Appeal No UKEAT/0273/19/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 February 2020

Before

GAVIN MANSFIELD QC

DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR WILLIAM HALL — APPELLANT

LONDON LIONS BASKETBALL CLUB UK LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Daniel Isenberg (of Counsel) Instructed By Linklaters LLP One Silk Street London EC2Y 8HQ
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

CONTRACT OF EMPLOYMENT

WORKING TIME REGULATIONS

1. **Wrongful Dismissal**. The ET found that the Appellant (Claimant below) had been wrongfully dismissed. He had resigned with immediate effect accepting the Respondent's repudiatory breach in failing to pay a contractual sum due. The ET erred in calculating damages for wrongful dismissal. It limited the Appellant's damages to 14 days, relying on an express term that would have permitted the Appellant to terminate on 14 days' notice, rather than considering when the Respondent could lawfully have terminated the contract. Appeal allowed; remitted to ET for assessment of damages.
2. **Holiday pay.** The ET found that the Appellant was entitled to a payment in respect of arrears of holiday pay on termination. It erred in making a pro rata deduction to the holiday pay, to reflect the Appellant's part-times hours. **Harpur Trust v Brazel** [2019] IRLR 1012 applied. Appeal allowed, order in correct sum substituted.

GAVIN MANSFIELD QC DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. This is an appeal against part of a decision of Employment Judge Hallen sitting alone in the East London Employment Tribunal ("the ET") on the 14 and 15 February 2019. The Appellant was the Claimant below and in this Judgment I will refer to him as the Claimant. He was represented by a McKenzie Friend below and for the purposes of this appeal has the great benefit of representation by Messrs Linklaters LLP and Mr Daniel Isenberg of counsel, both of whom are acting pro bono. The Employment Appeal Tribunal ("EAT") would like to record its gratitude to solicitors and counsel for their pro bono assistance in this matter.

2. The Respondent, London Lions Basketball Club UK Limited, , was represented below by Mr McCauley, its managing director. It does not appear or take any part in this appeal. No response to the Notice of Appeal was provided in accordance with the EAT's directions and Practice Direction. Following correspondence that I need not go into for the purposes of this Judgment, on 15 January an order was made debarring the Respondent from taking any further part in the appeal pursuant to Rule 26 of the **EAT Rules 1993**. Nobody has attended on behalf of the Respondent today or sought in any way to change that position.

The ET Judgment and the scope of the appeal

3. The facts, for the purposes of this appeal, can be stated fairly briefly. The Claimant is a professional basketball player and the Respondent is a professional basketball club. The Claimant was employed by the Respondent under a contract dated 23 August 2017 for the 2017/18 season under a fixed term contract to expire on the final game of the season. In fact

A the contract was terminated on 14 February 2018 when the Claimant resigned with immediate effect.

B 4. The Claimant claimed before the Tribunal: (1) constructive wrongful dismissal; (2) unlawful deduction from wages; (3) a failure to provide written terms and conditions of employment; and (4) breach of the **Working Time Regulations** in relation to holiday pay. The Respondent counterclaimed against the Claimant for breach of contract.

C 5. The ET upheld all of the Claimant's claims and dismissed the Respondent's counterclaim. There has been no appeal against any of the findings of liability on the D Claimant's claims, nor has there been an appeal of the dismissal of the counterclaim.

6. The subject matter of this appeal relates to two matters as to the quantification of the E Claimant's entitlements in the light of the Tribunal's findings. Ground one alleges an error of law in the calculation of damages for wrongful dismissal. Ground two alleges an error of law in the calculation of the entitlement to holiday pay. I will deal with each of them in turn.

F **Ground 1**

7. Ground one is expressed by Mr Isenberg in his helpful skeleton argument at paragraph 2.1 as follows, "The Tribunal erred in law in limiting the Claimant's damages for repudiatory G breach of contract to the 14-day period referred to in clause 24 of the employment contract".

