Case number: 3303591/2019 & others (as on attached schedule)

EMPLOYMENT TRIBUNALS

Claimant: Mr Jonathan Goodhand & others

Respondent: Felixstowe Dock and Railway Company

Heard at: Bury St Edmunds **On:** 2 – 14 December 2022

Before: Employment Judge Laidler (sitting alone)

Representatives:

For the represented claimants: Ms N Ling, Counsel

For the respondent: Mr C Jeans KC
Mr A Edge

RESERVED JUDGMENT

1. Voluntary overtime is in principle to be included within the calculation of a 'week's pay' for some of the test claimants.

2. The test claimants whose overtime was sufficiently regular and settled for the voluntary overtime to be included are – Bowers, Cable, Double, ~~Fenn~~, Fidgett and Humphreys but not Da Costa, Craig, Dagnall, Fenn, Frost, Loftus, Rhodda and Symes.

3. HGP should be included in the calculation of the holiday pay of Craig, Frost, Da Costa, Dagnall and Rhodda (Cable not pursuing his claim for such at this Hearing and reserving his position)

4. The appropriate 'reference period' for the calculation of the holiday pay in these proceedings is 52 weeks.

5. These conclusions will apply only to the 4 week Regulation 13 WTR leave and not to Regulation 13A.

REASONS

Procedural History

1. The claims of Mr Turley (who subsequently withdrew) and Mr Goodhand were received on 1 February 2019 bringing a claim of unauthorised deductions and holiday pay in respect of voluntary overtime only.

2. On 20 September 2019 claims were presented in respect of Nathan Bruce and 741 other claimants of deductions in respect of overtime payments and holiday pay. Claims in respect of all the test claimants were included in this multiple.

3. On 23 December 2019 claims were brought by Mr Garrett and 83 others.

4. On 13 December 2019 an application to amend was made to include claims for HGP (higher grade pay) to also be reflected within holiday pay. This application was granted on 18 February 2020.

5. Further applications to amend the claims to permit deductions post dating the presentation of the claim form to be included in these proceedings were made and granted (pursuant to the approach in Prakash v Wolverhampton UKEAT/0140/06 and the Presidential Guidance on such amendments.

6. Further particulars on the HGP claims were given on 30 August 2022.

Test claimants

7. The selection of the test claimants and the difficulties that arose have been set out in previous case management discussion summaries following hearings on 22 July and 5 October 2022. The 13 who have been selected by the parties are to test the content, scope and application of the principles by which statutory holiday pay is to be computed. They have also been chosen as a sample from the claimant group numbering over 800. They are not “lead” cases under Rule 36 but the resolution of these 13 should assist in resolving the remainder by agreement, once all appeals are spent.

8. The 13 individuals ultimately selected: –

Mr Double has been throughout his employment an engineer (E)

Mrs Loftus has been throughout her employment, staff (S)

Mrs Craig was until May 2019 an operative (O) when she became an S on promotion

The other 10 have been throughout employment operatives (O)

The Issues

9. The following represents the agreed list of issues for determination by this tribunal. As has been recorded in it this tribunal is not being asked at the present hearing to consider questions of quantification, the amounts of the claimants' contractual entitlements to pay, questions as to the periods of leave to which the 4 week and 1.6 weeks entitlements are respectively to be allocated or questions as to whether deductions form a "series". It is understood that the appeal in Chief Constable for NI v Agnew [2019] IRLR 782 which will have a bearing on such matters is shortly to be heard by the Supreme Court.

Introduction

1. The Claimants contend that their entitlement to holiday pay pursuant to the Working Time Regulations 1998 ("WTR") includes pay they received, over a representative time period, in respect of:

    1.1. **Voluntary Overtime**. This claim is pursued by each of the Claimants; and
    1.2. **Higher Grade Pay**. This claim is pursued by the Claimants highlighted in yellow in the table appended at Schedule 1 of the List of Issues dated 1 December 2022 (including Test Claimants JC Craig and EG Frost) and also by Test Claimants CJ Cable, SJ Da Costa, N Dagnall and GC Rhodda.

2. The Claimants contend that the omission by the Respondent to include such sums in their holiday pay constitutes an unlawful deduction of wages, pursuant to section 13 Employment Rights Act 1996 ("ERA").

3. The issues relating to each of the heads of claim identified above at paragraph 1 are addressed separately below.

4. Sample Claimants have been selected for consideration at a hearing, scheduled for 2 December to 15 December 2022.

Issues Currently Reserved for Argument at the Appropriate Appellate Level

5. The issues listed at paragraphs 6 below are (subject to the emergence of fresh authority prior to the hearing scheduled as above) reserved for argument at the appropriate appellate level.

6. To the extent that EU law may be relevant to the questions which follow:

(i) Is the relevant EU law directly effective against the Respondent (which is a private company and not an emanation of the state) having regard to:

(a) the principle that Directives do not in general have direct effect against private parties;
(b) the effect of Protocol No 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom ("The Charter") which Protocol provides that nothing in Title IV of the Charter (including the right to paid holiday) creates justiciable rights applicable to the United Kingdom, except in so far as the United Kingdom has provided for such rights in its national law?

(ii) If by virtue of the Charter the relevant EU law was directly effective against the Respondent:

(a) Did such direct effect cease at 31 December 2020 by virtue of s5(4) and para 39 of Schedule 8 of the European Union (Withdrawal) Act 2018 as amended?

(b) Are the Claimants accordingly unable to rely on such direct effect for any period after 31 December 2020?

(iii) Is the exclusion of voluntary (and/or all non-guaranteed) overtime by the relevant provisions of the ERA (including section 234) to be disregarded by way of "interpretation" of the WTR.

Voluntary Overtime

7. Pursuant to regulations 13 and 16 of the WTR and, subject to paragraph 6 above, Article 7 of Directive 2003/88, is voluntary overtime in principle included within or excluded from the calculation of a "week's pay" for each or any of the Sample Claimants?

8. In particular, as a matter of law, are voluntary overtime earnings capable of amounting to "normal remuneration"?

9. If so, in what circumstances are such earnings to be included?

10. Are such earnings to be included only in the circumstances contended for by the Respondent, namely that:

10.1. The voluntary overtime in question must be usually worked (within the appropriate reference period), that is to say on a significant majority of occasions; and/or

10.2. The occasions on which voluntary overtime is worked must be regular; and/or

10.3. The occasions on which the overtime is worked must be expected; and/or
10.4. The voluntary overtime worked must form a significant element of pay; and/or

10.5. The number of hours worked, or at least the minimum number of hours worked must be regular and expected.

11. On the facts before the Tribunal, which, if any, periods of voluntary overtime earnings of each or any of the Sample Claimants are to be included in the computation of pay for each holiday in respect of which an "in time" claim is made? [This will require resolution of further subsidiary questions set out from paragraph 16 below.]

12. It is agreed between the parties that the Claimants' claim is limited to 20 days of holiday per year, no claim being pursued in respect of Regulation 13A WTR (i.e. purely UK domestic) holiday pay.

Higher Grade Pay (HGP)

13. Does Higher Grade Pay, qualify for inclusion in holiday pay under the WTR 1998 and, subject to paragraph 6 above, the WTD 2003/88?

14. In particular, in respect of each or any of the Sample Claimants, was the incidence of Higher Grade Pay, as the Respondent contends of an [irregular, impermanent or abnormal] character such as not to qualify for inclusion?

15. If and to the extent that Higher Grade Pay does qualify for inclusion in holiday pay, which, if any periods of Higher Grade Pay are to be included in the computation of pay for each holiday in respect of which an "in time" claim is made? [Note: this will require the resolution of further subsidiary questions set out from paragraph 16 below].

Issues Relevant to Both Heads of Claim

(i) Reference Period

16. What is the appropriate reference period for the purposes of the above claims:

(a) for the purpose of establishing normality, regularity or other qualifying characteristic;

(b) for the purpose of calculation, to the extent that any liability arises in principle?

17. Is it in each or either case:

(i) Twelve (12) weeks;

(ii) Fifty-two (52) weeks; or

(iii) Some other period, identified by the Tribunal, pursuant to s. 229(2) ERA or otherwise?

Mechanics and Calculation

18. Pursuant to Regulations 16(2) and 13 of the WTR 1998 (and regulation 13A WTR in respect of the claim relating to Higher Grade Pay) and under Section 221 ERA, interpreted or modified as appropriate so as to comply with the WTD subject to paragraph 6 above, did each or any of the Sample Claimants' remuneration in normal working hours vary with the amount of work done in the period in question?

18.1. If it did not vary, what is the amount, pursuant to section 221(2) ERA and Regulation 16 WTR, which was payable by the Respondent under the contract of employment in force on the first day of leave, had each Sample Claimant worked throughout their normal working hours?

18.2. If it did so vary, what is the amount, pursuant to section 221(3) ERA and Regulation 16 WTR, of remuneration for the number of normal working hours in a week, calculated at the average hourly rate of remuneration payable by the Respondent over the representative reference period identified above?

19. To the extent that voluntary overtime and/or Higher Grade Pay are properly to be included in the holiday pay of each or any of the Sample Claimants how is the amount of such pay to be quantified by the Tribunal?

Time Limits

20. Does the Tribunal have jurisdiction to consider each (or any) of the Claimants' claims? In particular:

20.1. Has each Sample Claimant brought their claims within 3 months (plus any extension applicable under the statutory conciliation provisions) of the last alleged deduction comprising the disallowance of overtime earnings from holiday pay?

20.2. Has each Sample Claimant brought their claims within 3 months (plus any extension applicable under the statutory conciliation provisions) of the last alleged deduction comprising the disallowance of Higher Grade Pay from holiday pay?

20.3. Does the Tribunal only have jurisdiction to consider a claim in respect of a "series" of deductions where there is less than a three-month gap between any alleged deductions from wages?

21. In any event, it is common ground between the parties that any "series" of deductions is limited to any shortfalls in the two years before each claim was presented to the Employment Tribunal.

10. For this hearing the tribunal had the following: –

A bundle of documents comprising 3427 pages divided into sections A to T, sections F to R contained documents relating to each of the test claimants

3 bundles of authorities (715 pages)

Charts (of various sizes) showing the overtime and HGP payments worked and received by the test claimants

A table of discrepancies between the claimants and respondent's charts

Written opening and closing submissions on behalf of both parties

11. The tribunal heard from the following witnesses: -

For the respondent

Toby Allerton, Senior Manager – Workforce Planning

Nicholas Luck, Human Resources Director

Gavin Brunning, Senior Manager – Planning

Simon Sagi, Resource Planning Manager

Only Mr Allerton was cross examined on behalf of the claimants, the contents of the other 3 witness statements not being disputed

For the claimants:

Christopher Cable

Jaclyn Craig

Steven Da Costa

Nathan Dagnall

Stephen Double

Kester Fenn

Mark Humphreys

Teresa Loftus

Gareth Rhodda

Lewys Symes

The tribunal did not have any evidence from the following 3 test claimant, Mr W Bowers, Mr NJ Fidgett and Mr EG Frost. The other claimants were all cross examined on their witness statements.

The Facts

12. From the evidence heard the tribunal finds the following facts.

13. The respondent (commonly known as “the Port”) is the U.K.’s busiest deep seaport handling about 36% of the U.K.’s import and export container business through its container terminals supported by 3 rail terminals together with high volumes of wheeled – cargo (primarily trailers) through its Roll – on Roll – off Dooley Ro – Ro terminal. It provides a 24 hours a day/365 days a year service.

14. As of 1 November 2022, the Port employed approximately 2550 people. In addition to employing stevedores, those who operate cranes and drive vehicles, the Port employs engineers, clerical, supervisory and managerial staff and operates its own Port Constabulary, Fire and Ambulance arrangements with a Medical Centre and Seaman’s Mission on site. The employees can be categorised as follows: –

1532 plant drivers

200 labourers

54 engineers

766 clerical, supervisory or managerial roles

15. The following represents an overview of the test claimants set out in Mr Allerton’s witness statement and provided in an agreed document to the tribunal at the outset of these proceedings.

	Name	Job title/payroll cycle	Collective Agreement	Roster pattern	Hrs/ week	Years service	O/T Claim	HGP Claim
1	Bowers *	RTG Driver Weekly	Hourly	Quayside	42	14	Y	
2	Cable	Tug Driver Weekly	Hourly	Quayside	42	22	Y	Y
3	Craig	Process Controller (Vessel) Monthly	Staff	Quayside	42	26	Y	Y
4	Da Costa	Tug Driver Weekly	Hourly	Quayside	42	25	Y	Y
5	Dagnall	Container Lift Truck Driver (5 days) Weekly	Hourly	5 – day RTG	40	18	Y	Y

6	Double	Container Truck Driver (5 days) Weekly	Engineer	Quayside	42	21	Y	
7	Fenn	Quayside Gantry Crane Driver Weekly	Hourly	Quayside	42	24	Y	
8	Fidgett *	Tug Driver Weekly	Hourly	Quayside	42	17	Y	
9	Frost *	Rail Tug Driver Weekly	Hourly	Rail Except No Saturdays	40	30	Y	Y
10	Humphreys	Tug Driver Weekly	Hourly	Quayside	42	18	Y	
11	Loftus	Terminal Planner 3 Monthly	Staff	Quayside	42	37	Y	
12	Rhodda	RORO Tug Driver Weekly	Hourly	Dooley	39	19	Y	Y
13	Symes	RTG Driver	Hourly	5 – Day RTG	40	19	Y	

*Did not give evidence

16. The Port has an unpredictable workload and schedules change regularly. Labour requirements on each shift vary based on workload with frequent changes in demand, for example, when vessels change their arrival time or amend their schedule to call at a different Port first. To deal with this the Port operates a series of shift patterns which are designed to meet a relatively low base level of fixed labour on each shift which the Port then tops up with additional labour on the shifts required. The additional labour is obtained by flexible shift employees, voluntary overtime and contractors. Mr Allerton accepted in evidence that with volatile shipping and rail demands and unexpected events e.g., weather the respondent would seek to avoid fixed costs and use overtime instead when needed. In his reply statement at paragraph 60 he commented on the suggestion that the Port could reduce overtime by employing more staff full time and stated that whilst that would be feasible 'there would be risks associated with adding fixed cost when workload varies significantly, and the union and employees would be very quick to complain about any development which restricted overtime opportunities'. Overtime is therefore an integral part of the Port's 'labour model'. (see also paragraph 49 of his original statement).

17. The following shift patterns are used: –

Quayside pattern – 8 week rotating cycle – consists of 2 days, 2 nights followed by 4 rest days. The shifts are 12 hours. This provides 24 hours per day coverage for quayside functions. It operates 7 days per week all year round and is used in other areas of the Port which operate on a 24/7 basis like engineering.

Rail pattern – 3 week rotating cycle – this covers 7 days and nights over 6 days per week is really is closed on Saturday night and Sundays. All shifts the 12 hours and the pattern averages 44 hours per week over the 3 week cycle.

5 day RTG pattern – 3 week rotating cycle – RTG is a rubber tyred gantry crane. This patent covers days and nights over 5 days per week. All shifts the 12 hours and the pattern averages 40 hours per week over the 3 week cycle.

Dooley pattern – 3 week rotating cycle – worked by employees at the Dooley terminal servicing the roll on roll off ferries and geared specifically to the ferry sailing schedule. The pattern averages 39 hours per week over the 3 week cycle.

18. Overtime working is voluntary. Almost all of it is worked as an extra shift on what would otherwise be a non-working day. As most basic time shifts are for a 12 hour period it is not possible to work an overtime period before or after a shift because of the rules on working time.

19. There is an employee portal on the Port's intranet. Access to it is via an Employee App issued to employees. If they wish to work overtime they go onto this App and 'tick' the shifts they would like to work.

20. The Labour Management System (LMS) collates all the employee availability for overtime and ranks them using an algorithmic priority system which has been agreed between the unions and workplace representatives. It puts those who have done the least overtime in the current reference period at the head of the queue.

21. Usually, employees who have requested overtime will know at least the day before whether it is to be offered to them. It can also be cancelled prior to the shift by the planners if the resource is no longer required.

22. Even if they have expressed a wish to do overtime by "ticking" in the App the employee can then turn overtime down if offered it. They are not obliged to do it even though they have indicated a wish to do so on the App.

23. Overtime is paid at enhanced rates agreed with the union and recorded in collective agreements. There are approximately 1900 employees represented by Unite the Union ('Unite') at the Port covering the hourly paid group of employees. The Port recognises Unite for collective bargaining purposes for the entire hourly paid workforce.

