EMPLOYMENT TRIBUNALS

Claimant: **Mr Bell**

Respondent: **Securitas Security Services (UK) Limited**

Heard at: Newcastle CFCTC (by CVP) **On:** **15 November 2021**

Before: Employment Judge Newburn

Appearances
For the Claimant: Mr Bell, in person
For the Respondent: Ms Bann (Solicitor)

RESERVED JUDGMENT

The Claimant's annual leave should be calculated in accordance with Section 221(2) of the Employment Rights Act 1996.

REASONS

Introduction

1. This is a claim regarding holiday pay brought by 6 employees working for the Respondent. Mr Bell is the designated lead Claimant. The Claimants all bring claims of unlawful deduction from wages relating to the calculation of their annual leave. The Claimants maintain that the Respondent has changed the basis upon which annual leave payments are calculated and this has resulted in them being (and continuing to be) underpaid.

2. The Respondent claims that it has always calculated each of the Claimants' annual leave payments in accordance with section 221(3) of the Employment Rights Act 1996 ('**ERA'**) which it asserts is the correct method of calculation. This method of calculation involves determining an employee's average pay across a

reference period. Until 6 April 2020, this reference period was 12 weeks; however, the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018, changed the reference period to 52 weeks, and the Respondent confirms that it changed the reference period in line with that legislation.

3. The Claimants claim that this is not the correct method of calculating their annual leave.

Issues

4. It had been decided at an earlier case management hearing that remedy was not within the scope of the current hearing and was agreed that the issue to be resolved at this hearing would be determining the basis upon which the Claimant is entitled to have his holiday pay calculated. I discussed this with the parties at the start of the hearing and the list of issues for the hearing was agreed as follows:

    4.1. How should the Claimant's annual leave pay be calculated:

        4.1.1. Should it be calculated in accordance with a contractual term as asserted by the Claimant; if not,

        4.1.2. Should annual leave pay be calculated under Section 221(2) ERA or under section 221(3) ERA.

The hearing

5. The hearing took place on Cloud Video Platform (CVP). The lead Claimant, Mr Bell attended at the hearing and confirmed that the other Claimants would not be attending at the hearing to give evidence. A diary error meant the Respondent's representative had not initially attended the hearing. However, the Respondent's representative was contacted and did attend shortly thereafter. She confirmed that she had prepared for the hearing in advance and made arrangements so that she could attend to represent the Respondent on the day, however the Respondent's witness Mr Austin was not available to attend the hearing.

6. I had an agreed hearing bundle running to 289 pages as well as a witness statement bundle, with witness statements from each of the 6 Claimants as well as further witness statements from 3 other employees working for the

Respondent. I had one witness statement from Mr Austin, who is the Respondent's HR and TUPE advisor.

7. At the hearing, Mr Bell was the only witness in attendance at the hearing from either party. I reviewed the hearing bundle and discussed with the parties whether it would be possible to progress the hearing on this basis.

8. Mr Bell confirmed that had no questions he wished to put to the Respondent's witness and did not object to me considering the evidence in his witness statement notwithstanding him not being present at the hearing. Mr Bell explained he was happy to progress with the hearing on the day.

9. The Respondent's representative confirmed that she did have questions for the other Claimants and witnesses.

10. I considered the parties' views, and the hearing bundle; it appeared to me that this was not a case in which the factual events were heavily (if at all) disputed and the issue for me to determine was principally an academic one which meant the parties' arguments would primarily be raised in their submissions.

11. Noting that Respondent's representative had questions for the other Claimants in this matter and they were not in attendance at the hearing for me to discuss their claims, I decided to limit this hearing to a determination of the issues on Mr Bell's case only. Practically, it is likely that the Judgment on the issue in Mr Bell's case will be of assistance to the other Claimants in this matter.

12. There was no animosity between the parties who were cooperative and pleasant throughout the hearing. The parties explained that they simply wished to hear the outcome of the issue in order to ensure the correct method of calculating annual leave was being used going forward, and to discern whether annual leave had been paid correctly in the past, and if not, to rectify that issue.

Findings of Fact

13. There were no great disputes as to the relevant findings of fact. I set out only those I consider relevant and necessary to determine the agreed issues set out above. I have, however, considered all of the evidence provided to me and I have borne it all in mind.

