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).**
>
> **(2) The period of additional leave to which a worker is entitled under paragraph (1) is—**
>
> **(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;**
>
> **(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;**
>
> **(c) in any leave year beginning on 1st April 2008, 0.8 weeks;**
>
> **(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;**
>
> **(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.**
>
> **(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.**
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> **…**
>
> **(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—**
>
> **(a) the worker's employment is terminated; or**
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> **(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or**
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> **(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.**
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> **…"**

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16. Regulation 16 of the **1998 Regulations** provides as follows:

> **"Payment in respect of periods of leave**

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16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 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).

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

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

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

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

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

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(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."

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17. Section 221 of the **ERA** provides as follows:

"221 General.

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

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(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.

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(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

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

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

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

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Case law

18. Ms Millns took me to the decision of the Court of Appeal in **Evans v Malley Organization Limited (t/a First Business Support)** [2003] ICR 432. **Evans** concerned a sales representative who was paid commission in relation to contracts sold. This was the largest part of his remuneration. The issue before the Court of Appeal was whether Mr Evans pay "varied with the amount of work done", in which case the calculation of a week's pay fell within Section 221(3) and commission would be included under the averaging mechanism provided for in that section; or whether his case fell within Section 221(2), in which case it was common ground that the calculation of a week's pay would include his basic pay only and would not include commission. The Court of Appeal held that his case fell within Section 221(2) and therefore accepted that the calculation of his holiday pay should be based on basic pay alone.

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19. I accept that **Evans** gives me some assistance, albeit indirectly. Firstly, as Ms Millns points out, the Court of Appeal focused on the question what were the commission payments for? That is apparent from for example paragraph 24 (the Judgment of Pill LJ), paragraph 35 (the Judgment of Judge LJ) and paragraph 43 (the Judgment of Hale LJ, as she then was). The Court looked at the issue as essentially one of causation and came to the conclusion that the commission payments were not payments for the amount of work done but, rather, were payments for the degree of success in securing the relevant contracts. Ms Millns submits that there is an analogy with **Evans** to be drawn in terms of the approach to Section 221(2) but, obviously, it is important to bear in mind the issue was whether **Evans** was a Section 221(2) or a Section 221(3) case. Here, it is common ground that Section 221(2) applies, and the question is as to what effect that has. Different aspects of the terms of Section 221(2) are under consideration.

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20. The second respect in which the **Evans** case gives a degree of assistance, and perhaps more importantly to Ms Millns' appeal, is that it is clear that the Court of Appeal accepted that if the case fell within Section 221(2) of the **ERA** then the commissions which were paid to Mr Evans when he was working were not to be included in the calculation of a week's pay for the purposes of his annual leave: only his basic pay would be included. That conclusion was reached despite the fact that commission was the larger part of his remuneration and despite the potential hardship that this may have caused Mr Evans.

21. In **British Gas Trading Limited v Lock** (supra) commission was paid by reference to sales achieved, and the issue was whether in Mr Lock's case those commissions should have been included in the calculation of his holiday pay. When the case it came back to the Court of Appeal following the decision of the CJEU, Sir Colin Rimer analysed the **Evans** case at paragraphs 41 to 49. At paragraph 49, having considered the relevant passages from the Judgments in the **Evans** case, he concluded that "**Evans** shows to my satisfaction that it is not possible to interpret the Regulations by conventional domestic cannons of construction as entitling Mr Lock to holiday pay that includes any commission element". In other words, in the **Lock** case the Court of Appeal clearly endorsed the result in **Evans**, namely that under domestic law, and in particular Section 221(2) **ERA**, the commissions earned by Mr Evans, and in this case Mr Lock, would not be included in the calculation of holiday pay. That, says Ms Millns, tends to support her analysis of Section 221(2) which is that the profitability bonus should not be included because it is paid according to levels of overall profit rather than work done.

22. Ms Millns also took me to the decision of the Employment Appeal Tribunal ("EAT") in **May Gurney Ltd v Adshead & Ors** [2006] UKEAT/0150/06. I derived less assistance from this decision given that it was essentially concerned with the question whether the case before the

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EAT fell within subsection (2) or (3) of Section 221, but I accept Ms Millns' submission that the fact that the EAT approached the question as "essentially a question of causation" (paragraph 69 of the Judgment) is at least consistent with her proposed approach to Section 221(2) in the present case.