24. Unite also has members within staff roles for example Mrs Craig and Mrs Loftus.

25. The conditions of service of the 55 hourly paid Engineers are governed by the Engineering Collective Agreement, with Unite being the recognised union for collective bargaining purposes for that group within the Port.

26. The applicable Collective Agreement for the Test claimants is set out in the table above.

27. All contracts incorporate the appropriate Collective Agreement.

28. The Collective Agreement for Operational Employees states at clause 5.1:

'All paid absences (e.g. holidays) will be paid at the employee's contractual basic pay as defined in 1.3 above'

Clause 1.3 states that:

'Contractual basic pay is made up of basic pay (including contractual overtime), shift pay and SLVP (Shift length variability pay)'

This tribunal is not concerned with contractual overtime.

3.2 provides:

'Voluntary overtime is additional hours which the employee volunteers for in addition to working their rostered hours. Rules for voluntary overtime are as per sub – section 2.7'

29. The Collective Agreement applicable to Hourly Paid Engineering Employees cross refers to the Operational Employees agreement in respect of the above matters.

30. The Collective Agreement applicable to Supervisory and Clerical Grades has similar provisions to the above.

Higher Grade Pay ('HGP')

31. To be able to cover the fluctuations in its work and demand the Port needs to be able to move employees between roles to balance out skills required. It does this by ensuring that it has a significant number of people who are multiskilled and can be deployed to different tasks as required. These employees are volunteers who have been upskilled by the Port through training and licensing and are known as "Reliefs".

32. The workforce is informed of training opportunities and interested employees invited to volunteer. Those selected undertake the requisite training programme

and are relieved of other duties to facilitate this. On successful completion they are issued with the appropriate licence as evidence that they have achieved the necessary level of competence and are authorised to operate the equipment they have been trained on. Once licensed any Relief is required to respond to instructions to work in any relief role for which they are qualified in both basic time and overtime. They will receive Higher Grade Pay (HGP) where the rate for the role is higher than their own.

33. The labour planning team is known as the Resource Office. Shift patterns are in place to cover the base-level of labour required on top of which the Resource Office will make an initial labour-resourcing plan for a maximum of two weeks ahead arranging some flexible labour based on projected problem shifts. However, much of the planning has to be carried out at short notice to cover sickness, holiday and other variables for example, the weather.

34. HGP maybe for all or part of a shift as required, paid in 15 minute increments. Any relief who holds the relevant licence can be deployed for that task at any time. The Resource Office will simply text them or their work supervisor will ask them to change role. They are generally deployed on an ad hoc, day-to-day basis. They may be moved to different roles at short notice. This could be during a shift, for example to cover sickness arising during it or to drive a piece of equipment for a short period.

35. An assignment may however last for a few weeks depending on requirements although that is rare.

36. The collective agreements applicable to the test claimants claiming HGP payments as part of annual leave contain terms with regard to higher grade working and HGP. It is provided that HGP be reflected in holiday pay where the employee has undertaken the higher grade role continuously for the previous 13 weeks. Mr Frost qualified for holiday pay based on his HGP allowance on that basis.

Agreed Facts

37. Some matters were agreed between the parties in correspondence of 22 November 2022. (Bundle T, p3326 & 3435). As these go to the issue of calculations, which this Hearing is not concerned with, they are noted but not set out here.

The individual test claimants

38. In relation to each of the test claimants the tribunal had tables setting out the overtime worked by each individual claimant prepared by the claimants'

solicitor. It also had similar tables in relation to those claimants claiming HGP. The respondent had prepared charts showing the same information. There were some discrepancies between the two and these were set out in a 2 page undated note handed up to the tribunal. As this tribunal will not be concerned with calculations at this time it does not propose to record those discrepancies in these reasons.

39. For the same reasons the tribunal will not cover in these reasons the detail of the Amended Particulars of Deductions served by the claimants on 29 November 2022 (and the tables for each claimant served with the original document on the 28 November 2022). Further, that document reserves the claimants' position in relation to deductions arising with a gap of more than three months between them and that later part of a series pending the Supreme Court decision in Agnew (referred to above).

40. What has been recorded in relation to each test claimant is the period during which it is claimed the respondent made unauthorised deductions from wages and on how many occasions, together with the tribunal's findings in relation to each individual sample claimant.

Christopher Cable

41. Mr Cable has been employed by the respondent since 22 February 2000. He has worked in various sections but from May 2013 returned to the Tug section container division as a tug driver which is where he currently works.

Overtime

42. Mr Cable claims that the respondent made unauthorised deductions from his wages on 27 occasions between 15 August 2019 and 25 November 2021. (Bundle T/3369 – 70)

43. Mr Cable worked the following overtime:

2016	55 shifts (51 of 12 hours, 3 of 8 hours and 1 of 11 hours = total of 647 hours)
2017	57 shifts (All of 12 hours = total of 684 hours)
2018	76 shifts (1 of 8 hours and 75 of 12 hours = 908 hours)
2019	77 shifts (all of 12 hours = 924 hours)
2020	46 shifts (all of 12 hours = 552 hours)
2021	31 shifts to the end of November (all of 12 hours = 372 hours)

44. In evidence Mr Cable confirmed he liked to do overtime but would stop doing it so often when his wife suggested he was doing too much. Also, he himself could 'get sick' of doing it if he had been doing it quite often and would then have a break from it. If they had a holiday coming up or for specific expenditure he would do overtime. As he is now considering life after retirement he is trying to build a 'nest egg' and will do more overtime when he can. He accepted he can choose when to put himself forward for overtime and is under no pressure from management to do so.

45. When taken to the charts and tables of his overtime record he explained how in 2020 he had received some compensation following an accident so decided not to do any overtime. There were also lockdowns during that period. Although the staff at the Port were classed as key workers he was 'pretty ginger' about being at work then and was being cautious. After the first national lockdown Mr Cable only worked 2 shifts up until July. Once he had witnessed the health and safety systems put in place to protect the shifts he got back into doing overtime again. He worked overtime shifts ever month to the end of the year.

46. The chart for the quarter April – June 2019 shows quite a bit of overtime compared to only one shift for that quarter in 2020. Mr Cable recalled having gone on a cruise in March 2019 that had been quite expensive which might have explained him working more overtime after it.

47. In 2021 there were only 2 overtime shifts worked up to the beginning of May, after which Mr Cable did more overtime and at least monthly to the end of the year.

48. In describing the system, he confirmed that although he usually got the overtime he wanted by using the App there were fluctuations and there was no pattern. It 'ebbed and flowed'. Save for 2020 and 2021 Mr Cable was averaging more than one session of overtime a week. Until 2020 there were no months when overtime was not worked.

HGP

49. Mr Cable performed HGP duties for several years until the end of February 2018. No claim is currently pursued by him at this Hearing because his last HGP shift was worked more than 52 weeks before the first instalment of pay in respect of which a claim can be pursued following Bear Scotland. He reserves his right to do so depending on the outcome of Agnew.

50. Mr Cable explained that once an employee held a licence to do higher grade work he or she could be asked to perform that at anytime. This might be when someone had called in sick or was just late and you might only perform the task for 30 minutes. It was not permanent but for the session you were asked to do.

Jaclyn Cheryl Craig

51. Mrs Craig has held various roles since commencing employment with the respondent in 1996 but in 2009 became an internal tug driver (IT driver). She continued in that role until the end of May 2019 when she was promoted to her current role as process controller. Prior to that promotion she had applied for and gained two HGP licences; that of vessel controller in March 2015 and a rail controller in March 2016.

Overtime

52. Mrs Craig claims that the respondent made unauthorised deductions from her wages on 21 occasions between 21 March 2019 and 15 December 2021 (Bundle T/3371-2).

53. The charts and tables show that Mrs Craig worked the following overtime:

2016	5 shifts (3 of 12 hours and 2 of 8 hours = 52 hours)
2017	11 shifts (3 of 12 hours, 2 of 6 hours, 5 of 8 hours and 1 marked w/2 = 90 hours)
2018	22 shifts (14 of 12 hours, 7 of 8 hours, 1 of 2 hours = 226 hours
2019	3 shifts (22 hours)
2020	2 shifts (18 hours)
2021	12 shifts (110 hours)

54. Mrs Craig was very frank in explaining that her husband also works at the Port and in 2016 they worked the same shifts. It would be a joint decision by them as to whether to work overtime so that they could be at work together and would only work overtime if they both got it. She just did 5 overtime shifts in 2016.

55. When asked about some of the overtime shifts in 2017 Mrs Craig stated that the 6 & 8 hour ones she believed were when she was doing higher grade work. There was no overtime worked between 13 March and 28 May. After the shift on 29 May there was no overtime worked until 21 August. 4 shifts were worked from then to the end of the year.

56. In 2018 there were 7 shifts of overtime in January which Mrs Craig believed were when she would do a shift on tugs and then come back in at night as Process Controller, a role she had always wanted to do. The 8 hour overtime were likely to be in that role and the 12 hour shifts on tugs.

57. Mrs Craig gained promotion to Process Controller in May 2019 and then did little overtime at all. She explained her pay had increased and therefore she did not need overtime so much. She began electing to do overtime again in

2021 to be at work with her husband trying to coincide with his shifts. Since her promotion she would mainly do overtime if she needed the extra money, for example at Christmas.

58. For the period for which the claim is brought on 9 occasions she had not worked any overtime in the 3 month period immediately preceding the alleged deduction. The first alleged deduction is 21 March 2019 but Mrs Craig had not worked any overtime since 8 November 2018. By 2020 and 2021 the later part of the claim Mrs Craig had been promoted and on her own evidence hardly did any overtime.

HGP

59. Once promoted in 2019 Mrs Craig stopped performing higher grade work as she had been promoted into the role she had been doing the higher grade work in. It was in her words 'irrelevant to me' after that. She explained however that when she had done it she could be told on the same day of the shift or possibly a day in advance that this was required of her. She could even receive a message when working on the tug that she was needed in the higher grade role. She accepted that by its very nature HGP was an acting up allowance which you could be called upon to perform on the spot or pulled off at any time.

60. The following information is taken from the tables and summarises the number of times HGP duties were performed:

2016	71 times
2017	115 times
2018	118 times
2019	32 times

<u>Steven John Da Costa</u>

Overtime

61. Mr Da Costa claims that the respondent made unauthorised deductions from his wages on 28 occasions between 21 February 2019 and 23 December 2021 (Bundle T/3373-4).

62. Mr Da Costa commenced employment with the respondent in September 1997. Shortly after he started working in his current role as Tug Driver. He obtained a RTG driver licence approximately 20 years ago. The charts and tables show that Mr Da Costa worked the following overtime:

2016	17 shifts (2 of 6 hours, 11 of 8 hours, 3 of 10 hours and 2 of 12 hours = 154 hours)

2017	27 shifts (2 of 6 hours, 7 of 8 hours, 14 of 10 hours, 4 of 12 hours = 256 hours)
2018	26 shifts (4 of 8 hours, 3 of 10 hours, 18 of 12 hours = the claimant's evidence is the was 286 hours which may be accounted for by 16 February showing '1010' as the overtime worked).
2019	15 shifts (I hour, 1 of 8 hours and 13 of 12 hours = which on the claimant's evidence totalled 174 hours)
2020	5 shifts (2 of 8 hours, 10 hours, 2 of 12 hours = 50 hours)
2021	3 shifts (1 hour, 2 of 24 hours = 25 hours)

63. Mr Da Costa gave evidence that he had never done much overtime. He would do it when he felt like it and was under no pressure to do it. He had undergone a number of knee operations including one in October 2109 following which he had a phased return to work, but he was not then limited in what aspects of his job he could do. When he chose to do overtime was unrelated to his knee.

64. When he did tick to do overtime Mr Da Costa would choose 6 or 8 hours but that was not preferred by the respondent and he would be offered 12 hours which he did not always want to do so it would be offered to someone else.

65. For the period for which the claim is brought on 11 occasions he had not worked any overtime in the 3 month period immediately prior to the alleged deduction. The last occasion claimed is the 23 December 2021. Mr Da Costa had worked no overtime since 3 May 2021. If a 12 month reference period were taken he had only worked 3 sessions of overtime (one in April 2021 being of only 1 hour) Another example is the alleged deduction of 4 June 2020. Mr Da Costa had only worked overtime 3 times that year in April and May. Before that he had not worked any since 26 August 2019. Going back 12 months he had only worked 7 shifts of overtime.

HGP

66. Mr Da Costa had been licenced to perform HGP duties in about 2003/4 but this was rescinded on medical grounds a few years later due to his knee. After the knee replacement surgery in October 2019, he reapplied for his crane licence and regained it in March 2021 after successfully completing further training. The HGP shown in the charts for 2021 was therefore the first for several years, as follows:

2021	36 times (and various periods of sick leave).

67. Mr Da Costa explained that on a given morning he could look at what he was due to do at work and it would show tug driving and by the time he arrived at work he would be crane driving as higher grade work.

Nathan Carl Dagnall

68. Mr Dagnall commenced employment on 8 January 2004 as a Warehouse Operative. He later moved onto tug driving for approximately 10 years. About 2 years ago he was promoted to Empty Container Handler having worked as Relief in that role for a time.

Overtime

69. Mr Dagnall claims unauthorised deductions from wages on 46 occasions from 23 November 2017 to 28 October 2021.

70. Mr Dagnall worked the following voluntary overtime

2016	9 shifts (1 shift of 8 hours, 8 shifts of 12 hours = 104 hours (given in witness statement as 92 hours)
2017	12 shifts of 12 hours = 144 hours
2018	22 shifts (1 shift of 8 hours and 21 shifts of 12 hours = 260 hours
2019	19 shifts (1 shift of 8 hours and 18 shifts of 12 hours = 224 hours)
2020	20 shifts (2 shifts of 8 hours and 12 shifts of 12 hours = 160 hours
2021	19 shifts of 12 hours = 228 hours

71. Mr Dagnall accepted that there were times when he did overtime and times when he did not. He did it when he wanted to do it and although he continued to work during the pandemic he chose not to do much overtime. He does not rely upon it for normal expenditure but earns it for the unexpected and luxuries. He would not know from one month to the next if he wanted to work it and accepted therefore that the respondent could not predict when he might want to do it. He acknowledged that there were a whole host of reasons that influenced the availability of overtime form wind and weather to strikes around the world or blocked shipping lanes.

72. The first alleged deduction is the 23 November 2017. In the 3 months prior Mr Dagnall had only worked 2 shifts of overtime. For the deduction on 16 July 2020 the claimant had only worked one shift of overtime in the 12 weeks prior and not done any prior to that since 13 February 2020. Taking a 12 month period he had only performed 11 shifts

HGP

73. Mr Dagnall performed some higher grade work from September 2019 to the end of March 2021 when he was promoted into the role he was acting up for and the HGP therefore stopped. The following information is taken from the tables:

2019	33 times
2020	82 times
2021	31 times

74. The last deduction relied upon is the payslip 28 October 2021. Mr Dagnall had not performed any higher grade work since 25 March 2021. The respondent points out in its closing submissions that he seems to be claiming that HGP formed part of his normal renumeration at a time when he was no longer earning it (paragraph 258).

<u>Stephen Mark Double</u>

75. Mr Double has worked for the respondent since April 2001 as a Maintenance Engineer.

Overtime

76. Mr Double claims unauthorised deductions on 41 occasions between 27 June 2019 and 25 November 2021. Mr Double worked the following overtime:

2016	53 shifts (1 described as W/1 and 51 shifts of 12 hours, 1 of 13 hours = 626 hours)
2017	53 shifts (1 described as W/1 and 52 shifts of 12 hours = 625 described in witness statement as 613 hours)
2018	63 shifts (1 of 4 hours 62 shifts of 12 hours = 748 hours)

2019	57 shifts of 12 hours = 684 hours
2020	37 shifts (1 shift of 4 hours and 36 shifts of 12 hours = 436 hours)
2021	69 shifts (68 shifts at 12 hours and 1 at 13 hours = 829 hours)

77. In 2016 Mr Double only did 2 shifts in the first quarter but then 46 shifts in the second half of the year. In that second half the weeks varied from him doing 1 shift of overtime in some weeks to 3 in others. By contrast in 2017 he did more shifts at the beginning of the year than he did in the second half. Mr Double explained that in Engineering there were times when no overtime was available maybe due to budget. He believed that explained why there were less shifts worked at times in 2019.