14. The Respondent is a company that provides a range of security services to clients across the UK. Historically the Respondent acquired a number of other Security companies, and in or around 2011 it acquired Chubb Security. Nissan is one of the Respondent's clients. The Claimant, and all of the Claimants in the proceedings joined to this one, work at the Nissan site.

15. The Respondent's annual leave year runs from 1 January to 31 December. In April each year the Respondent carries out an annual pay review however, that review is dependent on negotiations with its clients and as a result staff pay rises are not guaranteed.

16. The Claimant is a senior security supervisor, working at the Nissan Site. He began working in the security industry as a security officer on 1 August 1991, with Allied Security. Further to a series of transfers by operation of law pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('**TUPE**') throughout the years, his employment passed from Allied Security, to Lockhearts Security, to Mitie Security, to Chubb Security, and finally his employment was transferred to the Respondent in 2011.

17. The Claimant's evidence was that each year of his employment from 1991 to date, his employer at the relevant time carried out an annual salary review in April and he had achieved a rise in his hourly rate of pay every year of his employment to date bar one year.

18. The Respondent's annual leave year runs from 1 January to 31 December. In April each year the Respondent carries out an annual pay review, however the Respondent's evidence was that this is dependent on negotiations with its clients and staff pay rises are therefore not guaranteed.

19. The Claimant is and has always been paid hourly and, until reaching an alternative agreement in 2013 (detailed in paragraph 25 below), he was entitled to 28 days annual leave.

20. The Respondent stated that due to the nature of the role and varying client requirements, its security officers with guaranteed hours usually work on a shift system.

21. Like the other Claimants in the joined proceedings, the Claimant used to work a 3 week shift pattern consisting of 7 days on work and 4 days off work followed by 7 days on work and 3 days off work. The shifts worked alternated between 3

night shifts and 4 day shifts then 4 night shifts and 3 days shifts, each shift is 12 hours long and is always paid at the employees' set hourly rate. This meant the Claimant's overall weekly hours would cycle in a repeating pattern every three week at 72 hours, 48 hours, 48 hours.

22. The Claimant's shifts were fixed at 12 hours, and he was paid at a fixed hourly rate which did not change depending on the day or on the timing of his shift, (for example the Claimant did not receive a higher rate of pay when his shift was either a night shift, or on a weekend). However, the Claimant was entitled to receive double his hourly rate if his shift fell on a bank holiday.

23. In March 2013, the Claimant was asked to change his shift pattern by the Respondent's client Nissan.

24. From this time the Claimant's agreed to a change in his shift pattern and he began to work on a two week shift pattern with 60 hours in the first week, and 57 hours in the second week. His working hours are as follows: 12 hour shifts on Monday to Thursday each week, and on Fridays, the Claimant alternates weekly between working a 9 hour shift and then a 12 hour shift the following week. As before, the Claimant's hourly rate of pay does not change depending on the day or on the timing of his shift.

25. Additionally, at this time the Claimant's evidence was that his contract was also amended by agreement so that he is not required to work on any bank holiday but would receive his regular contractual pay for this and not double pay. This essentially had the effect of increasing his annual leave entitlement to 28 days plus bank holidays.

26. The Respondent stated that if the Claimant were to work a bank holiday in future the Claimant would remain entitled to receive double pay.

27. The Claimant stated his shift patterns are fixed, and have been throughout his employment since 1991, only changing via agreement, such as the agreement in 2013. His evidence was that he would be able to tell me with certainty what days he would be working in any given period, and how much his gross pay would be for that period.

<u>7/21 Split term</u>

28. In the Claimant's oral evidence, he stated that Allied Security operated a holiday year which ran from 1 April to 31 March however, during his time working with Allied Security, it changed the holiday year to 1 January to 31 December.

29. The Claimant asserted that when Allied Security changed its holiday year to run from 1 January to 31 December it was agreed that the pay rate for his annual leave would be split across the year ('**the 7/21 split**'). The 7/21 split worked as follows; in any year in which he achieved a pay rise further to his annual review, regardless of when in the leave year he took his leave, his first 7 days of annual leave would always be calculated at his hourly rate as was payable to him from January to March of the year in question ('**the pre pay rise rate**'), and his remaining 21 days of annual leave would be paid at the hourly rate payable to him between April and December of the year in question ('**the post pay rise rate**').