8. The relevant findings of the ET in its Reasons were as follows. The ET correctly H directed itself as to the principles of constructive dismissal, at least in the statutory arena, at paragraph 34 of its Reasons, and raised the relevant questions for common law wrongful

dismissal also. The ET found first that the Respondent had failed to pay contractual wages and benefits to which the Claimant was entitled, and second that that failure amounted to a repudiatory breach of contract, paragraphs 39 and 40 of the Reasons. The ET found that the main reason that the Claimant had resigned was that he had not been paid the sums to which he was contractually entitled, paragraph 27. For the purposes of this ground of appeal, paragraphs 45 and 46 are significant being the ET's conclusions on the claim for constructive wrongful dismissal. The ET said this:

> **"45. The Respondent's failure to pay the Claimant his contractual wages and benefits also amounted to a constructive wrongful dismissal. The Respondent's failure to pay the Claimant his wages and benefits triggered his resignation after the Claimant lodged a grievance by letter dates 12 February 2018. The Respondents failure to deal with that grievance and/or rectify its breach by paying wages and benefits lawfully due and owing pursuant to the contract amounted to a repudiatory breach of contract which the Claimant acted upon two days later (14 February) by resigning and thereby not accepting the breach.**
>
> **46. A failure to pay wages is a fundamental breach of contract entitling the Claimant to resign which the Claimant did. As a consequence, the Respondent was not able to make a counterclaim for breach of contract as it was in breach of contract itself. At the point of the Claimant's resignation due to a fundamental breach of contract the parties no longer owed any contractual duties to each other. As such, after 14 February 2018 the Claimant could not have been in breach of contract by taking up employment with another company. Accordingly, the Respondent's counterclaim against the Claimant was dismissed."**

9. It is clear from those findings that the ET, as it says in the first sentence of paragraph 46, found that the Respondent had committed a fundamental breach of contract entitling the Claimant to resign, which he did, and on that basis his claim of constructive wrongful dismissal was made out.

10. Having found on that claim in the Claimant's favour, the ET went on to determine compensation and its reasoning is set out at paragraphs 47 to 50. The Claimant had claimed that he should be compensated for the remainder of his contract of employment, i.e. for the entire season which he expressed to be up to and including 20 May 2018. He had argued below there was no general right to terminate the contract of employment on notice and that therefore the constructive wrongful dismissal meant that he should be paid for the remainder of the fixed

A term. For reasons I will come on to in a moment, that might be thought to be in accordance with orthodox contractual principles.

B 11. The ET, however, rejected that claim and its reasons for doing so are seen at paragraph 48 where the ET said this:

> **"However the Tribunal did not accept this argument. The contract of employment contained in clause 24, which confirmed that the Claimant had the right to terminate the contract of employment on the giving of 14 days notice in respect of a serious breach of contract by the Respondent"**

C 12. At paragraph 49 the ET then quotes clause 24 of the contract:

> **"If a club is guilty of serious or persistent breach of the terms and conditions of the contract, the player may terminate this agreement by serving a notice of termination to take effect after 14 days on the club".**

D 13. This, in the ET's mind, was specific to the circumstances in this case in respect of the failure to pay wages and benefits. At paragraph 50 the ET goes on to say that accordingly the ET awarded the Claimant 14 days loss of wages for the notice period before applying the statutory ACAS uplift. Therefore the Claimant was awarded the sum of £1,050, representing

E 14 days loss of wages, plus a 15% uplift.

14. Mr Isenberg argues that paragraph 48 to 50 represents an error of law in the approach to

F calculation of damages and that the ET was wrong to rely on clause 24 of the employment contract as limiting the Claimant's entitlement to damages for wrongful dismissal. I have been greatly assisted by the points made by Mr Isenberg in his skeleton argument and I will set out the analysis relatively briefly for these purposes.

G

15. First, the purpose of damages for breach of contract is to put the innocent party in the position that they would have been in if the contract had been performed. That is to say if the

H particular provisions of the contract had not been breached. Second, in making an assessment as to damages for breach of contract, the contract breaker is to be taken as having performed his

obligations in the least onerous way possible, within its legal powers under the contract. Mr Isenberg relies for that principle upon **Lavarack v Woods of Colchester Limited** [1967] 1 QB 278.