78. In 2020 with the onset of the pandemic his recollection was that there was no overtime available to start with and then some did become available in the second half of 2020 when systems had been put in place to reduce contact between various shifts. Taking the example of the alleged deduction on 25 June 2020 in the 12 weeks prior Mr Double had not worked any overtime. In the 52 weeks prior he had worked 30 shifts. No pattern can be seen. No overtime was worked from 14 March to the beginning of July 2020. Only 5 shifts were worked in the first quarter of 2020. However in every year save 2020 Mr Double averaged at least 1 if not more shifts of overtime a week.

79. Mr Double accepted that as one of the keenest engineers to want to do overtime that put him at a disadvantage on the App as the algorithm would put him to the bottom after he had done some.

80. Mr Double does not claim HGP

<u>Kester Fenn</u>

81. Mr Fenn has been employed by the respondent since March 1998. His current role is as a Ship to Shore Crane Driver which he has performed since 2002.

Overtime

82. Mr Fenn claims unauthorised deductions from wages on 36 occasions between 14 February 2019 and 31 December 2021. He worked the following overtime

2016	20 shifts of 12 hours = 240 hours

2017	29 shifts of 12 hours = 348 hours
2018	52 shifts of 12 hours = 624 hours
2019	36 shifts of 12 hours = 432 hours
2020	28 shifts of 12 hours = 336 hours
2021	48 shifts of 12 hours= 576 hours

83. Mr Fenn amended paragraph 21 of his witness statement to make it clear that his evidence was that if the employee changes their mind about overtime, for example waking up fatigued or having other personal issues to deal with, they can change their mind and not perform an overtime shift even when they have been allocated it. He was not happy with the words in the paragraph as originally drafted that said you could cancel if you 'don't feel like doing it'.

84. Mr Fenn would work overtime for extra money for luxuries like holidays and gifts but would not rely on it for regular expenses stating it was 'too risky to do so'.

85. Mr Fenn had a problem with his knee which was operated on in November 2016 and that accounted for the low level of overtime that year and sickness absence.

86. Mr Fenn would usually 'tick' to do overtime at night and believed that accounted for times when he did not do any in 2017 as it was not available. In the last quarter he only worked 4 shifts.

87. Mr Fenn performed more overtime in 2018 but it reduced in 2019 to only 36 in the year. There were periods of sickness and Mr Fenn explained he tended not to do overtime in the school holidays. In the last quarter of the year there were only 5 sessions worked and he could not recall why that was.

88. In 2020 Mr Fenn only worked 28 shifts in the year. There was only 1 shift between the beginning of the year and 16 February. Mr Fenn could not recall why that was initially stating it must have been when he had Covid but on looking at the charts accepted that must have been in 2021 when he had 3 weeks off sick in the January. He did recall that overtime was not consistent during lockdown.

89. Mr Fenn also explained that his family life coupled with the availability of overtime would be the main reasons for gaps when none was performed.

90. Mr Fenn does not claim HGP

<u>Mark Francis Humphreys</u>

91. Mr Humphreys commenced employment with the respondent in May 2004 and continues in the role of IMV Tug driver.

Overtime

92. Mr Humphries claims unauthorised deductions from wages on 38 occasions between 22 March 2018 and 16 September 2021. He worked the following overtime:

2016	68 shifts (9 of 8 hours, 59 of 12 hours = 780 hours
2017	73 shifts (3 of 8 hours, 1 of 11 hours and 69 of 12 hours = 863 hours stated as 847 hours in claimant's witness statement)
2018	58 shifts (2 of 8 hours and 56 of 12 hours = 688 hours)
2019	57 shifts of 12 hours = 684 hours
2020	39 shifts of 12 hours = 468 hours
2021	54 shifts of 12 hours = 648 hours

93. Mr Humphreys gave evidence that he just ticked to work overtime when he wanted to but otherwise had no particular rules he applied as to when he would work it. He might cancel an overtime shift if he felt he had not had enough sleep but would try and do so early on.

94. In 2018 Mr Humphreys had sickness absence in January to March and acknowledged that had then affected his ability to perform overtime.

95. In 2019 and 2020 Mr Humphreys had time off to look after his father.

96. In 2021 there were more overtime shifts worked in the beginning of the year and Mr Humphreys thought this would have been down to the weather and preferring to spend more time at home when the weather is good.

97. Although Mr Humphreys felt he did quite a lot of overtime he accepted there was no pattern to it.

98. Taking the deduction alleged to have been made on the 23 July 2020 no overtime had been worked prior to that since March. Between October 2019 and 6 January 2020 no overtime was worked and then none between 25 January and 16 February 2020. On average however (save for 2020) Mr Humphreys did at least 2 sessions of overtime every week.

99. Mr Humphreys does not claim HGP

<u>Teresa Loftus</u>

100. Ms Loftus has worked for the respondent since 195. Her current role is a terminal planner in the Vessel section.

Overtime

101. Ms Loftus claims that there were unauthorised deductions on 25 occasions between 15 July 2018 to 15 December 2021. She has worked the following overtime:

2016	22 shifts (1 6 hour shift, 2 8 hours and 19 shifts of 12 hours = 250 hours
2017	31 shifts (1 hour, 2 6 hour shifts 1 7.5 hour shift, 27 shifts of 12 hours = 344.50 hours)
2018	40 shifts (3 shifts of 1.5 hours, 17 shifts of 8 hours, 19 shifts of 12 hours, 1 of 13 hours = 381.50 hours)
2019	26 shifts (1 hour, 1 shift of 8 hours, 24 shifts of 12 hours = 297 hours
2020	9 shifts (1 of 6 hours, 8 of 12 hours = 102 hours)
2021 hours in	13 shifts of 12 hours = 156 hours, stated as120 witness statement)

102. Ms Loftus explained that her personal circumstances contributed to how often she put herself forward for overtime. When she started with the respondent she was a single parent with two children, the company was very good to her and in return she would do overtime when required. She would use the overtime to assist with unexpected expenditure and to help her children but did not rely on it for regular payments feeling that would be a 'dangerous situation to get into'. As her team got bigger the availability of overtime reduced and was primarily to cover sickness absences.

103. In 2018 there was a contrast between the amount of overtime worked at the beginning of the year and that at the end. Ms Loftus stated that she would only not do overtime if her children were ill or there was non available.

104. In 2019 Ms Loftus did less overtime later in the year and felt that might have been because she had already done quite a bit which would push her to the bottom of the list on the App but also less overtime might have been available as less holidays were being taken at that time of year.

105. In 2020 although Ms Loftus continued working as a key worker throughout the pandemic it was much quieter with shipping schedules affected. Ms Loftus worked only one shift of overtime in the first half of 2020 and then 8 shifts between 19 August and 15 November.

106. In the period of claim taking the alleged deduction on 14 June 2019 Ms Loftus only worked 7 overtime shifts in the 12 weeks prior to that date and 6 of those were between 3 and 29 April 2019, with none in May. If a 52 week reference period were taken Ms Loftus worked 29 overtime shifts with no shifts between 23 June and 22 July 2018, only 2 shifts were worked in the period 25 August to 26 December, 1 between 6 January and 20 February 2019.

107. Ms Loftus does not claim HGP.

Gareth Rhodda

108. Mr Rhodda commenced employment with the respondent on 14 November 2002 as a Roll on, Roll off (RoRo) Operator.

Overtime

109. Mr Rhodda claims unauthorised deductions for 67 occasions between 16 November 2017 and 18 November 2021. He worked the following overtime:

2016	16 shifts (1 hour, 2 - 4 hour shifts, 1 6 hour shifts, 6 6.5 hour shifts, 2 7 hour shifts, 1 10 hour shift and 3 shifts of 11 hours = 111 hours
2017	15 shifts (4 hours, 6 hours, 7 hours, 4 - 7.5 hour shift, 8 shifts of 12 hours = 143 hours)
2018	13 shifts (4 hours, 6 hours, 8 hours, 7 shifts of 12 hours, 3 of 12.5 hours = 139.5 hours)
2019	32 shifts (3 shifts of 1 hour, 7 shifts of 4 hours, 1 of 5 hours, 4 shifts of 7.5 hours, 11 shifts of 12 hours, 5 shifts of 12.5 hours, 1 shift of 13 hours = 273.5 hours
2020	20 shifts (1 of 6 hours, 1 of 7.5 hours, 1 of 8 hours, 2 of 9 hours, 6 of 12 hours, 7 of 12.5 hours, 1 of 13 hours, 1 of 17 hours = 229 hours)
2021	16 shifts (4 shifts of 4 hours, 1 of 5 hours, 3 of 6 hours, 1 of 8 hours, 4 shifts of 12 hours, 2 of 12.5 hours and 1 of 13 hours = 133 hours

110. Mr Rhodda stated in his witness statement that between 2016 and 2020 he would roughly do 24 hours of overtime in a 3 week cycle. In cross examination however he confirmed that he had not had the records now available before him when he made the statement and accepted that those records do not show such a cycle.

111. In 2016 he did 16 shifts of overtime the same number he did in 2021. They were of varying duration and some very short. He accepted in cross examination that in the later part of the year he did overtime on a 'few odd occasions.'

112. Mr Rhodda could not recall the circumstances of 2017 and why he had only done 15 shifts but accepted that was what he was entitled to do and no one could predict the overtime shifts he would choose to do.

113. Since the beginning of 2020 Mr Rhodda has chosen not to do so much overtime but to try and finish some DIY projects at home. In 2020 he only did 6 sessions of overtime from 31 January to 8 May totalling 71.5 hours. He then did none between 9 May and 7 August. He then did more sessions between then and the end of the year.

114. In 2021 there were even less sessions of overtime worked. There were 13 sessions between 13 February and 31 May varying between 4 hours and 13 in length. There was then some sickness absence and annual leave and only 3 sessions of overtime in the second half of the year on 28 August and 2 & 3 December

HGP

115. Mr Rhodda received a full licence as a Relief Chargehand in October 2021 but had started performing HGP duties in December 2020. He performed two sessions on 19 and 30 December 2020.

116. In 2021 Mr Rhodda performed higher grade work once in January, none in February, twice in March and April. He did none in May but 5 in June. There were none in July when he had a period of sickness absence and none in August when he was on annual leave. On returning he did two sessions in August on 16 and 17 and then 5 sessions in September. In October he did 9 sessions and 8 in November. Mr Rhodda explained in his witness statement at paragraph 44 that once he was paid HGP duties for over 17 weeks in a row. He was not challenged on this in cross examination. On an examination of the tables and in particular that at page 2632 the tribunal notes that the sessions for October and November came to 17 but that was only an 8 week and not 17 week period.

117. Mr Rhodda accepted that the requirement to perform higher grade work could occur at very short notice and is measured in units of 15 minutes. It can be for less than 1 hour. In his section there are 5 Relief Chargehands and they decide between themselves who will perform HGP duties for that particular shift if it is required. They then inform the team leader so that the respondent knows who needs to be paid HGP for that day (he was not challenged in cross examination as to that arrangement). This explains the amount of HGP duties in October and November 2021 as one of the Chargehands had left to take on a different role and was not replaced so the HGP duties were split between the remaining Reliefs in the team.

<u>Lewys Symes</u>

118. Mr Symes commenced employment with the respondent in or about October 2003 as a RTG driver. He claims that the respondent made unauthorised deductions on 27 occasions between 4 January 2019 and 18 November 2021.

Overtime

119. Mr Symes carried out the following overtime:

2016	6 shifts of 12 hours = 72 hours
2017	43 shifts (2 shifts of 8 hours, 41 shifts of 12 hours = 508 hours)
2018	40 shifts (4 shifts of 8 hours and 32 shifts of 12 hours = 416 hours)
2019	39 shifts (1 shift of 5 hours, 1 shift of 6.75, 7 shifts of 8 hours, 30 shifts of 12 hours = 427.75 hours)
2020	34 shifts (1 shift of 4 hours, 33 shifts of 12 hours = 400 hours given as 412 hours in witness statement
2021	35 shifts of 12 hours = 420 hours

120. Mr Syme's evidence was that the voluntary nature of the overtime gives the employee freedom. He had been building an extension on his house and has cut down the overtime he was doing to enable him to do that.

121. In 2016 Mr Symes did 4 sessions of overtime in February and then none until April when he did one session and one in May. He then did not do any for the rest of the year.

122. In 2017 he did not do any overtime until April when he did 2 sessions, 1 in May and 6 in June. He then did sessions in each of the months for the remainder of the year. His recollection was that the earlier months were when he was working on the house. He and his wife would also have continual discussions about how much he was working and that might lead to him not doing as much overtime

123. In 2018 Mr Symes did not do overtime between February and May. That was due to the birth of his daughter. In the summer months he will choose not to do overtime as he would prefer not to be at work being a keen cyclist.

124. In 2019 Mr Symes did 12 shifts in the first quarter before a period of sick leave. He did not do any from September to the end of the year. He stated that they often took a family holiday in September and he may then not have got back into doing overtime on his return.

125. In 2020 Mr Symes did 6 shifts of overtime before the first national lockdown confirming (as had other claimants) that although they kept working throughout the Port was affected by events in China. He then did 10 shifts between April and May and then none until one on 26 July. 17 more shifts were carried out between then and the end of the year.

126. In 2021 Mr Symes did 2 sessions of overtime in early January and then none until 5 April. During some of that time he had taken paternity leave. He then did 32 shifts across the remainder of the year.

127. Mr Symes does not bring an HGP claim

The three claimants who did not give evidence

128. The tribunal did not hear oral evidence from Mr Bowers, Mr Fidgett and Mr Frost and they did not tender witness statements. Bundles of documents were provided in relation to them, and the following findings have been extracted from the documents

William Bowers

129. Mr Bowers commenced working for the respondent on or about 11 June 2008 as a Floating Terminal Operator 2.

Overtime

130. Mr Bowers claims unauthorised deductions for the period 26 April 2019 to 21 October 2021. He performed the following overtime:

2016	17 shifts (1 shift of 4 hours, 5 shifts of 8 hours, 11 shifts of 12 hours = 176 hours)
2017	31 shifts (1 bank holiday, 2 shifts of 8 hours, 28 shifts of 12 hours = 352 hours + the bank holiday)
2018	57 shifts (1 shift of 8 hours, 56 shifts of 12 hours = 680 hours)
2019	58 shifts (2 shifts of 8 hours and 56 shifts of 12 hours = 688 hours)

2020	55 shifts (1 shift of 8 hours and 54 shifts of 12 hours = 656 hours)
2021	57 shifts (1 of 8 hours and 56 shifts of 12 hours = 680 hours)

131. As can be seen Mr Bowers did very little overtime in 2016 with significant gaps between the shifts. There was no overtime worked between 26 June and 18 September and none in November.

132. More overtime was worked in 2017 with more in the first quarter than the second when only 7 sessions were worked. Towards the end of the year 3 sessions were worked in October and 2 in November before a period of sick leave and then no more overtime for the rest of the year.

133. The overtime worked increased significantly in the next 4 years. Sometimes overtime is worked before a period of annual leave.

134. In 2020 there was only 2 sessions of overtime in January 3 in February and 3 in March. There were 7 sessions around a period of annual leave in April and then none until one session at the end of June. Much more was worked in the second half of the year. The tribunal may not have heard from Mr Bowers but is aware from the other claimants that the pandemic affected the Port and is one explanation as to why there was not so much overtime worked certainly in the first quarter of 2020.

135. In 2021 no overtime was worked between April 17 and 20 May.

136. On average in the years 2018 – 2021 Mr Bowers has worked overtime over once a week. In those years it is rare for there to be a month when no overtime was worked.

137. Mr Bowers does not bring an HGP claim

<u>Nigel Fidget</u>

138. Mr Fidgett commenced employment on or about 16 March 2005 as a Floating Terminal Operator 2.

Overtime

139. Mr Fidgett claims unauthorised deductions from 9 August 2018 to 23 December 2021. He performed the following overtime

2016	63 shifts (1 shift of 2 hours, 3 shifts of 8 hours, 59 shifts of 12 hours = 734 hours)
2017	72 shifts of 12 hours = 864 hours

2018	80 shifts of 12 hours = 960 hours
2019	76 shifts (1 shift of 6 hours, 75 shifts of 12 hours = 906 hours)
2020	67 shifts of 12 hours = 804 hours
2021	47 shifts of 12 hours = 564 hours

140. In its closing submissions the respondent highlighted the following 'gaps and clusters':

> Between late January and late February 2019
> Between late March and early April 2020
> Between May and late June 2020
> Between June and July 2021.
> November 2021 and the end of the year.
>
> (Paragraph 217 respondent's closing submissions)

141. Mr Fidgett did however average more than 4 shifts a month in all years save 2021 when it was just below that.

142. Mr Fidgett does not bring an HGP claim

<u>E G Frost</u>

143. Mr Frost commenced employment with the respondent on 10 August 1992 as a warehouseman.

Overtime

144. Mr Frost claims unauthorised deductions from 11 April 2019 to 16 December 2021. He performed the following overtime:

2016	1 shift of 12 hours
2017	9 shifts of 12 hours (108 hours)
2018	8 shifts of 12 hours (96 hours)
2019	8 shifts of 12 hours (96 hours)
2020	4 shifts of 12 hours (48 hours)

2021	21 shifts of 12 hours (252 hours)

145. Clearly Mr Frost performed very little overtime until 2021 and the reasons for that are not known and neither is why it then increased.