30. The logic behind this was to encourage staff to evenly distribute their annual leave throughout the year, rather than saving up all annual leave until after April, so as to receive holiday pay at the higher post pay rise rate.

31. The Claimant asserted that his contractual terms and conditions, including the 7/21 split term, had remained the same throughout each of the relevant transfers that took place culminating in his contractual terms being preserved upon his transfer to the Respondent.

32. The Claimant did not have a copy of this employment contract, and he was not able to provide any documentation demonstrating the 7/21 split being operated in practice throughout his employment.

33. The bundle contained witness statements from 7 other witnesses, (4 of which are currently Claimants in proceedings joined to this one) from witnesses who, like the Claimant all work at the Nissan Site, and who had all worked for either Allied Security, or joined Lockhearts Security, and had their employment transferred through the series of companies until ultimately being transferred to the Respondent in 2011 alongside the Claimant.

34. Each of those witnesses assert in their statements that their annual leave was calculated in accordance with the 7/12 split term. However, I was not provided with any documentary evidence from those witnesses regarding the 7/21 split term, either by way of an employment contract or section 1 statement of particulars which made reference to it, payslips demonstrating its use in practice,

evidence from Nissan on the issue, or contemporaneous letters or emails confirming the existence of the 7/21 split term.

35. The Claimant stated in evidence that during the transfer from Mitie Security to Chubb Security, there was a breakdown in communication and Mitie Security did not provide any contractual details regarding the transferring employee's contractual terms to Chubb Security. The Claimant's evidence was that Chubb agreed the Claimant's terms and conditions would not be altered and they would transfer and maintain their previous terms.

36. The Respondent confirmed that it was not provided with copies of the Claimant's contract when his employment was transferred from Chubb Security and it was not aware of the 7/21 split term or provided with any details regarding it. Accordingly, it states that it has always calculated the Claimant's annual leave in accordance with the relevant statutory provisions.

37. The Respondent's evidence was that having been involved in numerous transfers affected by TUPE, it does not have a policy of deliberately harmonising its employees' terms and conditions of employment and even has employees working on over 30 different contracts of employment. The Respondent highlighted that where it had information regarding the Claimant's terms and conditions those terms were maintained; an example of this was demonstrated by an email string in 2013.

<u>2013 emails</u>

38. In 2013 the Claimant spoke with the Respondent regarding his holidays. The email thread in the hearing bundle (pages 246 – 249) indicated that a Mr Neave spoke with HR about the issue on the Claimant's behalf explaining that the Claimant had been paid 11.8 hours for an annual leave day, however he should have been paid for 12 hours.

39. In response to this query the Respondent investigated the matter and on 10 July 2013 a HR advisor for the Respondent explained that the number of hours for holidays had been calculated based on averages. Thereafter the email thread shows that the Respondent responds to confirm that because the Claimant was transferred under TUPE, his contract confirmed each of his 28 days annual entitlement would be set at 12 hours, and not calculated by reference to an average of the hours he had worked in any period.

40. The parties therefore agreed that the Claimant was entitled to 12 hours pay for each day of annual leave he took. This was regardless of when he took that leave, meaning if he took that leave on a Friday upon which he was due to work his 9 hours shift, he would still be paid for 12 hours work.

41. The Claimant had suggested this email thread indicated his holiday pay was not based on an average pay calculated by reference to a particular period but was instead fixed. The Respondent highlighted that this email communication only relates to the amount of holiday the Claimant was entitled to and does not shed any light on the way in which payment for those holidays was calculated. The Respondent confirmed that whilst it was agreed that the amount of holiday the Claimant received was not to be calculated by reference to an average of previous hours worked over any period, the payment for annual leave was still calculated as an average of pay the Claimant had received over the relevant period.

42. The Respondent asserted it has always followed, and continues to follow, the BEIS guidance on calculating holiday pay for employees. A copy of this document was in the bundle at pages 278 – 289 of the bundle. The Respondent stated that this guidance stipulates that for employees with a shift pattern with fixed hours (full or part time) the pay for annual leave should be calculated on the basis of the average number of weekly fixed hours worked in the previous 52 weeks, at their average hourly rate.