16. Mr Isenberg submits, quite rightly, that in the normal case of wrongful dismissal the assessment of damages is the comparison between what the Claimant did in fact receive and what the Claimant would, as a matter of contract, have been entitled to receive had the employer performed its obligations in the least onerous way possible. In many cases, that would be what would have happened had the employer given the notice that is provided under the contract. However, in a fixed term contract, as in this case, the starting position would be what the innocent party, the employee, would have received over the remainder of the fixed term period.

17. The exercise for the ET would be to consider the contract in the light of the facts and ask what power the Respondent had to terminate and what sums would have been earned over the minimum period through to termination.

18. In this case the Respondent's rights are as follows. First, there is no general right to terminate the contract on notice. Second, the contract was for a fixed term to expire on the last game of the season, that date being a known fact. Third, the Respondent did retain a power to terminate under clause 22, but only in cases of serious or persistent breach on the part of the Claimant. It was not alleged, at any stage of the proceedings below, that clause 22 operated. It was not suggested that there had been a serious or persistent breach on the Claimant's part at the point that he had terminated.

19. Therefore, in consequence applying the contract to the facts of this case, the Respondent had no right to terminate the contract before the end of the fixed term period. Nor did the ET find that the Respondent did have such a right. Indeed, the ET appears not to have addressed that question at all, because at paragraphs 48 and 49 the ET directed itself to clause 24, which concerned the Claimant's rights to terminate the contract of employment, giving notice in circumstances of serious breach of contract.

20. The Claimant raises two features that give rise to an error of law. First, following the analysis I have just set out, the Claimant's right to terminate under clause 24 was not a right of which the Respondent could avail itself. Therefore the ET directed itself to the wrong type of clause, if I can put it that way. Second, in effect, paragraph 48 and paragraph 49 mean that the ET limited the Claimant's power to terminate in circumstances where there was a breach to operating clause 24 - the contractual mechanism for termination, rather than terminating the contract at common law by accepting the repudiatory breach of contract.

21. The Claimant says: first, clause 24 was the wrong term for the ET to consider; second, there had been no election to operate clause 24 of the contract; and third, the ET was wrong implicitly to regard clause 24 as excluding the common law right to accept a repudiation.

22. In a case where a contractual right to terminate is provided expressly, two questions may arise in relation to the common law right to terminate by accepting a repudiation. First, as a matter of construction, does the express term of the contract exclude the common law right to accept a repudiation? Second, as a matter of fact, was the mechanism of termination the operation of the expressed contractual term, or was it an acceptance of the repudiation at common law?

23. Mr Isenberg says the following in relation to the point of construction (paragraphs 21.1 to 21.3 of his skeleton argument). First in the absence of the termination clauses, the Claimant would undoubtedly have been entitled, as a matter of common law, to accept the repudiation and resign immediately and claim damages for the duration of the contractual period, as to which proposition, he is plainly right. Second, he says, it is a matter of legal orthodoxy that where a contract contains a termination clause, that will not usually preclude termination at common law. He relies on **Stocznia Gdynia SA v Gearbulk Holdings Limited** [2010] QB 27 at paragraph 20 and paragraph 17.16 of Lewison's sixth edition of *The Interpretation of Contracts*. Third, he says that to the extent that the ET interpreted clause 24 as excluding a common law right to terminate on repudiation, that is both contrary to principle and would require clear words to that effect, relying on **Dalkia Utilities Services Plc v Celtech International Limited** [2006] 1 Lloyd's Rep 599 at paragraph 21.

24. I can see scope for argument as a matter of construction in a given case as to whether or not common law rights are excluded, but I accept Mr Isenberg's submission that one would need clear wording in the express terms of the contract to exclude a common law right to accept a repudiation. However, in this case that issue does not arise for determination because this can be dealt with as a matter of fact in the light of the ET's findings.

25. The ET made an express finding that the mechanism of this termination was a constructive wrongful dismissal and it arose by the Respondent having committed a repudiatory breach of contract which the Claimant accepted by resigning with immediate effect. That is clear from the ET's reasoning at paragraphs 45 and 46 to which I referred earlier in this Judgment. Therefore, in those circumstances, the ET having found that this was the acceptance

of a repudiation at common law, it was appropriate for the ET to go on to determine damages in the ordinary way. In those circumstances clause 24 has no bearing on the assessment of damages. The enquiry for the ET should have been what loss did the Claimant suffer from being deprived of the right to continue to be employed for the remainder of the fixed term.