HGP

146. The circumstances of Mr Frost performing Relief work are not known as he did not give evidence. The following information comes from the tables at Section N pages 2168 – 2179.

2016	43 times
2017	61 times
2018	43 times
2019	68 times
2020	88 times
2021	117 times

147. In 2016 Mr Frost did not perform any higher grade work until March and then performed 16 sessions in the first half of the year and 27 sessions in the second half.

148. In 2017 there were only 2 sessions worked in the first quarter, 20 in the second quarter and 39 in the rest of the year.

149. In 2018 – 2021 the sessions were spread more across the year.

Relevant Law

150. Article 7 Working Time Directive (2003/88/EC)

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

151. Working Time Regulations 1998

16 Payment in respect of periods of leave

(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) and the exception in paragraph (3A)

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

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

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

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

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

(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—

(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

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

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.

(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.

(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.

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

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

152. Employment Rights (Employment Particulars and Paid Annual Leave (Amendment) Regulations 2018 SI 2018/1378 ('the Amendment Regulations)

1. These Regulations may be cited as The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 and come into force on 6th April 2020.

…

Part 3

Paid Annual Leave

10. Amendments to regulation 16 of the Working Time Regulations 1998

Amendments to regulation 16 of the Working Time Regulations 1998

10.—(1) Regulation 16 of the Working Time Regulations 1998 is amended as follows.

The Regulation went on to set out the amendments by the insertion of (e), (f), (3A) and (3B) as included in the amended version of Regulation 16 above.

153. The Explanatory Memorandum to the Amendment Regulations was handed up at closing submissions. It makes reference to implementing the recommendations of the Taylor Review which recommended that 'Government should increase the holiday pay reference period to 52 weeks to take account of seasonal variations.' It states at paragraph 7.2 that in the review Matthew Taylor had found widespread acknowledgement that the 12 – week reference period does not work for everyone and leads to differences in incentives between employers and workers regarding the timing of annual leave. The Government therefore agreed that the holiday pay reference period should be increased to 52 weeks to provide a 'fairer reflection of workers' remuneration' and to reduce the likelihood of workplace conflicts.

154. **Employment Rights Act 1996**

S23(4A)

An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

Employments with normal working hours

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.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

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

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

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

(4) In this section 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.

222 Remuneration varying according to time of work.

(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.

(4) In subsection (3) "the relevant period of twelve weeks" means 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.

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

223 Supplementary.

(1) For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours,

shall be brought in.

(2) If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.

(3) Where—

(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime),

account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

224 Employments with no normal working hours

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

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

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

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

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

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

…

234 Normal working hours.

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

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

(3) Where in such a case—

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

(b) that number or minimum number of hours exceeds the number of hours without overtime,

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

155. The claimants' counsel referred to the following cases in submissions.

156. Evans v The Malley Organisation Ltd [2003] ICR 432. This case concerned a claimant who was employed as a sales representative who was paid a basic wage and commission which was the larger part of his remuneration. He was entitled to holiday pay at his normal basic rate and complained that it should include commission. The Employment Tribunal rejected his claim holding that he had 'normal working hours' and that his remuneration did not vary with the amount of work done in the period and that therefore his week's pay was that payable under his contract in accordance with section 221(2) ERA. The EAT overturned that decision and the employer appealed.

157. The Court of Appeal allowing the appeal held that the distinction between subsections (2) and (3) of section 221 ERA turned on whether the employee's remuneration did or did not vary with the amount of work done in normal working hours. That subsection (4) did not bear on the issue and did not require or permit all contracts in which commission was part of remuneration to be placed within subsection (3). Although the claimant's remuneration varied, it did not vary 'with the amount of work done'.

158. Pill LJ giving the lead judgment stated at paragraph 23:

'…Work is done and the amount of work does not depend on the number of contracts obtained. Time spent attempting unsuccessfully to persuade a client to sign a contract is as much work as a successful encounter with the client. I am unable to read the expression 'amount of work done' as meaning that amount of work and that part of the work which achieves a contract. The amount of work resulting in a contract may vary, but the result achieved by the work is a different concept from the act of working'.

159. He also referred to the use of the averaging method and the fit between subsection (3) and pieceworking in the traditional sense:

'…Where there are marked variations in the amount of work done as between one week and another fairness can be achieved by calculating the amount of holiday pay be reference to an average. That objective is a fair but limited one. Its inclusion in the statute does not require that contracts such as the present should be forced into the subsection (3) category

160. At paragraph 43 Hale LJ stated that the ordinary meaning of 'amount' of work done would refer to its quantity and not to its quality or its results.

161. In May Gurney Ltd v Adshead & others UKEAT/0150/06 the claimants holiday pay was calculated without giving credit for the two types of bonuses they received. One was fixed (described as an attendance allowance) and the other variable. The variable one depended on the section in which the employee worked. In the District Section the employees worked in gangs and each gang had to earn a certain amount in order to cover their running costs. Thereafter they received a bonus on any amount made over and above those costs. In the Mainline Section the bonus was 'more ad hoc and discretionary'. It depended very much on the attitude of the foreman or line manager. Sometimes an incentive bonus would be introduced to encourage the speedy and efficient performance of a particular task. The Employment Tribunal found that the amount of work did vary with the work done and that the holiday pay should be determined by averaging the pay over the twelve weeks preceding the holiday. The EAT upheld that decision. Mr Justice Elias (as he then was) stated:

66. We think some insight into the scope of Sub-Regulation (3) may be gleaned by considering the paradigm case of piecework, where workers are paid a sum for each item produced. Such an arrangement classically falls within the scope of Sub-Regulation (3) as Mr Hand accepts. However it cannot be said even in that case that there is a direct correlation between the amount of work done and the items produced. The number of widgets produced is not merely a function of effort; typically it will be related to other factors, such as the skill and experience of the workforce. A frenetic novice will not necessarily produce as many widgets as a slower and more measured old hand. What is being rewarded is effective performance: and that is measured by output. It is not always a precise measure: the batch of material may on some occasions be more difficult to work with than in others, or the tools may be poor, and a less effective performer may on occasions produce more widgets with a good batch of material than a better performer with a poor batch and older tools.

67. So even in this classic example of piecework, external factors may influence the outcome and therefore the perceived performance which in turn affects the overall reward. The correlation between performance and output is, therefore, never entirely direct. Even less direct is the relationship between quantity of work and output, at least if quantity simply means the effort of the individual worker.

68. In our view it is inevitable that in all circumstances where pay is related to work done, as opposed simply to payment for the hours worked, there will have to be some objective measure relating to work output which will be used to define or determine how much work has been done. There can be no other independent assessment of the level of work performance. But focussing on results will never wholly reflect the effort put in, and

success will always be influenced by factors which are independent of the worker himself. This does not, however, forbid the conclusion that pay varies with work done, albeit that it does not do so in a rigid linear way.

69. We do not think that *Evans* is suggesting that standard piece work or productivity arrangements of this kind fall out with the scope of sub-section 3. We agree with the Tribunal that it is essentially a question of causation. With piece work and productivity arrangements of this kind, there is a close relationship between performance and results. The results are a tolerably accurate, albeit not precise, measure of the performance or work done. In the case of commission arrangements of a kind which occurred in *Evans*, the link is far more indirect. No doubt in a general way a worker is likely to be more successful the more effort he makes to obtain an order, but success in that regard is far from guaranteed. The outcome is more speculative: success is contingent on factors quite unrelated to the worker's performance. A serendipitous worker may stumble upon success because he happens to have approached the right potential client at the right time; another may work equally as hard or even harder and yet fail to be rewarded at all by his efforts. In such cases, results are not a fair or even tolerably accurate measure of performance in the way in which they are in piece work and productivity arrangements.

70 Accordingly, we reject the submission of the Appellants that the fact that there may be external factors which cause the same level of performance to lead to different output demonstrates that there is no direct correlation between work and pay. To a greater or lesser extent that will almost always be the case.

71 In our judgment where pay is related to output and output is in turn significantly connected with level of performance, then it can properly be said that the pay varies with the work done. Typically, a higher level of performance, whether in terms of speed or efficiency in other ways, is likely to lead to a greater output, however that is measured.

162. The EAT held that both bonuses were to be included in a calculation of a week's pay. In relation to the variable bonus it agreed with the tribunal that it was a 'classic productivity scheme. More efficient working led, at least once the threshold was reached, to higher rewards'. It would be 'unreal' to say that it was anything other than a subsection (3) case. With regard to the fixed bonus the EAT rejected the employer's argument that it was simply for attendance at work and not paid for work actually done or even for being available for work. A week's pay covers the remuneration which the employer is obliged to pay under the contract once the contacted hours have been worked. It was clear however that:

84 '…. It obviously does not itself have to be an element of pay which varies with the work done to be considered as part of the pay falling within Working Rule 18.4.2 or subsection (3).

163. The respondent cited A & B Marcusfield Ltd v Melhuish [1977] IRLR 484 in which the EAT held that a bonus of £10 per which the employee regularly received for undertaking an additional duty to her normal work ranked as remuneration for the purpose of computing her redundancy payment. The court stated that the legal questions was:

> '9…is this something which *is* regular if it is in fact *always* paid, ie regularly, throughout the period for consideration in relation to the amount of remuneration received; or is it regular only if it is part of the basic contract and not an exceptional addition to the basic contract.'

164. The court did not consider it necessary to make a distinction between bonus and wages as remuneration must include bonus just as much as it includes wages. It concluded that:

> 11…the regularity is one which has to be considered in relation to the record of payment; and if during the whole of the relevant period (and in this case it was the longer period from late September to early March) there is a regular payment and a regular receipt of the amount in question as part of the contractual arrangement between the two for the time being in force, even if they are a departure from the regular, basic contract, nevertheless the degree of regularity which is relevant to the matter is imported into the transaction…'

165. The respondent also referred to Econ Engineering v Dixon [2020] IRLR 646. The claimants in that case had a basic working week of 39 or 40 hours. Weekly in arrears they were paid a wage based on an hourly rate of pay, as well as a shift allowance and pay for overtime which was worked on a voluntary basis. Monthly in arrears they were also paid a 'profitability bonus' which was an hourly supplement in respect of each hour they worked in the proceeding month, whether as part of their basic hours or overtime. It was a complex calculation but was contingent on hitting specified profitability targets and would vary according to how successful the business had been in the month in question. The company only calculated holiday pay on the claimants' basic salary. The tribunal held that the profitability bonus was required to be include in the calculation of the claimants' holiday pay under both regulation 13 and 13A. The company's appeal was allowed.

166. It was common ground in that case that section 221(2) ERA applied. The EAT agreed that the section required the tribunal to determine what the employee's contractual entitlement was at the relevant calculation date. Regulation 16(3) WTR provides that the calculation date is the first date of the period of leave in question. This the court determined referred to:

> '33…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 40 hours in a given week'.

167. That was not the case with regard to the profitability bonus. Although paid as an hourly supplement in respect of hours worked it was also paid as a supplement for any hours of voluntary overtime worked. Further it was contingent on the hitting of specified profitability targets and therefore varied according to how successful the business has been in the month in question. It was therefore:

> '…a bonus based on profit made rather than the fact that normal working hours have been worked'. (paragraph 34)

168. The mere fact that the employee had worked a given hour or throughout his normal working hours in a week, did not mean that he necessarily became entitled to be paid the profitability bonus. It was therefore not a sum which fell to be included within section 221(3) ERA. In the court's view the condition for entitlement to payment 'must simply be the completion of the normal working hours in a given week'. The EAT substituted its declaration for that of the tribunal that on a true construction of s221(3) ERA the profitability bonus did not fall to be included in a calculation of a week's pay.

169. These cases and the applicability of section 234 must now be read in light of the decisions in Lock, Williams, Dudley & Flowers, referred to below.

170. **Article 7 Working Time Directive** provides:

> Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of such leave laid down by national legislation or practice'

The word 'paid' is not defined in the Directive

171. A series of cases made it clear that 'paid' means that 'normal remuneration' must be maintained during the four weeks of leave required by the Directive.

172. In Stringer & others v Revenue and Customs Comrs [2009] ICR 932 the court stated at paragraph 58:

> 'However, according to the case law of the court, the expression 'paid annual leave' in article 7(1) of the Directive 2003/88 means that, for the duration of annual leave within the meaning of that Directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest' Robinson – Steele v RD Retail Services Ltd [2006] ICR 932

173. Williams v British Airways (CJEU) [2011] IRLR 948 concerned pilots whose remuneration comprised a fixed annual salary and supplementary payments that varied according to the time spent flying and time spent away from home. During period of annual leave they only received the basic pay without any payments in respect of the supplementary allowances. The following are relevant extracts from the decision.

174. From Advocate General Trstenjak

> **47**
> In the view of the Court, the purpose of the requirement of payment for annual leave is to put the worker, during such leave, 'in a position which is, as regards remuneration, comparable to periods of work'. In my view, the Court's further findings with respect to the level of holiday pay are sufficiently clear, it having expressly held in paragraph 50 of the judgment in *Robinson-Steele* that the term 'paid annual leave' in Article 7(1) of Directive 93/104 means that, 'for the duration of annual leave within the meaning of the Directive, remuneration must be maintained'. Moreover, any remaining doubts as to the interpretation of that sentence should

be dispelled by the subsequent clarification ('in other words') to the effect that 'workers must receive their *normal* remuneration for that period of rest'. That clarification must be taken to mean that the level of holiday pay must correspond exactly to that of normal remuneration.

51

…In particular, it is necessary to ensure in this regard that the worker does not suffer any disadvantage as a result of deciding to exercise his right to annual leave. A prime example of such a disadvantage is any financial loss which, depending on the initial situation, would deter him from exercising that right.

…

58

C – Procedure in the case of complex pay structures

1. General

The principle that holiday pay must be determined in such a way as to correspond to the worker's 'normal' remuneration needs, of course, to be adapted in cases where the level of remuneration is *not* constant precisely because it is prone to variation from one period to another depending on individual factors considered relevant by the parties to the collective agreement. Such factors may be linked either to a worker's professional position within the undertaking or to the specific services that he performs. The latter category includes supplements in the form of special payments and expense allowances.

…

60

2. Requirements of EU law and the competence retained by the member states in matters relating to the laying down of rules governing the details of holiday pay

A definitive assessment of what is meant by 'normal remuneration' within the meaning of the Court's case law is precluded not least by the paucity of EU legislation in this field, which fact necessarily imposes limits on an interpretation by the Court.

…

64

In essence, the European Union thus takes an approach similar to that adopted in the implementation of ILO Convention No 132, which likewise contains no specific provisions on the calculation of holiday pay and instead leaves a broad margin of discretion to the signatory states. [56] Thus, Article 1 of that convention provides that 'the provisions of this Convention, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards, court decisions, statutory wage fixing machinery, or in such other manner consistent with national practice as may be appropriate under national conditions, shall be given effect by national laws or regulations'.

65

Such an approach is consistent both with the subsidiarity principle and with the need to respect the autonomy of management and labour in relation to collective pay negotiations. It should be recalled in this connection that the right of collective bargaining and the autonomy of negotiation inherent in that right constitute fundamental rights which are protected in the legal

order of the European Union. [57] The right of collective bargaining is recognised both by various international legal instruments in which the member states have participated or to which they have acceded – such as the European Social Charter signed in Turin on 18 October 1961, [58] to which, moreover, express reference is made in Article 136 EC – and by instruments developed by the member states at Community level or within the framework of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council in Strasbourg on 9 December 1989, [59] which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000. [60]

66

Such an approach is also consistent with practical requirements, particularly since it is extremely difficult to adopt uniform provisions applicable to all sectors. [61] Indeed, the observations submitted by the parties to the main proceedings show just how much the aviation sector *relies* on flexibility. Rules must be established which take into account the particular characteristics of each sector and are accepted by management and labour. Moreover, the Court must also take into account such restraint on the part the EU legislature when interpreting EU law. On the other hand, it must be borne in mind that the discretion available to member states, as I have already stated, [62] is not unlimited. Rather, the implementing measures must be consistent with a framework of EU law.