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The Tribunal's reasoning

23. The Tribunal's reasoning in relation to the profitability bonus is more fully set out in its Reconsideration Judgment. At paragraph 2 it noted that it was common ground between the parties that Section 221(2) applied. It then went on to say the following at paragraphs 3 to 8:

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> **"3. In its application for reconsideration, the Respondent submits that 'it is not the case that it automatically follows that any sum payable under the contract is an amount which is payable for working during normal hours of work'. The Tribunal accepts that. The Tribunal was satisfied, however, that, once the Respondent had set the targets and bonus rates for the coming year, whatever bonus enhancement applied because a target had been met was part of the amount that was payable by the Respondent if the Claimants worked throughout their normal working hours in a week (paragraph 30 of the Tribunal's reasons).**
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> **4. The Respondent submits that the finding is inconsistent with the fact that the bonus enhancement was profit-related so that a Claimant could work through his normal hours of work and not be entitled to any bonus payment. The Tribunal accepts that a Claimant might not be entitled to a bonus enhancement if the relevant target had not been met. That did not mean, however, that, if the bonus enhancement was payable because the target had been met, it was not part of the amount that was payable if the Claimant worked throughout his normal working hours in a week. The Tribunal can see no inconsistency here.**
>
> **5. The Respondent also submits that the finding was inconsistent with the Tribunal's other finding that the bonus enhancement was not referable solely to normal hours of work, but would also be paid for overtime hours. The Tribunal again can see no inconsistency. Section 221(2) requires the enhancement to be taken into account only in relation to payment for normal hours of work.**
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> **6. The Respondent submits that the Tribunal failed to address the fact that a payment may be contractual in nature but nevertheless not be a payment due because an employee has worked their normal hours of work in any given week. The Tribunal accepts that, but repeats what it says in paragraph 3 above.**
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> **7. Finally, the Respondent points out that the bonus enhancement was variable, depending upon whether targets were met. Since Section 221(2) provides no mechanism for averaging out variable payments when calculating a week's pay, it must be read, the Respondent submits, as being limited to payments of basic pay for normal hours of work only.**
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> **8. Regulation 16(3)(c)** WTR **provides that the calculation date for the purposes of calculating remuneration during leave is the first day of the period of leave in question. Section 221(2)** ERA **provides that the sum payable is 'the amount which is payable . . . under the contact of employment in force on the calculation date if the employee works throughout his normal working hours in a week'. The Tribunal accepts that this reference to 'a week' rather than 'that week' suggests that this provision is based on an assumption that the employee's payment for working normal working hours will not be varying from week to week. The Tribunal notes, however, that an employee's pay for working throughout their normal working hours is very likely to change from time to time to reflect such matters as pay rises, changes in an employee's normal working hours and pay cuts. Section 221(2) must, therefore, be capable of applying even where there are changes in an employee's pay from**

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one week to the next. The Tribunal considers that Section 221(2) should be read as meaning that holiday pay should be what would be payable to the employee for working through their normal working hours in the week in which the calculation date falls. That would include, for example, any pay rise that has taken effect that week. It would also include, in the case of these Claimants, any bonus enhancement payable in that week."

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24. The Tribunal's analysis was therefore that whilst the phrase "payable …if the employee worked throughout his normal working hours in a week" did suggest that Section 221(2) assumes a payment which will not vary from week to week, this could not be decisive given that the section must have been intended to be capable of application in the event of changes in pay which occurred from time to time such as pay rises, changes in an employee's normal working hours and pay cuts. On this basis, the Tribunal considered that the question under Section 221(2) should be answered by reference to what would be payable to the employee for working through their normal working hours in the week in which the calculation date falls. This would include any pay rise which had taken effect that week and any bonus enhancement payable in that week.

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The arguments of the parties

25. The Notice of Appeal advances three grounds of appeal namely, first, that the Tribunal's analysis of Section 221(2) was wrong in law ("Ground 1"); second, that there was no evidence to support the Tribunal's conclusion ("Ground 2"); and, third, that the Tribunal failed to give adequate reasons for its decision ("Ground 3").

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26. At the beginning of the Hearing I asked Ms Millns whether Grounds 2 and 3 were in fact pursued and, ultimately, she realistically indicated that they were not. I say "realistically" because they can be disposed of very shortly. There clearly was an evidential basis for the Tribunal's conclusion and its reasons for its conclusion are perfectly clear, particularly from the Reconsideration Judgment. The question in this appeal is really whether the Tribunal's analysis of Section 221(2) was correct and that is the question which Ms Millns raises under Ground 1.

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27. Turning to Ground 1, Ms Millns advanced essentially the arguments that were advanced by the Respondent in seeking reconsideration of the Tribunal's original decision, but which were rejected by the Tribunal. She submitted that:

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a. Firstly, it is clear from the decisions in **Evans**, **Lock** and **Adshead** that commission payments do not fall to be included in the amount of week's pay under Section 221(2) and that there is no material distinction between this type of payment and the profitability bonus in the present case.

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b. Secondly, it is also clear from the phrase "payable…if the employee works throughout his normal working hours in a week" that Section 221(2) contemplates a fixed sum which will invariably be paid for the completion of the required number of working hours in a given week, whereas the profitability bonus may not be paid and/or may fluctuate from month to month.

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c. Thirdly, moreover, the productivity bonus may be paid by way a supplement in respect of each hour worked but it is not solely referable to the fact that the employee has completed the requisite number of working hours in a week.

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d. Fourthly, there would be practical difficulties if the Tribunal was right given that the profitability bonus was calculated on a monthly basis and paid at different times by reference to different periods to basic pay and other payments received by the Claimants.