43. Accordingly, the Respondent asserted it has always and continues to calculate the Claimant's holiday pay in accordance with section 221(3) ERA, taking his average pay over the relevant reference period. Pre 6 April 2020, this reference period was 12 weeks and further to the amendment to Regulation 16 Working Time Regulations 1998 ('**WTR**') the reference period was increased to 52 weeks in April 2020.

44. In April 2020. the Claimant first became aware that the Respondent was not making payment of his annual leave in accordance with the 7/21 split.

45. The Claimant explained that the increase in the reference period to 52 weeks had a noticeable impact on his pay because he had always (bar one year) received an annual pay increase in April, part way through the annual leave year (1 January – 31 December).

46. The increase in the reference period from 12 weeks to 52 weeks meant that when the Claimant had received an annual pay rise at the beginning of April, his holiday pay for a day of annual leave in July, would be lower than his holiday pay for a day of annual leave in December; this would even be the case if he had chosen the same equivalent day in his shift pattern for both days of annual leave. To put it another way, if the Claimant were to take 2 weeks of annual leave covering one full shift rotation, he would receive less pay for the same 2 week holiday taken in July than if he took it in December; however, had he worked this 2 weeks instead, he would have received the same pay for doing so whether he worked that period in July or in December.

47. Where the reference period was 12 weeks, the Respondent was taking an average of the Claimant's pay over (usually) the preceding 12 week period. As a result, the greatest impact this would have on the Claimant's holiday pay would be in the first week after he received his pay rise, since the calculation of his annual leave would include 11 weeks where he had received pay at his pre pay rise salary. Thereafter, the effect would taper with each passing week, until 12 weeks after his pay rise, at which point each of the 12 weeks in the reference period would all have been paid at the Claimant's post pay rise salary.

48. The Claimant had believed the Respondent was making payment of his annual leave in accordance with the 7/21 split; a combination of factors had meant he had not realised this was not the case until April 2020. These factors included the fact that he expected his holiday pay would vary because he believed it was being paid in accordance with the 7/21 split, his payslips did not breakdown how holiday pay was calculated, his payslips varied from month to month as his pay cycle did not align with his shift pattern, and when the reference period was limited to 12 weeks, this had a limited effect on the Claimant's holiday period so the effect would not be obvious in his payslips.

49. The Respondent's evidence was that as most employees take their holiday in the latter half of the year, in the Claimant's circumstances it accepts that both he, and the Claimants in the joined proceedings, would have found it difficult to determine what method of calculation had been used to calculate their holiday pay.

Respondent's submissions:

50. The Respondent submitted that it has always calculated the Claimant's holiday pay by calculating the average pay over a 12 week reference period up until April

2020, thereafter it began to use the 52 week reference period further to the change in the law and in accordance with the BEIS guidance.

51. The Respondent believed this to be the correct basis upon which to calculate holiday for the following reasons:

    51.1. Both parties agreed the Claimant had normal working hours, and that where this is the case, a week's pay would be calculated in accordance with sections 221 - 223 ERA.

    51.2. The Respondent did not believe that section 221(2) ERA should apply because section 221(2) ERA states that it is to be used where an employee's rate of pay in normal working hours does not change with the amount of work done in the period. The Respondent submits that there is no definition of "the period" in section 221(2) ERA; it therefore submits "the period" should equate to the employee's pay reference period. As the Claimant is paid monthly, the relevant period is every month. The Respondent submits that since the Claimant's pay **does** vary from month to month, section 221(2) ERA cannot apply.

    51.3. The Respondent further submitted that because the Claimant was entitled to double pay in bank holidays, his pay could vary each month, and accordingly section 221(2) ERA could not apply.

52. The Respondent highlighted the BEIS guidance which states that to calculate annual leave payments for employees who work on shifts, an employer should take an average of their pay from the relevant reference period, currently 52 weeks, and prior to April 2020, 12 weeks. The Respondent submits the Claimant works shifts and scenarios like his are covered by the BEIS guidance. The BEIS guidance was included at pages 278 – 289 of the hearing bundle and is entitled "Holiday pay Guidance on calculating holiday pay for workers without fixed hours of pay".