26. In my judgement, the ET, without the benefit of legal representation for either party, has erred in law in its approach to the principles for calculation of damages for wrongful dismissal. I allow the appeal in relation to ground one against the findings set out at paragraph 47 to paragraph 50.

Ground 1: Disposal

27. The next question, having reached that conclusion, is what is the EAT to do with the matter? The normal course of action where an error of law has been found by the EAT is to remit the matter to the ET for a re-hearing in the light of the relevant legal principles. The guiding authority for the EAT's jurisdiction in this matter is **Jafri v Lincoln College** [2014] ICR 920, a decision of the Court of Appeal, the leading judgment being given by Laws LJ. I can take the relevant principles from the headnote (at 920 F to G)

> "**the only function of the Employment Appeal Tribunal was to see that the decision of employment tribunal were lawfully made, that if the appeal tribunal detected a legal error by an employment tribunal, it had to remit the matter, unless either it concluded that the error could have affected the result and was therefore immaterial, or though the results would have been different without the error, the appeal tribunal was able to conclude what the result would have been, and, in either case, the result had to flow from findings made by the employment tribunal, supplemented (if at all) only by undisputed or indisputable facts; that the appeal tribunal was not to make any factual assessment for itself, or any judgment of its own as to the merits; that in any case where, once the employment tribunal's error of law was corrected, more than one outcome was possible, it had to be left to the tribunal to decide what the outcome should be, however well placed the appeal tribunal might be to take the decision itself"**

28. Therefore, having identified an error of law on ground one, the question is whether the EAT is able to conclude what the result would have been, relying on the findings made by the

ET supplemented, if at all, only by undisputed or indisputable facts. **Jafri** makes clear that the EAT cannot make any factual assessment for itself or any judgment of its own as to the merits.

29. Given the relatively small value of this appeal, this is a matter that has caused me some difficulty. I have been greatly assisted by Mr Isenberg's submissions this morning that the ET findings and undisputed facts show me all that I need in order to make a decision as to the correct amount of damages in the Claimant's case. However, I have reached the conclusion that I am not able to do that. The ET did not make findings in relation to loss over the period of the reminder of the fixed term and I am not satisfied that there are sufficiently clear undisputed or indisputable facts to allow me to make that decision myself.

30. The ET closed its mind to the assessment of damages for the remainder of the fixed term by deciding that only 14 days loss was recoverable and therefore it did not go on to look at the position as it would have been over the remainder of the relevant period. I accept Mr Isenberg's submission that the rate at which wages would have accrued, and the accommodation allowance would have accrued were not in dispute between the parties. That is clear from the ET's Reasons where, at paragraph 12, it makes findings as to those matters. There is an additional matter in relation to health club benefits that the ET did not make findings about but, in an effort to reduce the scope of factual uncertainty, Mr Isenberg indicated on behalf of his client this morning that he would be prepared to abandon that element of his claim for damages.

31. The ET does not make a finding as to when the fixed term would have come to an end. However, I am directed to paragraph 47 where the ET refers to the Claimant's representative's argument that the end of the season would have been on 20 May 2018. In my judgement that is

A a recital of a submission rather than a finding but it makes no difference in this case because I have seen the pleaded case of both parties and it seems not to be in dispute. So it was an undisputed fact that the end of the season was on 20 May 2018.

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32. However, in my judgement, the real difficulty of this case is mitigation. The Claimant accepts that he was under a duty to mitigate his loss during the period, and he gives credit for what he says in his schedule of loss were the sums that he earned. The Respondent challenges the mitigation position in its counter schedule of loss on two grounds. The arguments raised may or may not have been good ones but the problem for the EAT is that the ET made no findings whatsoever as to the Claimant's earnings, and no findings whatsoever as to whether or not his alterative earnings were reasonable mitigation or whether other or steps should have been taken.

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33. Therefore, I am in a position where there are no findings as to loss for the remainder of the notice period from the ET, and although I have great sympathy for the Claimant's position in relation to recovery of damages for a relatively short period, I am afraid the matter is going to have to be remitted to the ET to make findings on the proper basis as to loss for the remainder of the fixed term.