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28. For his part Mr McHugh argued on behalf of the Respondent that:

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a. Firstly, Section 221(2) required the Tribunal to identify the Claimants' contractual entitlements in respect of remuneration as at the calculation date and then to identify which sums were payable under that contract if the employee worked throughout his normal working hours in a week.

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b. Secondly, it is common ground that profitability bonuses were paid as a matter of contractual right, and that in practice the Respondent did in fact meet its predetermined targets, and there was no evidence that there had ever be an occasion when it did not do so. As the Tribunal had found, the bonus was invariably paid. I note here that Mr McHugh also accepted, however, that it was not necessarily paid at the same rate given that the bonus would fluctuate based on the profitability of the business from month to month.

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c. Thirdly, there would be no practical difficulties on his proposed approach.

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Discussion and conclusions

29. I agree with Mr McHugh that Section 221(2) **ERA** requires the Tribunal to determine what is the employee's contractual entitlement as at the relevant calculation date. In the case of the calculation of payment for annual leave, Regulation 16(3) provides, as I have noted, that the calculation date is to be the first date of the period of leave in question. Therefore, the issues is as to the contractual terms as at that date.

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30. I note in passing the decision in **Leyland Vehicles v Reston & Ors** [1981] ICR 403, which was to the effect that the purpose of the calculation date is to fix the point at which the relevant contractual terms are identified, and the sums payable are determined, so that the fact of a subsequent increase, even if backdated, would not mean that the pay increase was to be

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incorporated in the calculation of "a week's pay" for the relevant statutory purposes. I therefore have some doubts about paragraph 8 of the Reconsideration Judgment where the Employment Judge appeared to base her reasoning on the need for Section 221(2) to be able to address situations in which the contractual terms changed after the calculation date. The scheme of the legislation is that the contractual terms are to be identified as at the calculation date and subsequent changes are therefore irrelevant.

31. Second, I also agree with Mr McHugh that his proposed analysis of Section 221(2) does not necessarily create significant practical difficulties in calculating the supplement which might be due to the Claimant in a given week. As has been noted, the way in which the profitability bonus was calculated meant that, on a monthly basis, a supplement for each hour worked was calculated and then paid in arrears. I do not see any great practical difficulty in the company continuing to do this should the conclusion be that those payments are to be included in the calculation of holiday pay. In the course of argument, I also drew the parties' attention to Section 229(2) of the **ERA**, which provides at least the Tribunal with sufficient flexibility to apportion sums "in such manner as maybe just" where different elements of an employee's remuneration are preferable to different reference periods.

32. Where I do see the potential for practical difficulties is where, for example, an employee's period of annual leave spanned the end of one month and the beginning of another, and where the levels of profitability in each month meant that there were significant differences in the profitability bonus payable in respect of the hours worked in the first month as compared with the hours worked in the second. In that situation, on the approach of Mr McHugh identifies, the employer and the Tribunal would then need to decide which rate they should apply. The answer to that question would not be obvious although the other sections in Chapter 2 of Part XIV of the **ERA**, which involve averaging, look at the period of time prior to the calculation date.

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33. However, I do not think that this consideration is material to the issue of construction in the present case given that it, too, could be resolved as a matter of construction if necessary. In my judgement, properly construed, the words "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" refer to a sum or sums which are payable by the employer as a matter of legal obligation where that obligation arises simply because the employee has worked their normal working hours in a week. Here, that is true of basic pay, where it is both necessary and sufficient, for the entitlement to arise, that the employee has worked their 39 or their 40 hours in a given week.

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34. This is not the case in relation to the profitability bonus. Mr McHugh is right to point out that the profitability bonus is paid by way of an hourly supplement in respect of each of the hours worked by the employee, and it is therefore true that an employee who works 39 or 40 hours in a given week will be paid, in effect, 39 or 40 supplementary payments in respect of each of those hours. However, he will also be paid the supplement for any hours of voluntary overtime which he has worked. Moreover, the payment is contingent on hitting specified profitability targets and will vary according to how successful the business has been in the month in question. The profitability bonus is therefore a payment by way of a bonus based on profit made rather than the fact that normal working hours have been worked. Putting the matter another way, it is necessary but not sufficient that the employee has worked a given hour in order for him to be entitled to the supplement for that hour: the mere fact that the employee has worked a given hour, or even throughout his normal working hours in a week, will not mean that he is necessarily entitled to be paid any profitability supplement.

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35. It follows that the profitability bonus is not a sum which falls to be included in the calculation under Section 221(2) **ERA**. This conclusion is supported by the reference to “a week” in the statutory provision, which tends to indicate that the section contemplated a fixed sum which would be paid, as it were, week in week out upon completion of the working week. However, that is not ultimately the decisive point. To my mind, the decisive point is that the condition for entitlement to payment must simply be the completion of the normal working hours in a given week.

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36. In these circumstances, I will allow the appeal. The parties are agreed that this is not a case in which remitting the matter to the Tribunal would serve any useful purpose. I therefore substitute a declaration that on the true construction of Section 221(2) ERA, the profitability bonus does not fall to be included in a calculation of a week’s pay in the present case.

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