Claimant's submissions

53. The Claimant asserts he is contractually entitled to receive pay under the 7/21 split term.

54. In the alternative, the Claimant asserts that he is entitled to be paid in accordance with Section 221(2) ERA. The Claimant submits section 221(2) ERA provides the

correct method of calculation because he has normal working hours, he has a fixed shift pattern, and a fixed hourly rate. His hourly rate does not vary, and he receives the same rate of pay regardless of the amount of work he does within his normal working hours.

55. The Claimant does not believe that Section 221(3) ERA should be used to calculate his wages because his salary does not vary with the amount of work he does.

The law:

56. Section 13(1) ERA provides:

> *"(1) An employer shall not make a deduction from wages of a worker employed by him unless*
>
> *a. the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *b. the worker has previously signified in writing his agreement or consent to the making of the deduction. that a worker has the right not to suffer unauthorised deductions from wages."*

57. Regulation 13 and Regulation 13A of the WTR confirm that an employee is entitled to 5.6 weeks holiday in a leave year.

58. Regulation 16 WTR provides that an employee is entitled to be paid in respect of any period of annual leave to which s/he is entitled under Regulations 13 and 13A at the rate of a week's pay in respect of each week of leave.

59. Regulation 16(2) WTR provides that sections 221 to 224 ERA shall apply for the purposes of determining the amount of a week's pay for the purposes of the Regulation.

60. From 6 April 2020, the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 amended Regulation 16 WTR to provide that the calculation of a week's pay under sections 221(3) and 222(3) ERA should be calculated by reference to a 52 week period instead of a 12 week period.

61. Section 221 ERA states:

"*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*".

62. Section 221(3) ERA states:

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

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

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

63. Section 222 ERA states:

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

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

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

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

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

64. Terms may be implied into employment contracts by custom and practice. To do so, the term must be reasonable (that is fair and not arbitrary), notorious (generally established and well known) and certain (that is clear-cut) (Bond v CAV Co [1983] IRLR 360 and Henry v London General Transport Services Ltd [2001] IRLR 132).

65. In Dudley Metropolitan Council v Willetts [2017] UKEAT/0334/16/JOJ, EAT The EAT held that holiday pay must correspond to "normal remuneration", and "*In order to count as "normal", a payment must have been made over a sufficient period of time, which was a question of fact and degree*." Simler P held that in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis to justify the description "normal", the principle in British Airways v Williams [2012] ICR 847 applied and it would be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. This was approved by the Court of Appeal in East Midlands Ambulance Trust v Flowers UKEAT/0235/17.

66. In Bear Scotland Ltd v Fulton and ors; Langstaff P observed that 'normal pay' is simply pay that which is normally received by the worker. "*There is a temporal component to what is regarded as normal: payment has to be made for a sufficient period of time to justify that label.*"

Conclusions:

67. In the first instance the Claimant claims that his annual leave should be calculated in accordance with the terms of his contract. In his oral evidence the Claimant asserted that his contract states he is entitled to be paid for annual leave in accordance with the 7/21 split as his contract had been varied by agreement to include this term during his employment with Allied Security. The Claimant asserted that his contractual terms (including the 7/21 split term) were maintained whilst his employment passed through a series of transfers and the Respondent was obliged to maintain his contractual entitlement on his transfer from Chubb Security.

68. The burden of proof is on the Claimant to prove the existence of the term upon which he seeks to rely.

69. Unfortunately for the Claimant, his contract of employment was not provided to the Respondent further to his transfer from Chubb Security, and the Claimant believes it had not been provided to Chubb Security further to his transfer from Mitie Security.

70. The Respondent confirms that until part way through these Tribunal proceedings, it had no knowledge of the 7/21 split term. The existence of the 7/21 split term was not part of the information provided to the Respondent by Chubb Security during the transfer, and the Respondent did not have any documentation detailing the term or indicating that it has been raised or discussed prior to these proceedings. Since 2011, payment of the Claimant's annual leave had been calculated based on the average of pay in the relevant reference period (12 weeks, pre 6 April 2020, and 52 weeks after that date).

71. I had no contemporaneous documentary evidence before me at the hearing to confirm the existence of the 7/21 split term, or that the Claimant's annual leave had ever been paid in accordance with the 7/21 split.