…

69

i) Pay within the meaning of EU law

It is true that there is no definition of the term 'pay' either in the Working Time Directives or in Directive 2000/79. EU law does, however, provide a sufficiently clear definition in Article 141(2) EC, and the Court itself has relied on that definition when interpreting Directives which – like Directive 93/104 itself, inter alia at issue here – were adopted on the legal basis of Article 118a EC. [63] Moreover, that definition is consistent with the standards of international employment law, its drafting history making it clear that it is based on Article 1(a) of ILO Convention No 100 [64] [65] Against that background, it seems to me that the definitions provided by primary law may also be relied on in this case for the purpose of interpreting Directive 2000/79.

70

It is thus necessary to consider which payments must be regarded as being components of remuneration in accordance with that definition.

71

According to the legal definition contained in Article 141(2) EC, pay means 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. It makes no difference in this regard whether the payment is received under a contract of employment, by virtue of a legislative provision or on a voluntary basis. [66] By and large, that provision has been interpreted extensively in the Court's case law. [67] For that reason, the meaning of pay as defined in Article 141(2) EC may, in certain circumstances, extend far beyond a national definition of pay. [68] The remunerative nature of any payment must be determined by individual examination.

175. The Advocate General then considered the various components in that case. It was stated that there was no doubt that article 141(2) EC of the EC Treaty covers 'any consideration which a worker receives as 'basic pay'. It followed that:

> 73
> …The fixed amount automatically due to any pilot under the MOA in conjunction with the collectively agreed provisions on monthly flying times also falls into the category of basic pay. That pay is fixed at a precise level which is dictated by specific factors such as the pilot's rank and the aircraft fleet to which the pilot in question belongs. There is no doubt, therefore, that that fixed, invariable component of every pilot's pay forms part of the 'normal remuneration' which, in accordance with the Court's case law, must continue to be paid to the worker for the duration of the period of leave.

176. The Advocate General then considered the supplements in that particular case:

> **77**
>
> In principle, the broad definition of pay in Article 141(2) EC covers not only the remuneration payable strictly as consideration for the work undertaken but also any additional components such as bonuses, supplements and allowances, concessions granted by the employer and ex gratia payments. [74] The Court has certainly recognised as pay, within the meaning of that provision, allowances based on the criterion of mobility, that is to say, allowances which reward the worker's readiness to work at different times. (109/88 *Danfoss* [1989] IRLR 532, paragraph 3) Consequently, an allowance for inconvenient working hours, (C-236/98 *Jämställdhetsombudsmannen* [2000] IRLR 421, paragraph 39 et seq), overtime pay (C-300/06 *Voß* [2007] ECR I-10573, paragraph 12 et seq) and overtime pay for training course attendance, the duration of which exceeds the individual's working hours, (C-360/90 *Bötel* [1992] IRLR 423, paragraph 13, and case C-457/93 *Lewark* [1996] IRLR 637, paragraph 23) have also been regarded as coming within the scope of that definition. Logically, then, that category would necessarily also include pay supplements for overtime, supplements for working on public holidays, shift allowances and any comparable payments.
>
> **78**
> The similarity of the – not exhaustively listed – payments mentioned above to the supplements at issue here is obvious, since they are all ultimately linked to the pilot's readiness to make himself available for work for as long as the employer considers this necessary. However, there is a difference between the two types of supplement at issue in so far as the FPS represents direct consideration for an activity typically carried on by a pilot (namely the flying of an aircraft), whereas the TAFB is more in the nature of compensation for the fact that the pilot necessarily has to be away from his normal base for travel-related reasons. The fact that the potentially compensatory nature of a payment does not automatically preclude its classification as pay within the meaning of Article 141(2) EC is demonstrated not least by the fact that, in accordance with case law, even statutory compensation for unfair dismissal falls within the scope of that definition. [80] By comparison with payments of this kind, however, the compensatory nature of the TAFB – or at least the non-taxable portion of it at issue here – is clearly less pronounced. It must also be noted in this regard that, unlike the non-taxable share of the TAFB, the taxable share is not an expense allowance but is already classified as pay

under national law. In my view, that classification is correct, particularly since the latter constitutes indirect consideration for the activity performed which is compensatory in nature and comparable to an allowance for inconvenient working hours. Irrespective of the foregoing, both supplements are monetary benefits purposely paid by the employer for a specific activity performed by the pilot, meaning that the remunerative nature of both allowances cannot be called into question.

79

Those supplements therefore constitute 'any other consideration' which the worker receives in respect of his employment relationship pursuant to Article 141(2) EC. Accordingly, those pay components also form part of 'normal remuneration' which, in accordance with the Court's case law, must continue to be paid to the worker during his period of leave. A worker is therefore, in principle, entitled to the supplements normally due to him also in respect of periods of annual leave.

80

The fact that a worker exercises his right to annual leave cannot constitute a legally permissible ground for exceptionally interpreting pay within the meaning of EU law so narrowly as to exclude supplements falling due during that period. The effect of so doing would be to treat a worker differently, from a financial point of view, depending on whether he is working or on leave, which, as I have already explained at length, would be at variance with the Court's case law.

81

However, the fact that a right to the supplements normally payable is recognised as being enforceable on the merits does not necessarily mean that the worker has an undiminished right to all conceivable supplements. In my view, the Court imposed a limit on that right in so far as the case law can also be interpreted as meaning that the worker is to be entitled to no more than his 'normal remuneration'. I shall now explain the consequences of that interpretation.

82

b) Temporal component of 'normal remuneration'

As indicated at the outset, the concept of 'normal remuneration' also has a temporal component. According to the natural meaning of the word, 'normal' can only refer to something which has existed over a certain period of time and can later be used as a point of reference for comparison. As the Commission [81] and the appellants in the main proceedings [82] rightly point out, that expression essentially implies that remuneration which in itself fluctuates at regular intervals is levelled out to an amount representing average earnings. As the parties to the proceedings rightly recognise, the determination of 'normal remuneration' necessarily requires a *sufficiently representative reference period* but there are various different periods capable of being relied on for this purpose in the main proceedings. It is possible to take into account either the specific period in which the worker was on leave, so as to calculate his hypothetical average earnings, or an earlier period in which the worker was continuously active, so as to calculate his actual average earnings. Both possibilities are referred to in the fourth question. It would be just as feasible, on the other hand, to calculate a uniform level of holiday pay for each category of pilot. However, neither of the potential approaches seems more attractive than the other in practice, since they both have advantages and disadvantages. Thus, for example, the first approach has the disadvantage that it will not always be possible to determine with certainty which tasks the pilot on leave would have been likely to perform in the period in question, in so far as it is safe to assume from the situation in the main proceedings that the task in question could, in principle, have been performed by

any other pilot. [83] The second approach, on the other hand, could lead to difficulties when it comes to making new appointments, as there would not be any real reference period to rely on. [84] The fact remains, as the appellants in the main proceedings point out, [85] that there is in any event unlikely to be any significant quantitative difference in practice between the amounts calculated under the first and second approaches.

…

84
In the absence of detailed requirements at the level of EU law, it must be assumed that the competence to establish the reference period in question and to calculate the average remuneration for that period lies at the level of the member states, 'national legislation and/or practice' being relevant here, pursuant to Clause 3 of the European Agreement and Article 7 of Council Directive 2003/88. It is for the national legislature, in accordance with the relevant legal system, to adopt the necessary implementing provisions and for management and labour to adopt collectively agreed rules which set out the conditions under which such average remuneration can be paid.

86

c) Prohibition of discrimination
The foregoing interpretation of the Court's case law to the effect that the worker's entitlement is not to extend beyond his 'normal remuneration', leads, on the one hand, to a requirement to level out and calculate average earnings. This in turn means that basic pay and any supplements are not to be automatically aggregated where the latter are not usually paid. In this regard, the Danish Government's submission [88] that those supplements must be included in the calculation of an average sum only where they are systematic components of pay must be expressly endorsed.

87
That interpretation also implies, in essence, that a worker who takes leave must not be treated any differently, from a financial point of view, from when he is working. In the light of the regulatory purpose of the right to paid annual leave, that requirement is targeted primarily at financial disadvantages for the worker. However, this does not mean that a worker who takes annual leave should be placed in a better financial position than other workers. After all, the granting of 'normal remuneration' means that the usual restrictions should in principle also be applied. By analogy, the same is true of annual or other maximum limits on the extent to which, or the time during which, the worker can engage in a particular activity rewarded by the grant of a supplement. On that basis, those maximum limits would have to be taken into account in the calculation of holiday pay.

88

4. Interim conclusion
The answer to the fourth question must be that, in a situation such as that in the main proceedings, in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings. The calculation of that average remuneration must be based on a sufficiently representative reference period.

…
90

VII – Conclusion
In the light of the foregoing considerations, I propose that the Court's answer to the questions referred by the Supreme Court should be as follows:

(1) Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and clause 3 of the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines ('AEA'), the European Transport Workers' Federation ('ETF'), the European Cockpit Association ('ECA'), the European Regions Airline Association ('ERA') and the International Air Carrier Association ('IACA'), annexed to Council Directive 2007/79/EC of 27 November 2000, are to be interpreted as meaning that holiday pay must be calculated in accordance with national legislation and/or practice.

(2) In this regard, holiday pay must, in principle, be determined in such a way as to correspond to the worker's normal remuneration. In any event, an allowance granted as holiday pay will not satisfy the requirements of EU law if it is determined at a level which is just sufficient to ensure that there is no serious risk that the worker will not take his annual leave.

(3) In a situation such as that in the main proceedings, in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings. The calculation of that average remuneration must be based on a sufficiently representative reference period.

(4) The calculation of that average remuneration must take into account both supplements usually due to the worker as part of his remuneration and any restrictions in respect of annual or other limits on the extent to which, or the time during which, the worker can engage in a particular activity rewarded by the grant of a supplement.

177. From the judgment of the Court:

24
Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave.

25
By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave.

26
In that regard, it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case law cited above, according to which Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right (see *Robinson-Steele and others*, paragraph 58, and *Schultz-Hoff and Stringer and others*, paragraph 60).

…

28
It follows that, in addition to the components of the total remuneration set out in paragraph 24 of the present judgment, all those which relate to the personal and professional status of an airline pilot must be maintained during that worker's paid annual leave.

178. The case was subsequently heard by the Supreme Court (Williams v British Airways [2012] UKSC 43). Lord Mance JSC giving the decision stated:

13
The court [the CJEU] made clear in paragraph 26 that it is 'for the national court to assess' into which of the two categories identified in paragraphs 24 and 25 any payment fell. When it went on in paragraph 26 to state that 'That assessment must be carried out on the basis of an average over a reference period which is judged to be representative', the most natural reading of the statement is that the court understood that this assessment was also something that the national court could and would judge for itself. The court's reasoning in paragraph 26 further indicates that it contemplated an average over a reference period judged to be representative of 'normal' working and remuneration, rather, therefore, than a calculation based on what the employee might have earned during the holiday period, had she or he then been working.

14
The concept of 'a reference period ... judged to be representative' recognises the exercise of judgment inherent in words like 'representative' and 'normal'. The Court of Justice was not prescriptive as to what might or might not constitute a representative period. The court did not expressly address the question how far a Member State or national court might adopt a standard period, applicable to a range of employees, like that required under ss.221–226 of the Employment Rights Act 1996. Different British Airways pilots may earn different supplementary amounts of FPS (or TAFB) according to their different flying patterns during different periods. This could no doubt be one factor to bear in mind in arriving at any reference period, whether for pilots generally or for a particular pilot. Further, the court did not specifically answer question (5)(b), which is potentially relevant since reg. 9 of the Aviation Regulations provides:

> 'in any month - (a) no person ... shall act as a crew member during the course of his working time, if during the period of 12 months expiring at the end of month before the month in question the aggregate block flying time of that person exceeds 900 hours; and (b) no crew member employed by him shall have a total annual working time of

> more than 2,000 hours during the period of 12 months expiring at the end of the month before the month in question.'
>
> If a reference period of the previous 10 or 11 months at work were taken, a pilot might in that period have exhausted his or her permitted 900 hours. If an average is in such circumstances to be calculated including all 900 hours, the pilot would (as he or she arguably should) receive paid holiday pay higher than that receivable by a pilot who had only flown 800 hours in the same 10 or 11 months.

There was then discussion of the appropriate 'reference period' in that case with the court concluding:

> 21
>
> The solution, in my opinion, is that, in these circumstances and in the absence of any other means of ascertaining a representative reference period, the choice of a reference period is in the first instance for British Airways to make. This is a choice to be made by British Airways within the parameters of what can (reasonably) be "judged to be representative". Failing such a choice, British Airways cannot complain if a court or tribunal takes its own view of what best represents a representative period in the case of an individual employee who brings a case to it. This in my opinion matches the Court of Justice's own expectations: see para 13 above. It would be surprising if domestic courts or tribunals were to conclude that they could not give effect to a domestic article using identical language to the Aviation Directive in the way in which the Court of Justice contemplated that the language of the Directive envisages. This is reinforced by the Court of Justice's conclusion that, in a context where the employer is the State, art 7 is directly effective (and so, by necessary implication, sufficiently certain for that purpose).
>
> …
>
> **23**
> I am also unimpressed by the submission that reg. 18 militates against or prevents a conclusion that, in the absence of a choice by British Airways, the employment tribunal can make its own assessment of 'an average over a reference period which is judged to be representative'.

179. In Lock v British Gas Trading Ltd CJEU [2014] IRLR 648 the court was asked to consider whether where a worker's annual pay comprising basic pay and commission payments made under a contractual right to commission article 7 of the Directive required that the worker be paid in respect of periods of annual leave by reference to the commission payments he would have earned during that period, had he not taken leave, as well as his basic pay. Mr Lock's commission constituted more than 60% of his total remuneration.

180. Advocate General Bot's view was that 'effective protection of the right to paid annual leave calls for an affirmative answer to that question'. Considering the court's judgment in Williams the Advocate General stated:

> **27**
> The existence of an intrinsic link between the various components making up the total remuneration of the worker and the performance of the tasks he is required to carry out under his contract of employment would seem, therefore, to be a decisive criterion for including those various components in the remuneration payable to the worker during his paid annual leave. The various allowances a worker may claim during his paid annual leave must therefore not only be directly linked to the performance of the tasks he is required to carry out under his contract of employment, but also have a certain degree of permanence.
>
> **28**
> That assessment of the existence of an intrinsic link between the various components making up the total remuneration of the worker and the performance of the tasks he is required to carry out under his contract of employment must, according to the Court, be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case law cited above, according to which Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right.
>
> …
>
> I consider that commission, such as that received by Mr Lock by reference to the sales contracts entered into by British Gas in consequence of the work he has carried out himself, must be included in the remuneration to which that worker is entitled during his paid annual leave.
>
> **31**
> The commission in question is directly linked to the work normally carried out by Mr Lock under his contract of employment. Moreover, such commission does in fact constitute remuneration for the work Mr Lock has carried out himself. The commission is therefore directly linked to that worker's own work within his undertaking.
>
> **32**
> In addition, although the amount of commission may fluctuate from month to month depending on the results obtained by Mr Lock, such commission is none the less permanent enough for it to be regarded as forming part of that worker's normal remuneration. In other words, it constitutes a constant component of his remuneration. A consultant who carries out his tasks satisfactorily within British Gas will receive commission each month in addition to his basic pay.
>
> **33**
> In my view, an intrinsic link does therefore exist between the commission received each month by a worker such as Mr Lock and the performance of the tasks he is required to carry out under his contract of employment. That link is all the more evident because the amount of commission is, by definition, calculated as a proportion of the results obtained by that worker in terms of contracts entered into by British Gas.

48

In my view, it is for the referring tribunal to determine what method and rules are appropriate for attaining the objective set out in Article 7 of Directive 2003/88, on the one hand, by interpreting its national law in a manner consistent with that objective and, on the other, by taking into consideration elements deriving from practice or from similar situations. Whatever the specific procedure adopted, I shall merely say that to take into account the average amount of commission received by the worker over a representative period, 12 months for example, would appear to me to be an appropriate solution.

181. The court went onto hold that:

29
In any specific analysis, for the purpose of the case law cited above, it is established that any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided and included in the calculation of the worker's total remuneration must necessarily be taken into account for the purposes of calculating the amount to which the worker is entitled during his annual leave (see *Williams and others* [2011] IRLR 948, paragraph 24).