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34. That deals with ground one of the Appeal.

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Ground 2

35. Ground two relates to holiday pay. Mr Isenberg's skeleton argument characterises it in this way, "The Tribunal erred in law in halving the Claimant's entitlement to holiday pay on the basis of the number of hours he worked on average per week".

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36. The ET had found that first the Claimant was entitled to paid holiday, and second that the Respondent wrongly had not given credit for that entitlement to holiday, either by allowing that holiday to be taken during the course of employment or by making a payment on termination in relation to that. The ET found that the Claimant was entitled to rights in relation to annual leave under the **Working Time Regulations** as he was a worker under Regulation 2(1) of the **Working Time Regulations**.

37. The ET also accepted at paragraph 55 of the Reasons, that the amount of accrued by unpaid holiday at the date of termination was 2.4 weeks, and accepted that the pay rate in relation to that period, led in the first instance to an amount of £484.62 per week.

38. Mr Isenberg for the Claimant criticises the ET's decision at paragraph 55 to halve that rate of pay on a pro rata basis to reflect the finding that the Claimant had worked an average of 20 hours per week. The ET appears to have regarded 20 hours being half of what it regarded as a normal 40 hour working week. The ET said this:

> **"55. It was accepted that the Claimant did not take holiday during this period of time and the Tribunal found that the Claimant worked an average of twenty hours per week. The Claimant's holiday entitlement should be pro-rated to reflect his twenty hours per weeks (twenty hours divide by forty hours) and the entitlement claimed by the Claimant in his Schedule of Los should be divided by tow. Accordingly, the Claimant is awarded £581.54 in respect of holiday entitlement which is to be uplifted by 15% (£87.23) and the Claimant is awarded a total payment of £668.77 in respect of unpaid holiday entitlement at the termination of his Employment."**

39. I agree with Mr Isenberg that paragraph 55 shows a clear error of law in the decision to pro rata, as it said, the holiday entitlement. It is a notable feature of the Reasons, perhaps brought about by the absence of legal representation below, that apart from the reference to **Regulation 2(1)** of the **Working Time Regulations** identifying the Claimant as a worker, there is no reference to the principles in the **Working Time Regulations.** The ET Judge did not

expressly direct herself as to the entitlement to annual leave under **Regulation 13** and **13A,** nor as to the entitlement to payment in respect of annual leave at **Regulation 16(1)** and **16(2).**

40. For the purposes of this Judgment I do not need to cite those in full but **Regulation 16(1)** and **(2)** makes clear that on termination an employee, or a worker, is entitled to a week's pay in respect of each week of leave.

41. Mr Isenberg relies upon the Court of Appeal's decision in **Harpur Trust v Brazel** [2019] IRLR 1012. The leading judgment was given by Underhill LJ. I take from the headnote the following quotation (page 1012):

> **"On any natural construction the Working Time Regulations make no provision for pro-rating. They simply require the straightforward exercise of identifying a week's pay in accordance with the provisions of sections 221-224 of the 1996 Act and multiplying that figure by 5.6"….**

42. 5.6 being the full amount of leave to which an employee or worker could be entitled over the whole of a leave year, applying both **Regulations 13 and 13A.** In the course of his judgment Underhill LJ said this at paragraph 57:

> **"He also referred to the judgment of the Inner House, given by Lord Eassie, in *Russell v Transocean International Resources Ltd* [2010] CSIH 82, [2011] IRLR 24. That case concerned offshore oil-rig workers who worked a pattern under which they had two weeks on the platform and two weeks off, so that they worked a total of 26 weeks per year. The issue was whether they were entitled to take their annual leave out of the weeks when they would otherwise be at work. It was held that they were not, and that decision was upheld by the Supreme Court ([2011] UKSC 57, [2012] ICR 185). That is not the issue before us – the Claimant accepts that her leave is taken in the school holidays – but Lord Eassie had occasion to consider the position of workers who only worked for part of a week. He said, at paras. 34-35 ([2022] IRLR 24 at 29-30):**
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> **'34. … [W]e see Article 7 of the WTD as requiring that there be provided to the worker within the year (which need not be a calendar year), at least four remunerated weeks of the weekly cycle in which he is free from work commitments.**
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> **35. On that reading of the WTD, those particular days during the employee's seven day working week on which the employee does not actually work are not generally reckonable towards annual leave. The point is perhaps best illustrated by the example, canvassed in argument, of the part time worker who may work three days per week - say Monday to Wednesday inclusive. Were the employer entitled to treat Thursdays as being weekly rest and Fridays and the weekend as annual leave, that would have the effect of requiring that part time worker to attend for work on each of the 52 weeks of the year. That, in our view, would infringe what is required of Member States by Article 7 of the WTD. What that article requires is that, within the leave year, there are at least four weekly cycles in which the part time worker is not required to turn up and put in his part time hours. *We would add that while the part time worker thus obtains four***