72. The Claimant gave witness evidence at the hearing on the 7/21 split term and provided witnesses statements from 7 other witnesses stating they believed their annual leave was paid in accordance with the 7/21 split term. However, the Claimant's statement, and the other 7 witness statements contained one paragraph regarding the 7/21 split term which had been copied and pasted into each statement and did not therefore provide much further information regarding the term; only the Claimant was available at the hearing to answer questions relating to his evidence.

73. Whilst 8 witnesses all assert the 7/21 split term exists, I was not provided with any documentary evidence from any of those 8 people to support this position. The evidence indicated that term had never been raised or discussed with the Respondent until these proceedings, and I was not provided with any documentary evidence demonstrating that it had ever been applied to any of the 7 witnesses or to the Claimant.

74. I found this lack of documentary evidence significant, and whilst I found the Claimant to be a credible and honest witness, because of the lack of supporting

evidence before me, he was not able to overcome the burden of proof with regards to the 7/21 split term and accordingly he was not able to rely upon it.

75. Equally there was not enough evidence before me at the hearing to demonstrate that the 7/21 split term had been incorporated by custom and practice. To do so, as highlighted by the Respondent's representative, the term would need to be reasonable, notorious, and certain. To be notorious the term needs to be customary or widespread in a particular trade or locality or at a particular workplace. There was no documentary evidence before me at the hearing to demonstrate that the 7/21 split term was customary in the security industry. Whilst the Claimant asserted the term was operated across the Nissan Site, I was not provided with any documentary evidence at the hearing to support this position. The Respondent's evidence was that it had never applied this term at the Nissan site or any other site and, since his transfer to the Respondent in 2011, the Claimant had not been paid his holiday in accordance with the 7/21 split term. This evidence before me at the hearing did not then demonstrate that the term was 'notorious'.

76. Accordingly, I find that there was not enough evidence brought before me at the hearing to permit the Claimant to rely upon the 7/21 split term as a method for calculating his annual leave.

Statutory method of calculation

77. I therefore needed to determine what was the correct method of calculating the Claimant's annual leave pay. In absence of an express term or written contract, this would be determined by statute.

78. Regulation 16 of the WTR confirms an employee is entitled to be paid at a rate of "a week's pay in respect of each week of leave" in accordance with sections 221 – 224 ERA.

79. Both parties agreed the Claimant had always had "normal working hours". There is no statutory definition of "normal working hours" and the words should simply be given their natural meaning. I found that the Claimant had previously worked on a fixed 3 week shift pattern, and in 2013 he began working a fixed 2 week shift pattern; he did not regularly work overtime, change the days in his shift, or change his shift pattern. Accordingly, my findings of fact confirm the Claimant had normal working hours and had always worked normal working hours.

80. Where a worker has "normal working hours" sections 221- 222 ERA should be used to determine the rate payable to the worker for annual leave.

Application 221 – 222 ERA to the Claimant

81. I considered the wording of the statute carefully and applied it to my findings of fact regarding the Claimant in order to determine the correct method of calculating his annual leave.

82. The starting position is set out in section 221 ERA which states that it is "*subject to section 222*", I therefore began by examining whether section 222 ERA applied.

Section 222

83. Section 222 ERA states it is to be used in situations where a worker's pay varies according to the day or time that the worker works. Where this is the case, section 222 ERA (as amended by the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018) confirms that the correct method for calculating a worker's pay would be by taking the average pay received by the worker over a 52 week reference period (previously a 12 week reference period). Section 222 ERA is most commonly used as the method of calculation of a week's pay for shift workers in circumstances where their shifts are not fixed or where they receive increased pay for working on weekends or night shifts for example.

84. I found that the Claimant is paid a set hourly rate and that rate does not vary according to the day he works or the time of his shift. The Claimant's shifts are fixed and regular and he is not frequently required to change them or work other shifts.

85. Therefore, although the Claimant could be considered a shift worker, and section 222 ERA is most usually used to calculate ha week's pay for shift workers, section 222 ERA is not applicable to the Claimant because, on my findings of fact, his rate of pay does not vary according to the day or time of his shift.

Bank Holidays

86. The Respondent highlighted that the Claimant would be entitled to double his hourly rate if he were to work a bank holiday, and therefore this would mean his

pay would vary according to the day he works. In my findings of fact however, I found that further to the agreed change in his shifts in 2013, the Claimant did not thereafter work bank holidays. His pay does not therefore vary where his working week includes a bank holiday, and section 222 ERA would still not apply to the Claimant.