30
In addition, the Court has stated that all components of total remuneration relating to the professional and personal status of the worker must continue to be paid during his paid annual leave. Thus, any allowances relating to seniority, length of service and to professional qualifications must be maintained (see, to that effect, case C-471/08 *Parviainen* [2010] ECR I-6533, paragraph 73, and *Williams and others* [2011] IRLR 948, paragraph 27).

31
By contrast, according to that same line of case law, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment need not be taken into account in the calculation of the payment to be made during annual leave (see *Williams and others* [2011] IRLR 948, paragraph 25).

182. Dudley Metropolitan Borough Council v Willetts [2017] IRLR 870 concerned employees employed by the council to maintain and repair council – owned housing stock. In addition to their contractual hours, they volunteered to perform additional duties, which they could choose to do or not to do as they pleased. These were out of hours standby pay, call – out allowance, voluntary overtime and mileage or travel allowance linked to these. They made claims under Regulation 16, Working Time Regulations 1998 to be paid while on annual leave, remuneration which included an element in respect of such duties. It was even recorded in the judgment that they could 'drop on and off the rotas to suit themselves whether day by day, week by week, month by

month or permanently' and that the additional work was 'almost entirely at the whim of the employee, with no right to enforce work on the part of the employer.' The Employment Tribunal upheld their claims for out of hours standby, call – outs and for some of the employees performing regular voluntary overtime, all of which their contracts of employment did not require them to perform together with the cost of travel and found that such fell within the concept of normal pay and were to be included in the remuneration paid to the claimants when on annual leave. It is to be noted however that the Employment Judge did find that in relation to one of the claimants the overtime was very rare and could not be said to be part of his normal pay. The only details given in relation to the other claimants are that one performed the overtime regularly, and one regularly on Saturdays, who saw it as an 'extension of his working week'. In relation however to out of hours standby the tribunal had found that this had been paid to the claimants 'over a period of years' at a rate of 1 week in 4 or 1 week in 5 with some variation when they swap on the rota'. In dismissing the council's appeal Simler J (as she then was) stated:

36
There is no doubt that the right to paid annual leave is a particularly important principle of EU social law, enshrined in Article 31(2) of the Charter. There is no provision for its derogation in the WTD. Recital 6 to the WTD requires account to be taken of the principles of the ILO Convention with regard to the organisation of working time. The ILO has adopted paragraph C132 which is the source of the requirement that the full period of holiday to which a worker is entitled should be paid at a rate that is 'at least his normal or average remuneration'. There is also no doubt that payments in respect of overtime (whether that be compulsory, non-guaranteed or voluntary), constitute remuneration as a matter of domestic and EU law.

37
EU law requires that normal (not contractual) remuneration must be maintained in respect of the four-week period of annual leave guaranteed by Article 7. That overarching principle means that the payments should 'correspond to the normal remuneration received by the worker' while working: see *Williams* and *Lock*. The purpose of this requirement is to ensure that a worker does not suffer a financial disadvantage by taking leave, which is liable to deter him from exercising this important right from which there can be no derogation.

38
It follows in my judgement, that the CJEU in *Williams*, having expressly endorsed the conclusion of the Advocate General at paragraph 90.2, did not purport to set a narrower test at paragraph 24 of its judgment that would have the effect of restricting the application of the overarching principle.

39
Having set out the overarching principle, the CJEU made clear that the division of pay into different elements cannot affect a worker's right to receive 'normal remuneration' in respect of annual leave. In each case the relevant element of pay must be assessed in light of the overarching principle and objective of Article 7 which is to maintain normal remuneration so that holiday pay corresponds to (and is not simply broadly comparable to) remuneration while working (paragraphs 22 and 23).

40

Further, for a payment to count as 'normal' it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so.

41
Read in that light, paragraph 24 of *Williams* is unsurprising and simply reflects the Court's assessment of the specific payments at issue in that case as examined in light of the overarching principle. That is reinforced by the reference to 'inconvenient aspects' which were directly relevant to the two payments at issue. Paragraph 24 does not however, set a sole or exclusive test of 'normal remuneration' dependent on a link between pay and the performance of duties undertaken under compulsion of the contract of employment. Nor does it restrict the application of the overarching principle. If there is an intrinsic link between the payment and the performance of tasks required under the contract that is decisive of the requirement that it be included within normal remuneration. It is *a* decisive criterion but not the or the only decisive criterion. The absence of such an intrinsic link does not automatically exclude such a payment from counting. That is supported by the fact that payments that are personal to the individual such as those relating to seniority, length of service and professional qualifications also count for normal remuneration purposes even though they are not necessarily linked to performance of tasks the worker is required to carry out under the contract of employment or to inconvenient aspects of such tasks.

…

43
Furthermore, the exclusion as a matter of principle of payments for voluntary work which is normally undertaken would amount to an excessively narrow interpretation of normal remuneration that gives rise to the risk of fragmenting of pay into different components to minimise levels of holiday pay. It would result in a risk of a worker suffering a financial disadvantage that might deter him from exercising these rights contrary to the underlying objective of Article 7. It would carry the risk identified by Advocate General Trstenjak of employers setting artificially low levels of basic contracted hours and categorising the remaining working time as 'voluntary overtime' which does not have to be accounted for in respect of paid annual leave. This is not a fanciful but a real objection to the respondents' argument as demonstrated by the current proliferation of zero hours contracts.

44
It seems to me that applying the overarching principle established by the CJEU in *Williams* and *Lock*, 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 *Williams* applies and it will 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.

45
Accordingly, the employment tribunal in the present case made no error of law in finding that remuneration linked to overtime work that was performed on a voluntary basis could be included in normal remuneration for calculating holiday pay.

46

If I am wrong and there is a requirement of an intrinsic link, the link is between the payment in question and tasks which a worker is required to carry out under his contract of employment, and I consider that this test is satisfied here. Absent a contract of employment, the specific agreement or arrangement made for voluntary overtime would not exist. The duties or tasks carried out in either case are the same. It seems to me that the contract of employment constitutes an umbrella contract in that sense. Whatever the position in advance of a particular shift, it seems to me that once the claimants commenced working a shift of voluntary overtime or a period of standby duty or callout, they were performing tasks required of them under their contracts of employment even if there was also a separate agreement or arrangement. The payments made were all directly linked to tasks they were required to perform under their contracts of employment and, once those shifts or standby periods began, they were in no different position from an employee who is required by his contract to work overtime or be on standby or attend callouts.

…
Call out allowances

…
49
In agreement with Mr Ford, and for the reasons already given, I do not accept the premise of this argument. The focus of the overarching principle derived from *Williams* is on the maintenance of normal pay; in other words, the pay that is normally received by the worker when he or she is working. The WTD draws no distinction between work that involves tasks that are contractually required and those that are done as a consequence of volunteering to be on standby or callout or working overtime under other special or separate arrangements. That is simply not its focus. In applying the intrinsic link test, the focus is on the link between the payment and the performance of duties or work that is normally done within the company or for the employer, to ensure no financial disadvantage as a result of taking annual leave in the interests of a worker's health and safety. It would be inconsistent with the overarching principle to exclude payments for 'voluntary' work that must be performed once the worker commences an overtime shift or standby duty and that is normally worked, simply because they are not required by the contract of employment. The question in every case, irrespective of the label put on the payment, is whether the payment forms part of the worker's normal remuneration. If payments for voluntary shifts, standby or callout payments are normally paid, they must be included in pay for holiday leave to ensure that there is no financial disadvantage as a result of taking such leave, irrespective of the source of the obligation to perform the work in question.

…

Out of hours payments

53
I do not accept these arguments. The focus in Article 7 is on normal remuneration and not the normal working week. As already indicated, whether a payment is normal is a question of fact and degree. Questions of frequency and regularity are likely to play a part in determining whether a payment is normal because a payment that is made on a regular basis suggests that it is a 'systemic component' of remuneration (see paragraph 86 of the Advocate General's opinion in *Williams*) that is usually or normally paid.

54
Moreover, I see no difficulty in principle in concluding that a payment is normally made if paid over a sufficient period of time on a regular basis, say for one week each month or one week in every five weeks, even if it is not paid more frequently or even each week. These are questions of fact for a tribunal and here, in my judgment, the tribunal was entitled to find that pay for working on this basis was part of normal remuneration. It was neither exceptional nor unusual. Fluctuations in the amount paid would be catered for by the 12-week average.

183. The case of Hein v Albert Holzkamm GmbH & Co KG CJEU C-385/17 was concerned with a construction work who had been on short-time work for 26 weeks and whose annual leave was calculated without excluding period of reduction of working time such as short-time work. Remuneration paid for overtime work was taken into account for the purposes of calculating pay for annual leave. The court held:

53. In the light of the foregoing, the answer to the first part of the first question is that Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the directive, remuneration for annual leave that is lower than the normal remuneration which he receives during periods of work. It is for the referring court to interpret the national legislation, so far as possible, in the light of the wording and the purpose of Directive 2003/88, in such a way that the remuneration for annual leave paid to workers in respect of the minimum annual leave provided for in Article 7(1) is not less than the average of the normal remuneration received by those workers during periods of actual work

184. The court also stated the following which the respondent relies upon in these proceedings, and which were discussed by the Court of Appeal in Flowers (see below):

46.Lastly, as for the rule that overtime worked by the worker is to be taken into account for the purpose of calculating the remuneration due in respect of paid annual leave entitlement, it should be noted that, given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7(1) of Directive 2003/88.

47.However, when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration due under the right to paid annual leave provided for by Article 7(1) of Directive 2003/88, in order that the worker may enjoy, during that leave, economic conditions which are comparable to those that he

enjoys when working. It is for the referring court to verify whether that is the case in the main proceedings.

185. In Flowers v East of England Ambulance Service NHS Trust [2019] IRLR 798 the claimants employed in a range of roles concerned with the provision of ambulance services claimed that the calculation of holiday pay should take account of overtime in two categories. The first was non – guaranteed overtime, being work which the employer was not obliged to provide but which the employee was obliged to perform on request. The second was voluntary overtime. The Employment Tribunal held that the contractual terms required only non – guaranteed overtime to be taken into account as did the Directive. The EAT held that the calculation should include an element in respect of both voluntary as well as non – guaranteed overtime. The Trust's appeal was dismissed by the Court of Appeal. It held that:

> The natural interpretation of the contractual provisions, read as a whole, was that overtime was part of pay and accordingly, the claimants had a contractual entitlement to have voluntary overtime taken into account for the purposes of calculating holiday pay and there was no basis for distinguishing between voluntary and non – guaranteed overtime payments for that purpose.
>
> That, while article 7 of the Directive 2003/88 did not specify the amount of pay to be received during a period of annual leave, it was clearly established that employees had to receive their normal remuneration during that period and that that included overtime where the pattern of overtime work was sufficiently regular and settled for payments made in respect of it to amount to normal remuneration; that there was no separate requirement, in determining normal remuneration, that hours of work were compulsory under the contract, and that, accordingly article 7 required regular but voluntary overtime undertaken by the claimants to be taken into account in calculating their holiday pay.

186. Bean LJ giving the judgment of the court stated as follows:

> **32**
> Subject to the *Hein* case, to which I am about to refer, I would have been content to say that I agree with Simler P's clear and persuasive analysis and have nothing to add. The CJEU case law establishes clearly that the question in each case is whether the pattern of work is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. There is no separate requirement that the hours of work are compulsory under the contract.

…

He explained that counsel for the trust, Mr Nicholls contended that the decision in Hein demonstrated that Simler J (in Dudley) and Soole J (in the EAT in Flowers) misinterpreted the Court of Justice case law. He paid particular regard to paragraphs 46 & 47 set out above and stated:

36
The wording of these two paragraphs, in particular the phrase I have italicised in para 46, seemed so surprising that we asked counsel to check the text of the judgment in German (the language of the case) to see whether anything has been lost in translation. We are satisfied that it has not. We therefore have to try to understand what the CJEU has pronounced. Overtime was not in issue before the CJEU in *Hein* – indeed, it appears clear from paras 62 and 64 of the Opinion of Advocate General Bobek that overtime *was* taken into account in the calculation of holiday pay. So, had this been a domestic case, anything said about overtime might be regarded as *obiter*; but Mr Nicholls is right to submit that the concept of part of a judgment being *obiter* cannot be said of a pronouncement by the CJEU on an issue of European law.

Having set out the arguments of both counsel as to the meaning and effect of those paragraphs he stated:

44
The CJEU is notorious for making pronouncements resembling those of the oracle at Delphi, but even by their oracular standards para 46 is hard to understand. If para 46 had said that 'in those cases where it is of an exceptional and unforeseeable nature' remuneration received for overtime does not in principle form part of normal remuneration, that would have been intelligible, consistent with the previous case law and with paras 1–45 of *Hein* itself. But to say, as a sweeping general proposition, that the nature of overtime is that it is exceptional and unforeseeable would be nonsense. Moreover, it is one thing to be oracular: it is another to be self-contradictory. I cannot believe that the CJEU intended to perform a handbrake turn at the start of para 46 of *Hein* and contradict so much of what they had previously said.

45
I therefore accept the submission of Mr Jones that the distinction being drawn in paras 46–47 of *Hein* is between exceptional and unforeseeable overtime payments on the one hand and broadly regular and predictable ones on the other.

187. Asplin LJ also expressed the view that paragraph 46 in Hein seemed to be inconsistent with the proceeding paragraphs of the judgment in that case.

188. As was stated by Bean LJ Hein was not about overtime but about short time working. It is noted that under the collective agreement remuneration paid for overtime was taken into account for the purposes of calculating holiday pay. (paragraph 40)

189. The respondent in the case before this tribunal accepts at paragraph 93 of its Opening Skeleton argument that this tribunal is 'for the moment, bound by the CA's judgment in Flowers'. At paragraph 16 of the closing submissions, it accepts that this tribunal is bound by Flowers to treat its interpretation of Hein as correct for the purposes of the present hearing and that voluntary overtime is not excluded in principle.

SUBMISSIONS

190. Both counsel handed up opening and closing submissions in writing and then spoke to them orally in closing. The following is only a summary of their respective positions.

On behalf of the claimants

191. *Voluntary overtime*

The claimants' primary case is that the respondent has a well established, broadly predictable system of overtime which those who wish to work overtime are able to participate in. That, consequently, pursuant to EU law, voluntary overtime is established as part of 'normal pay' because it is:

- A systematic component of remuneration
- Not exceptional and unforeseen
- Broadly regular and predictable.

192. There is no requirement, it is argued, that an individual must show that he or she worked overtime according to a broadly regular and predictable pattern. It is sufficient that the *system* operated by the employer is systematic and is broadly regular and predictable. Any employee then performing *any* voluntary overtime would be able to claim it as part of holiday pay. If that individual only worked a small amount of overtime then they would only receive an equivalently small uplift in their holiday pay.

193. The secondary case put forward on behalf of the claimants is that the appropriate test is whether the overtime worked was exceptional and unusual. The tribunal should exclude payments from normal remuneration only whether the voluntary overtime is worked sufficiently infrequently and irregularly to amount to it being unusual and unforeseeable. Even therefore where overtime is worked on an infrequent basis, as in the case of claimant Mr Frost, it would still be sufficiently regular to fall outside that categorisation.

194. It would be for the tribunal on the facts to determine whether the overtime worked in an individual case came within 'unusual and unforeseeable' but it was

submitted that none of the test claimants had a pattern that would fall into that category when the charts and tables are considered.

195. Counsel suggested that for overtime worked to come within 'unforeseen' it would be necessary that it was unforeseeable that the individual would choose to participate in the scheme.

HGP

196. The claimants' primary case is that this allowance should be included in the calculation of holiday pay pursuant to s221(3) ERA as when the employee has a relevant licence to act up their pay varies with the amount of work done. It is argued that the concept of 'quantity of work' is sufficiently capacious to include the greater quantity of work achieved when acting up into a more senior role, as reflected by the greater amount of pay then received. Claims are advanced under both Regulation 13 and 13A WTR.

197. If that argument is not accepted then under EU law the claimants submit that HGP is established as part of 'normal pay' because is a systematic component of remuneration and not exceptional and unforeseeable. This alternative case is advanced only in relation to Regulation 13 WTR.

198. The same argument is advanced in respect of HGP as for voluntary overtime in that all that is required for it to be included as part of normal remuneration is that the individual is eligible for it and that the system operated by the employer is systematic and broadly regular and predictable. It is not accepted that it is necessary for an individual to perform HGP for a certain period before it becomes part of normal remuneration. Once the licence is obtained, it is submitted, HGP becomes part of normal remuneration. The mere holding of the licence establishes the pattern. To require 13 weeks of performing HGP role it not consistent with the requirement to pay normal remuneration for annual leave.