> ***weeks in which he does not require to attend for work, the pro rata temporis principle still applies, because in terms of days of annual leave the part time worker receives the appropriate proportion of that which would be received by the full time worker within that weekly cycle*** **[emphasis supplied]."**

43. He said this at paragraph 63:

> **"I start by clearing some ground. Although the pro rata principle for which Mr Glyn contends is general in its application, it is important to appreciate that in this case we are concerned specifically with the position of part-year workers. We are not concerned with its application to workers who work part-time in the other sense noted at para. [2] (2) above, namely those who work throughout the year but for only part of the week. The position as regards entitlement to leave of such workers is, if I may say so, correctly analysed by Lord Eassie in the final sentence of the passage which I have quoted from his judgment in Russell. They are entitled under both the WTD and the WTR (ignoring, in the interest of simplicity, regulation 13A) to four weeks' annual leave. They are accorded that entitlement by being given four weeks in which they are not required to work at all, though of course all that they are actually relieved from having to work is the particular days in those weeks that they would have worked otherwise: in his example that is three days. In that sense their holiday entitlement amounts to only (in the example) twelve days, and the WTR do indeed, as he says, apply the pro rata principle. Lord Eassie could also have added, though it was not germane to the particular point that he was making, that the effect of regulation 16 was that the holiday pay to which such workers would be entitled for those weeks would be based on an average taken over twelve weeks in which they had likewise been working part-time, so that it would only represent three days' earnings and in that respect also would respect the pro rata principle. But that is not the issue here. In the 5.6 weeks of the school holidays that notionally constitute the Claimant's annual leave she is likewise only being relieved from working the number of hours for which she would have given lessons, and her holiday pay also will be based only on her earnings from such lessons. What we are concerned with is whether she should receive less than her entitlement, so calculated, in order to reflect the fact that she does not work throughout the year".**

44. The Court of Appeal's decision in that case tells us no more than is apparent from the face of the Regulations: the exercise of working out the amount of pay in relation to untaken leave is simply a question of the number of weeks multiplied by the amount of a week's pay as calculated in accordance with the relevant sections of the **Employment Rights Act 1996**. In this case there was no disagreement as to the number of weeks. The ET made a finding as to that. Nor was there any disagreement as to the relevant week's pay for the Claimant, because although his hours may only have been 20 on average, and may have varied, his weekly pay was fixed by the contract.

45. Therefore, the exercise for the ET was simply to multiply a week's pay by the number of weeks that had been taken. There was no basis for the pro-rating to cut that amount in half, and in doing so at paragraph 55 the ET erred in law.

Ground 2 Disposal

46. As to the disposal of this ground of appeal, this is a case where applying the principles in **Jafri** the answer is obvious, we have all the necessary ingredients of the claim in the ET's Reasons. Both the period of holiday leave to which the Claimant was entitled and the amount of pay per week. The only step in relation to which the ET erred was by halving the amount that was claimed by the Claimant in applying the relevant principles. It should not have halved it and the right answer is that the full amount claimed should have been awarded. I substitute for the ET's decision, an award in the sum claimed in the schedule of loss, i.e. twice the amount which the ET awarded.

47. The ET awarded an uplift of 15% on the amount of the holiday award that it ordered and that 15% should be applied to the unreduced holiday pay as correctly calculated. Following this Judgment I will ask the Claimant's legal advisors to draw up an order that reflects the principles I have set out in relation to substituting that amount of holiday pay.