87. Notwithstanding that, even if the Claimant were to work under a 3 week shift pattern as he previously had done, subject to hearing evidence regarding the Claimant's working hours whilst working on that shift pattern, I would still not be inclined to consider section 222 ERA to be appropriate.

88. Section 222 ERA asks that we consider whether the employee's "normal working hours" includes days or times where the employee's pay rate varies. Accordingly, we must establish whether the Claimant's pay varies during his "*normal working hours*" and to do so, we first need to determine the Claimant's "normal working hours".

89. Whilst there is no statutory definition of "normal working hours" case law provides some guidance on this topic where the higher Courts and Tribunals have been asked to consider what constitutes "normal" hours and "normal" remuneration in the context of considering whether various types of payments, commission, and overtime can be included when calculating an employee's annual leave with reference to a "week's pay" under sections 220 -224 ERA.

90. In those cases, the guidance indicates that when determining whether a particular number of hours worked may be considered "normal", one must consider whether the pattern relating to those hours extends for a sufficient period of time on a regular and/or recurring basis to justify the description "normal".

91. Applying the guidance from the case law, where the Claimant were working on a 3 week shift pattern, it seems unlikely that the occasions upon which the Claimant's shift had fallen upon a bank holiday could be adequately considered sufficiently regular and frequent so as to determine that such a shift could be considered part of the Claimant's "normal working hours". Section 222 ERA states that is should be used when an employee's pay varies according to the day or time that the worker works "*during*" *his "normal working hours"*. Since shifts that fall on a bank holiday are unlikely to be considered within the Claimant's "normal working hours", we would not consider their effect on the Claimant's pay for the purposes of section 222 ERA. What remains then is to

review whether the Claimant's pay varies on days or at times during the Claimant's "normal working hours", which it does not; accordingly, I would not consider section 222 ERA to apply.

Section 221(3)

92. The Respondent made oral submissions that section 221(3) ERA should be used to calculate the Claimant's pay which, similar to Section 222 ERA, confirms that a week's pay should be calculated by taking the average pay over a 52 week reference period. Section 221(3) however relates to employees whose pay varies according to the amount of work they do. Section 221(3) ERA is most frequently used as the method for calculating a week's pay for 'piece work'.

93. As detailed above, I did not find it to be the case that the Claimant's pay varied with the amount of work he carried out during his normal working hours. The Claimant receives his hourly rate for each of his normal working hours worked, this is the case regardless of whether he attended work and carried out his duties to an exemplary level or in a lacklustre fashion. The Claimant does not carry out 'piece work' and his pay does not fluctuate with regards to the amount of work he carries out in his normal working hours. Accordingly, the method of calculation set out in section 221(3) ERA does not apply to the Claimant.

Section 221(2)

94. The BEIS Guidance, to which the Respondent refers, confirms it is to be used in circumstances where the employee does not have fixed hours or pay, and sets out guidance where those circumstances apply, most notably giving detailed guidance on how to carry out these calculations for shift workers. However, in accordance with my findings of fact, although he works in shift patterns, the Claimant has fixed hours, and has a fixed rate of pay. In the circumstances as I have found them to be, I do not find this guidance and its calculations relating to shift workers applies to the Claimant.

95. Having ruled sections 222 ERA and 221(3) ERA as inapplicable to the Claimant, I turn to section 221(2) ERA. It applies in circumstances where an employee's rate of pay does not vary with the amount of work that the employee does during their normal working hours. Where this is the case, the employee should be paid at their contractual rate as at the day their annual leave is taken.

96. I have found that the Claimant had normal working hours, and that where the Claimant worked his "normal working hours", his pay did not vary for any reason. Applying these findings of facts to the statutory provisions, on a careful consideration of the statutory wording, I find that the correct method of calculating the Claimant's annual leave is dictated by section 221(2) ERA.

97. The Respondent has calculated the Claimant's annual leave by taking his average pay over a relevant period. I find that this was not the correct method of calculation. This is a Judgment on the issue of liability only; there will therefore be a hearing to deal with the issue of remedy.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 1 February 2022

Format of the Hearing
The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the Government Guidance in connection with the coronavirus pandemic and it was in accordance with the overriding objective to do so