Reference period

199. For the claimants it is submitted that as the Amendment Regulations contained no transitional provisions and as there is a presumption against retrospective effect the Regulations should be read as applying only in relation to pay for future holiday taken and in respect of which proceedings have not already been brought.

200. This would mean that in respect of the test claimants whose claims were brought on 20 September 2019 the 12 week period for calculating overtime would be the appropriate one. The claims in relation to HGP were also presented by way of amendment on 18 February 2020 so before 6 April 2020. It is accepted that claims presented by way of amendment after 6 April 2020 should have a reference period of 52 weeks applied.

On behalf of the respondent

Domestic law

201. The respondent argues that both claims fail under UK domestic law. In relation to overtime this is because applying the 'week's pay' formula contained in s221 – 224 ERA to the WTR as required by Regulation 16(2) and s234 ERA 'normal working hours' includes only overtime which is both compulsory and guaranteed, which is not the case in these proceedings.

202. Regarding HGP it is submitted it does not constitute 'remuneration' within the meaning of s221. The respondent relies on Econ Engineering. HGP would not qualify under s221(2) ERA as only basic pay and not additional payments conditioned on anything other than the completion of normal working hours fall to be included. It is paid for performing higher grade work and not for completing normal hours. Neither does the respondent accept the argument advanced on behalf of the claimants that s221(3) ERA is the applicable provision denying that pay varies with the amount done within the meaning of that section when claimants are performing higher grade work.

EU Position

Overtime

203 The respondent relies upon Hein v Albert Holzamm [2019] 2 CMLR 685 and in particular on paragraphs 46 – 47 as set out above. It states that it is the only CJEU case which addresses the question whether and in what circumstances voluntary overtime earnings count in the calculation of holiday pay. The test the respondent states is as set out at paragraph 47 of that decision of whether the overtime is 'broadly regular and predictable', otherwise it would not count. It disputes the wording adopted on behalf of the claimants that remuneration should only be excluded if 'unusual or unforeseeable' stating that is not what the court in Hein stated.

204. It is further argued that the English cases, whilst relevant, cannot qualify what the CJEU has said. It accepts that this tribunal is bound by the decision in Flowers but states that what was held in Flowers was that the CJEU was not distinguishing between voluntary and compulsory (or guaranteed) overtime. It held that the correct interpretation of Helm was that overtime could count if it was 'regular and predictable'. The respondent accepts that this tribunal must treat that interpretation of Hein in Flowers as correct whilst reserving its position to dispute its correctness at the appropriate appellate level (paragraph 16 closing submissions).

205. Although heard before Hein the decision in Dudley is relevant, referring particularly to paragraph 40, where it was stated that 'for a payment to count as 'normal' it must have been paid over a sufficient period of time' and paragraph 44 that 'where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis' it may justify the description 'normal'. The Court of Appeal approved the decision in Dudley

206. The voluntary overtime at the Port it was submitted is neither regular nor predictable and is not set up to be so due to the situations that the Port can face. The claimants accepted this. There were a whole variety of reasons why they would do or not do overtime and no pattern can be detected.

HGP

207. Applying EU law HGP is not doing the normal job duties but exactly the opposite and is pay for tasks not ordinarily required to do. It lacks the element of permanence. Applying the same test as for overtime of being regular and permanent it does not pass either.

208. It has also been agreed collectively where the borderline should be drawn namely that those who have carried out higher grade duties for a continuous period of 13 weeks should then have that element included in the calculation of holiday pay. CJEU has stated that respect should be given to the collective agreement and the respondent submits there is no reason to disrespect that agreement. 13 weeks is not an unreasonable position to draw the line.

Reference period

209.. The respondent submits that the appropriate reference period is 52 weeks throughout. As a matter of EU law, the question is what is a 'representative period' and the respondent submits that 52 weeks is that period. In support it was argued that the Attorney General in Lock and the Supreme Court in Williams seemed comfortable with a 52 week period.

210. The respondent submits that the 52 week period brought in by the Amendment Regulations applies prior to 6 April 2020 as in looking at overtime in this case the tribunal is applying EU law. It is therefore logical to apply the EU law regarding the requirement to have a representative reference period and UK law has now reverted to such a 52 week period by virtue of the Amendment Regulations.

211. In the alternative the respondent argues that as the pre-amble makes clear the Amendment Regulations were made under section 2(2) of the European Communities Act 1972 and is in effect 'tidying up' this issue because of EU law and bringing UK law in line with EU law. It is therefore declaratory of what the law *was* rather than being strictly retrospective. This is also supported by the EU case law referred to above which suggests that a 12 week reference period might sometimes not amount to the requirement of a 'representative reference period'.

CONCLUSIONS

212. Voluntary overtime

Issue 7 – pursuant to regulations 13 & 16 WTR and Article 7 of Directive 2003/88 is voluntary overtime in principle included within or excluded from the calculation of a 'week's pay' for each or any of the sample claimants?

Issue 8 – in particular, as a matter of law, are voluntary overtime earnings capable of amounting to 'normal remuneration'?

Prior to this Hearing it had already been recorded in the Case Management Summary of REJ Foxwell following a hearing on the 21 January 2022 that the 'tribunal is currently bound by the decision of the Court of Appeal in Flowers to hold that payments for voluntary overtime do in some circumstances fall to be included in the calculation of leave pay under the Working Time Regulations and/or the Working Time Directive'.

213. The respondent has accepted at this Hearing and in its written closing submissions that this tribunal is bound by the Court of Appeal decision in Flowers and that the court had concluded that the distinction being drawn in Hein was between exceptional and unforeseeable overtime payments on the one hand and broadly regular and predictable ones on the other. Bean LJ stated that subject to Hein:

> 'the question on each case is whether the pattern of work is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. There is not separate requirement that the hours are compulsory under the contract'

214. This tribunal must therefore conclude that as a matter of law voluntary overtime earnings are capable of amounting to 'normal remuneration' and can therefore

in certain circumstances be included in the calculation of a 'week's pay' for the purposes of holiday pay.

Issue 9 – if so, in what circumstances are such earnings to be included?

215. Domestic law

From the submissions made on behalf of the claimant it seems to have been accepted that this is an argument that can only be pursued under EU law. For the avoidance of doubt that must be the case for the following reasons.

216 Regulation 16(1) WTR provides for payment of annual leave (the 4 weeks and additional 1.6 weeks) to be calculated at the rate of 'a weeks pay'. Regulation 16(2) provides that sections 221 to 224 ERA shall apply for the purposes of that calculation.

217. Sections 222 and 223 apply where there are normal working hours for the employee. The claimants before this tribunal all have normal working hours (which are different depending on the type of role performed by them)

218. The sections then distinguish between employees whose remuneration does not vary with the amount of work done in the period and those whose does.

219. The tribunal is satisfied that the claimants' remuneration does not vary with the amount of work done in the period. Under section 221(2) their week's pay is therefore 'the amount which is payable by the employer under the contract of employment in force on the calculation day'.

220. Section 234 is also then relevant. The authorities have made it clear that unless overtime is compulsory or 'there is a mutual obligation in relation to the 5 hour's extra time' the overtime is not to be included in the calculation of normal working hours (Lotus Cars Ltd v Sutcliffe and Stratton IRLR [1982] 381 @ paragraphs 32 & 33; Gascol Conversions Ltd v Mercer [1974] ICR 420.

211. The tribunal therefore accepts the respondent's submissions that the claimants' case on overtime being included for both Regulation 13 and 13A holiday pay in English law cannot succeed.

EU law

222. The starting point must be the wording of Article 7 WTD in which pay is not defined. The cases have however made it clear that it means that 'for the duration of annual leave within the meaning of that Directive, remuneration must be maintained and that, in other words, workers must receive normal remuneration for that period of rest' (Stringer and others v Revenue and Customs Comrs [2009] ICR 932, citing Robinson – Steele v RD Retail Services Ltd [2006] ICR 932 para 50. As the commentary which follows concerns an

interpretation of the Directive it can only have relevance to the Regulation 13, 4 week period of annual leave.

223. Advocate General Trstenjak in British Airways plc v Williams [2012] ICR 847 considered that the court's position with respect to the level of holiday pay was 'sufficiently clear' citing the wording from Robinson – Steele referred to above. She also made it clear that it is necessary to ensure that the worker does not suffer any disadvantage because of deciding to exercise the right to take annual leave. During that period of leave the worker should be in a position as regards remuneration which is comparable to periods of work.

224. The Advocate General referred to cases where the level of remuneration is not constant because it is prone to variations from one period to another due to various factors which may be linked to the worker's professional position or include supplements or expense allowances and also the need to respect the autonomy of management and labour in relation to collective negotiations. She acknowledged that it is difficult to adopt uniform provisions applicable to all sectors and that consequently rules must be established which take into account the particular characteristics of each sector.

225. At paragraph 77 the Advocate General accepted that in principle the broad definition of pay includes additional components such as bonuses, supplement and allowances. This did not however extend to all conceivable supplements (paragraph 81). The worker must not be placed in a better financial position by taking annual leave (paragraph 87).

226. Normal remuneration can only refer to something which has 'existed over a certain period of time and can later be used as a point of reference for comparison'. The worker is entitled to holiday pay corresponding to average earnings calculated over a sufficiently representative reference period which can then level out fluctuating earnings. (paragraphs 82 & 88)

227. In her conclusion the calculation of that average remuneration must take into account both supplements usually due to the worker as part of remuneration.

228. The CJEU in Williams held that any inconvenient aspect linked intrinsically to the performance of the contractual tasks and for which a monetary amount is provided must be included in the calculation of the worker's total remuneration. For the pilots that meant the time spent flying must be taken into account. Components though to cover occasional and ancillary costs arising in the performance of the contractual tasks, for example in the pilots' case costs connected with the time the pilots have to spend away from base need not be taken into account. All the components related to the personal and professional status of the pilots must be maintained during the worker's paid annual leave.

229. In Lock Advocate General Bot stated that the existence of an 'intrinsic link' between the various components making up remuneration and the performance of the tasks required under the contract would seem to be a 'decisive criterion' for including various components in the calculation of holiday pay. Those components however must not only be linked to the performance of contractual tasks but have 'a certain degree of permanence' (paragraph 27). As the Advocate General had said in Williams the calculation must be carried

out over a reference period which is judged to be representative. He felt that 12 months would appear to be an appropriate period (paragraph 48). Mr Lock's commission constituted a 'constant component' of his remuneration and the court went onto hold that it was for the national court or tribunal to calculate the commission to which he was entitled during periods of annual leave.

230. There has been much discussion at this Hearing as to the effect of paragraphs 46 & 47 of the Hein case. As set out above the Court of Appeal considered this in Flowers and this tribunal must follow its conclusions in respect to those two paragraphs, namely that overtime was not an issue in Hein and that 'I cannot believe that the Court of Justice intended to perform a handbrake turn at the start of para 46…and contradict so much of what had previously been said' accepting the submission that the distinction being drawn was 'between exceptional and unforeseeable overtime payments on the one hand and broadly regular and predictable ones on the other' (Bean LJ at paragraphs 44 & 45)

231. The court in Flowers agreed with the analysis carried out by Simler J (as she then was) in Dudley. The following principles can be drawn from that decision, which was dealing with voluntary overtime:

> 231.1 That for a payment to count as 'normal' it must have been paid over a sufficient period of time.
>
> 231.2 That an 'intrinsic link' between the payment and the performance of contractual tasks is a decisive criteria but not the or the only decisive criteria
>
> 231.3 It will be for the fact finding tribunal to determine whether in a particular case where there is a pattern of work though voluntary that extends for a sufficient period of time on a regular and/or recurring basis it is sufficiently regular and settled for payments to amount to normal remuneration.

232. Concerns were expressed in Dudley (as they had been by the Advocate General in Williams) that the exclusion of payments for voluntary overtime would amount to an excessively narrow interpretation of the concept of normal remuneration that might give rise to 'the risk of fragmenting of pay into different components to minimise levels of holiday pay' and deter workers from taking holiday. It would carry the risk of employers setting artificially low levels of basic contractual hours and categorising the remaining working time as 'voluntary overtime' which did not have to be accounted for in respect of paid annual leave (paragraph 43). This was a point also made by the Court of Appeal in Flowers when it was accepted that a strict interpretation of the wording used in Hein at paragraphs 46 & 47 would contradict these concerns expressed by the Advocate General and in Dudley. Bean LJ expressed his agreement with Simler J that the current trend, certainly in the UK, towards zero hours contracts 'shows that this is not a fanciful but a very real objection to the trust's argument'.

233. In cross examination of each of the claimants in the Hearing before this tribunal it was put to them that the respondent had no way of knowing when they would perform overtime. They all accepted that was the way that the system worked. The respondent however then seeks to draw from their answers that their overtime is not 'predictable' as the CJEU meant in Hein. This tribunal cannot accept that inference. By its very nature in any system of voluntary overtime the employer will not necessarily know when individual employees will volunteer. They may as in this case choose to do it when it suits them to do it for family and/or personal reasons, to pay for unexpected expenditure or luxuries or they may always choose to do it. That is the very nature of it being voluntary and it is that flexibility that suits the respondent employer. To focus on predictability in the way that the respondent argues would mean a failure to uphold the overarching principle that the worker during periods of annual leave should be in a comparable position to periods of work. What is predictable in this case however from a study of the individuals working patterns over a period of time (in this case records for 5 years) is which individuals will perform overtime on a regular and recurring basis and which will not. It cannot be that the focus is on whether the employer can at any given moment say who will or will not volunteer for overtime. There is to use the words in Lock a 'certain degree of permanence' on the facts in this case.

234. The Court of Appeal in Flowers when considering the wording in Hein found that it was 'drawing a distinction' between the 'exceptional and unforeseeable' with the 'broadly regular and predictable'. On the facts before this tribunal most of the claimants were performing overtime on a broadly regular basis and the occurrence was not exceptional or unforeseeable. In Dudley it was said that it was a question of fact and degree for the tribunal as to whether the overtime had been paid over a sufficient period of time. The court in that case used the terminology 'regular and recurring' which is what the overtime has been for many of the claimants before this tribunal.

235. This is not to accept the arguments that have been advanced on behalf of the claimants. At paragraph 35 of her opening submissions and explored again in closing Ms Ling advanced the claimants primary case as being that where, as here, the respondent operates a 'well established, broadly predictable *system* of overtime in which those who wish to work overtime are able to participate' then voluntary overtime is established as part of 'normal pay' because it is:

    '(a) A systemic component of remuneration

    (b) Not exceptional and unforeseeable

    (c) Broadly regular and predictable.'

236. She went onto suggest that there is no requirement for an individual to show that he himself worked overtime according to a broadly regular and predictable pattern, 'it is sufficient that the system operated by the employer is systemic and is broadly regular and predictable' (paragraph 36, opening)

237. In oral closing submissions Ms Ling relied on paragraph 86 in Williams where the Advocate General accepted the Danish Government's submission that

supplements must be included in the calculation of an average sum only when they are 'systematic components of pay.' Ms Ling submitted that the Advocate General was in that paragraph discussing two different aspects. The calculation of normal pay by an average over the reference period and assessing the amounts not usually paid and to include only those where they are systemic components of pay. The distinction Ms Ling submits is an important one. The question being considered was whether a supplement or payment is a systemic component of pay should be assessed at individual level of pay or the employer's pay system. Ms Ling submits that it is not about whether an individual happens to have a particular component of pay. The much more obvious meaning of what the Advocate General was discussing is that it is the system employed of pay by the respondent. Ms Ling expressly stated in oral closing submissions that it was sufficient in this case that the respondent operates a system whereby overtime is a systemic part of pay to bring all the test claimants overtime pay within the meaning of remuneration. The judge asked her if she would therefore argue that once such a system of overtime is identified any claimant that works overtime would be covered and she agreed with that proposition however small an amount of overtime that person worked.

238. The tribunal accepts the arguments set out by the respondent at paragraphs 29 – 35 of its closing submissions that this argument goes against the authorities. It is not a position taken in any of them. The EAT in Dudley was specifically dealing with overtime. It did not say that as the respondent had a system of voluntary overtime, all the employees were entitled to overtime pay in their calculation of holiday pay, even the employee who the Employment Judge found only performed overtime rarely.

239. It is interesting to note that Ms Ling has in her paragraph 35 cited above adopted the wording in Hein of 'broadly regular and predictable'. When the court states that however at paragraph 47 and elsewhere it is referring to the 'worker' working overtime and the 'worker's pay' including a significant element in respect of it. The tribunal accepts the submissions on behalf of the respondent that when the Advocate General in Williams was referring in paragraph 86 to 'systemic components of pay' it was to an individual workers pay. As already stated had she meant to refer to a system in place by the employer she would have said so.

240. It is also to be noted that in Flowers the claims were to go back to the Tribunal for further assessment required in each individual case (paragraph 36 EAT decision).

241. The claimants' secondary argument is that if the tribunal considers it must examine the pattern of voluntary overtime worked by each individual the tribunal should exclude payments from normal remuneration only where 'voluntary overtime is worked sufficiently infrequently and irregularly to amount to it being 'unusual and unforeseeable'. The example is given of Mr Frost who would still fall outside that categorisation although it is accepted that he worked overtime infrequently. Ms Ling suggests that is the meaning of paragraph 54 of Dudley. However, that is the paragraph in which the EAT stated that a payment is normally made if 'paid over a sufficient period of time on a regular basis' and gave the examples of one week each month or even each week. The words that the overtime was 'neither exceptional nor unusual' were used to describe

the claimants' overtime in the case the court was dealing with. The Court of Appeal in Flowers approved the statement by Simler J which included at paragraph 40 that whether a payment has been paid over a sufficient period of time to amount to normal pay will be a question of fact and degree but will not include items which are 'not usually paid or are exceptional'.

Issue 10 - Are such earnings to be included only in the circumstances contended for by the respondent

242 In the list of issues, the respondent set out 5 criteria which are disputed by the claimants stating that they go significantly further than the dicta in Hein. The tribunal would agree with that submission. Those criteria do not appear in the respondent's closing submissions in which it focuses on the words 'broadly regular and predictable' from Hein.

243. In the list of issues the respondent suggests that:

1. The voluntary overtime in question must be usually worked (within the appropriate reference period), that is to say on a significant majority of occasions; and/or
2. The occasions on which voluntary overtime is worked must be regular; and/or
3. The occasions on which overtime is worked must be expected; and/or
4. The voluntary overtime worked must form a significant element of pay; and/or
5. The number of hours worked, or at least the minimum number of hours worked must be regular and expected.

244. Dealing with each of those in turn. The authorities have not said that overtime must be worked on a significant number of occasions. In giving its view on the wording in Hein the Court of Appeal in Flowers stated it was seeking to distinguish between the broadly regular and that which was exceptional and unforeseeable overtime.

245. In referring to overtime being regular the authorities have said 'broadly regular' or in Dudley that which 'extends for a sufficient period of time on a regular and/or recurring basis it is sufficiently regular and settled for payments to amount to normal remuneration'.

246. This tribunal cannot see that any of the authorities referred to the overtime being 'expected'. The point made above is repeated. The very nature of voluntary overtime is that to a degree it will be unexpected as the employer will not know when the employee is likely to volunteer. If only expected voluntary overtime were to be included the authorities would have said so but it is the view of this tribunal that would be interpreting EU law too narrowly and at variance with the case law.

247. The courts have also not stated that overtime must form a significant element of pay. It was a fact in Lock that his commission did but that may often be the case where commission is part of the contractual pay.

248. The authorities have made it clear that it is a question of fact and degree for the tribunal. It is for this tribunal therefore to consider the circumstances of each of the test claimants before it rather than laying down generalised criteria.

249. The authorities have considered the issue of an 'intrinsic link' between the overtime and the contract. Simler J accepted that was a decisive criteria but certainly not the only one. The tribunal must follow her reasoning, which it accepts in any event, that without the contract of employment the arrangement for voluntary overtime would not exist. The duties done by the test claimants are the same when performing voluntary overtime as they are when they are working their basic contractual hours. Further, as stated in Dudley once they have started the voluntary overtime shift they are performing duties required under the contract and there is a direct link to the tasks required of them under the contract. It is then no different to an employee who is required to work overtime.

Reference period

Issue 16 – What is the appropriate reference period for the purposes of the above claims:

(a) For the purpose of establishing normality, regularity or other qualifying characteristics
(b) For the purpose of calculation, to the extent that any liability arises in principle?

Issue 17 – is it in each or either case:

(i) Twelve weeks
(ii) Fifty-Two weeks; or
(iii) Some other period, identified by the Tribunal pursuant to s229(2) ERA or otherwise?

250. It is more appropriate to deal with this issue out of turn before setting out the conclusions about the individual claimants

251. Both the overtime and HGP claims are being determined by applying EU case law. The authorities referred to above are therefore relevant to the issue of the 'reference period' in addition to the principles they set out about voluntary overtime. They all refer to a sufficiently representative reference period and one that can then level out any fluctuating earnings (AG in Williams).

252. The Amendment Regulations came into force on 6 April 2020 and changed the reference period of 12 to 52 weeks. There are no transitional provisions and the parties' respective arguments have been set out above.

253. This tribunal has concluded that the reference period that should apply to this case is 52 weeks. The Explanatory Memorandum to the Amendment Regulations makes it clear that it represented a more straightforward arrangement and provides a balance between the needs of employers and workers. Most respondents to the consultation process had supported such a

change 'agreeing that ironing out the seasonal fluctuations in holiday pay was a positive outcome'.

254. 52 weeks is also consistent with the suggestions made in the CJEU case law. The Advocate General in Williams referred to a 'sufficiently representative reference period' and the Court adopted the same terminology. In Lock the Advocate General stated that a period of 12 months 'would appear to me to be an appropriate solution'.

255. The tribunal has therefore concluded that the 52 week reference period brought into force by the Amendment Regulations applies to these proceedings even where the claims were brought before the 6 April 2020 and some of dates when it is alleged there was an unauthorised deduction occur before that date. Had it been the intention that it apply only to proceedings brought on or after a particular date it would have said so. There is some force in the argument advanced by the respondent at paragraph 53 of its closing submissions that the Amendment Regulations were made under s2(2) of the European Communities Act 1972 (as stated in the heading) and that therefore the objective was to bring the UK law in line with EU law.

256. In any event, the case law makes it clear that this tribunal is able to identify a representative period and it considers 52 weeks to be that appropriate period. It gives a much clear and fairer assessment of the extra work undertaken by the test claimants than a 12 week or shorter reference period.

Issue 11 – on the facts before the Tribunal, which, if any, periods of voluntary overtime earnings of each or any of the Sample claimants are to be included in the computation of pay for each holiday in respect of which an 'in time' claim is made? [this will require resolution of further subsidiary questions set out from paragraph 16 below – the reference period]

257. From the evidence heard from the test claimants and documents provided the tribunal has concluded that the following claimants overtime fell within normal pay in that it extended for a sufficient period of time on a regular and/or recurring basis and is sufficiently regular and settled for payments to amount to normal remuneration. Messrs Bowers, Cable, Double, ~~Fenn,~~ Fidgett and Humphreys

258. The overtime worked by Messrs Da Costa, Dagnall, Frost, Rhodda and Symes and Ms Craig and Ms Loftus did not.

Those whose overtime fell within normal remuneration

259. The authorities have made clear that it is for the fact finding tribunal to determine whether the overtime of individual claimants fell within normal pay. The tribunal also needs to focus on the period covered by the claim although the period outside of that may be relevant in marginal cases. The tribunal has

therefore looked at the years 2018 to 2021 and calculated the average hours worked by the claimants which is as follows:

Bowers	56.75 shifts a year
Cable	57.5 shifts a year
Double	56.5 shifts a year
~~Fenn~~	~~41~~ 56.5 shifts a year
Fidgett	67.5 shifts a year
Humphreys	51.5 shifts a year

260. That is at least on average one shift a week (Mr Humphreys is just under but only fractionally). Some of those would be higher were it not for the exceptional situation of the pandemic in the early part of 2020 which had an untypical effect on overtime.

261. The tribunal is satisfied that looked at in this way the overtime was over the course of a year sufficiently regular and recurring for it to be included in the above claimants' normal remuneration for the purposes of holiday pay. The overtime shifts were routinely (save in certain cases) for 12 hours. To deprive the claimants of that amount of pay when calculating holiday pay is contrary to the principles set out in the EU case law.

262 The way that the respondent's App works for the purposes of allocating overtime is to put those who 'tick' at the bottom of the list if they have already worked quite a bit of overtime. It therefore prevents an employee achieving a regular pattern (to the extent that the respondent would argue is necessary) unless others are not at that particular time 'ticking' as well. To then deny the employee overtime pay as part of normal pay would be to defeat the objectives set out in the case law that the worker should not be deterred from taking annual leave and should not be disadvantaged by doing so financially.

Those whose overtime did not fall within normal remuneration.

263. The tribunal has concluded that applying the authorities Messrs Da Costa, Dagnall, Frost, Rhodda and Symes and Ms Craig and Ms Loftus did not carry out overtime for a sufficient period of time on a regular and/or recurring basis and sufficiently regular and settled for payments to amount to normal remuneration. The argument advanced on behalf of the claimants that the respondent operates a 'well established, broadly predictable system of overtime' and that all the test claimants' therefore should have their overtime included has already been rejected. The same averaging exercise over the years 2018 – 2021 has been carried out for those which this tribunal considers do not qualify as for those who do.

Mr Da Costa	49 shifts = 12.25 shifts a year
Ms Craig	39 shifts = 9.75 shifts a year
Mr Dagnall	80 shifts = 20 shifts a year
Mr Frost	41 shifts = 10.25 shifts a year
Ms Loftus	88 shifts = 22 shifts a year
Mr Rhodda	81 shifts = 20.25 shifts a year
Mr Symes	148 shifts = 37 shifts a year

264. This exercise demonstrates that these particular test claimants were on average doing less than one shift a week. They were not performing overtime on a sufficiently regular and recurring basis for it to form part of normal remuneration.

265. In written closing submissions counsel for the claimant commented on the evidence in relation to each individual claimant from paragraph 15 – 27. In relation to Ms Craig she accepted that overtime was infrequent and 'scattered' although arguing it was performed on a recurring basis. Mr Da Costa she stated was carrying out overtime on a recurring and broadly regular basis 'if extremely infrequently'. Mr Dagnall, that the position was 'uneven' but regular and recurring in that 'it is spaced throughout the year'. Mr Frost it was acknowledged performed 'extremely infrequent overtime shifts'. Ms Loftus it was submitted performed overtime 'at a low but reasonably steady rate. Mr Rhodda it was acknowledged performed overtime relatively infrequently. Mr Symes had significant gaps but it was still argued for all of them that it was regular and recurring.

266. The tribunal however cannot accept that in relation to those claimants' their overtime fell within the meaning given in the case law. It was not 'sufficiently regular and settled' (Flowers) nor 'on a regular and/or recurring basis' (Dudley) for the overtime to be included in the calculation of normal remuneration.

HGP

Issue 13 – Does Higher Grade Pay, qualify for inclusion in holiday pay under the WTR 1998 and, subject to paragraph 6 of the list of issues (matters reserved for argument at the appropriate appellant level) the WTD 2003/88

Domestic law

267. The claimants' primary case in relation to HGP cannot be accepted. HGP is paid to those employees who have obtained a licence qualifying them to perform alternative work to that normally performed. It is in effect for 'acting up'. It is not remuneration which varies with the amount of work done to fall within subsection (3) of section 221 ERA. Ms Ling argues in her opening submission (paragraph 55) that the concept of 'quantity of work' used in Adshead is sufficiently 'capacious' to include the greater quantity of work achieved when acting up in a more senior role. There was absolutely no evidence heard that when acting up a 'higher level of output is therefore generated'. A different role is undertaken but not necessary a higher level of output. The EAT in Adshead likened the variable bonus to a classic productivity scheme. HGP is not a productivity scheme at all. It is not paid on results or quantity of work but for performing the role. The work undertaken to attract HGP is by its very nature 'higher grade' but that does not bring it within subsection (3)

268. The appropriate subsection is therefore s221(2) which provides that remuneration is that paid under the contract in force on the calculation date 'if the employee works throughout his normal working hours in a week'. As was stated in Econ when considering the profitability bonus what is contemplated by the subsection is a 'fixed sum paid week in week out upon completion of the working week'. The decisive condition is the completion of the normal working hours in a given week. That is not what HGP is. It is for acting up and performing other duties. It is not paid 'week in week out' but only when the employee is required to perform such duties by the respondent.

269. HGP does not fall to be included in the calculation of holiday pay applying domestic law.

EU law

270. The claimants' secondary position is that pursuant to EU law HGP is established as part of 'normal pay' by those who work it because it is a systematic component of remuneration and not exceptional and unforeseeable. This alternative argument is advanced in relation to Regulation 13 WTR only. The same argument is advanced as in relation to voluntary overtime that the system operated by the respondent is 'systematic and broadly regular and predictable'. That position cannot be accepted.

271 The tribunal has however concluded that the claimants are entitled as a matter of principle to the inclusion of HGP in the calculation of holiday pay.

272 Higher grade duties differ to voluntary overtime. The respondent has invested in training the employee to carry out this Relief work which it has decided needs to be performed. There was reference to 100 hours being performed before the licence is given. That involves an investment by both the claimant and the respondent. When the licence is granted the employee is required to carry out Relief work when asked to do so. It is not voluntary. The respondent needs this to cover for unexpected or sometimes planned absence of other

employees or to cover in other situations**.** As explained by Mr Allerton, it is the Labour Planners in the Resource Office who make the initial decision about skill – shortages within a particular shift and who to assign. Although it will be by its very nature different work to that which had been performed under the contract it becomes intrinsically linked to the contract once the licence is granted and the employee is required to perform the higher grade duties. The element of predictability is that the employee *will* be asked to perform the higher grade duties as the respondent has, by seeking applications for and training the employee, evidenced a requirement for that particular Relief duty to be undertaken. It is much more akin the supplements in Williams than voluntary overtime. Also as was referred to in Dudley in Bear Scotland Ltd v Fulton [2015] ICR 221 the claimants there, as in the case before this tribunal, had no right to refuse the overtime once it was offered to them even though the employer was not bound to offer it. That is very similar to the position with HGP.

273. It can be seen from the records of the test claimants claiming HGP that although it cannot be said that they carry out the duties on for example a weekly basis on a particular day of the week, they do then carry it out on a regular and recurring basis. It is certainly not exceptional or unforeseen. It is predictable to the extent that the respondent has trained so many employees to hold the requisite licence and they then will be called upon to do HGP on a recurring basis.

Issue 14 – in particular, in respect of each or any of the Sample Claimants, was the incidence of Higher Grade Pay, as the Respondent contends of an [irregular, impermanent or abnormal] character such as not to qualify for inclusion?

274 Mr Cable does not currently pursued a claim for HGP at this Hearing because his last HGP shift was worked more than 52 weeks before the first instalment of pay in respect of which a claim can be pursued following Bear Scotland. He reserves his right to do so depending on the outcome of Agnew.

275. In relation to the other test claimants who pursue an HGP claim (Craig, Frost, Da Costa, Dagnall and Rhodda) the tribunal has concluded that this element should be included for all of them in the calculation of their holiday pay as part of their normal remuneration. To find otherwise would be contrary to the principles set out in the EU case law as cited above. How much each of those claimants will be entitled to will be a matter for another hearing as it was agreed that this tribunal would not at this stage deal with those calculations. On the conclusions reached by this tribunal and taking a reference period of 52 weeks the uplift for some of those claimants' may be very small. There will also be issues, not yet considered, dependent on the decision in Agnew.

276. In so concluding the tribunal is conscious that it could be argued it is not respecting the 'autonomy of management and labour in relation to collective

pay negotiations' (Advocate General at paragraph 65 of Williams). However, it sees no rationale for the position which has been adopted in the collective agreement that holiday pay will include HGP if it has been worked continuously for 13 weeks prior to the calculation date. The respondent submits that the collective agreement is 'entitled to weight in assessing whether Art 7 has been observed'. It cannot be disputed that is what was said in Williams but in this case the tribunal has concluded that it would not be applying the EU principles taken from the case law to accept that HGP can only be included in the calculation of holiday pay in such circumstances. It is highly unlikely that such will occur for most claimants and to deny them the inclusion of HGP when it has been worked sufficiently regularly by them but not within that test would not be in accordance with the principles set out.

277. As noted in the list of issues the calculation of the holiday pay due to individual claimants was not to be determined at this Hearing and a number of issues were reserved for argument at the appropriate appellate level

_____

Employment Judge Laidler

Date: ~~16 January 2023~~

17 March 2023
On reconsideration

Judgment sent to the parties on

20 March 2023

For the Tribunal office