



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Phil Clark

**Respondent:** Peninsula Business Services Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Heard at:** Southampton

**On:** 21 February 2025

**Before:** Employment Judge K Richardson

### Appearances

For the Claimant: In person

For the Respondent: Mr C Glyn KC (Counsel)

## JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unauthorised deductions from wages is well-founded. The Respondent made unauthorised deductions from the Claimant's wages in the period 1 March 2022 to 31 December 2023.
2. The Respondent is ordered to pay the Claimant £8,483 which is the gross sum deducted from pay. The Claimant is responsible for the payment of any tax or National Insurance.

**Approved by  
Employment Judge Richardson  
26 March 2025**

Judgment sent to the parties on  
16 April 2025

Jade Lobb  
For the Tribunal

**Note**

Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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**REASONS**

1. For clarity I should state that this judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. In particular, if I have not mentioned a particular point or piece of evidence it, it does not mean that I have overlooked it, it is simply because it is not relevant to the issues.
2. Throughout this judgment I shall refer to Mr Clark as the Claimant and Peninsula Business Services Ltd as the Respondent.
3. By a claim form dated 25 February 2024 the Claimant complains that the Respondent unlawfully failed to pay him commission payments as part of holiday pay in respect of holiday leave taken prior to his resignation from the Respondent's employment on 31 December 2023. The ACAS certificate is dated 12 February 2024 to 13 February 2024 and so the matters complained are within time.
4. The Claimant was employed by the Respondent in the capacity of Business Development Manager. The Claimant was contracted to work 40 hours per week with a salary of £30,000 per annum. In addition, the Claimant received commission payments based on sales generated for the Respondent which are referred to in more detail below.
5. The Respondent is a limited company which is principally engaged in the provision of Employment Law, HR and Health and Safety Advisory and Consultancy services to around 35,000 clients in the UK.
6. For reference at this hearing the tribunal was presented with a bundle complying with the 100-page limit including the index.
7. The Claimant presented a witness statement on his own behalf. The Respondent called no witnesses. Prior to the hearing the Claimant had indicated that he wished to call Mr Arun McIntosh, but confirmed at the hearing that this was not something he wished to pursue further.
8. The Respondent confirmed that it was not disputing that it had only paid the Claimant his basic salary for holiday leave taken in the 24 month period prior to the

termination of his employment on 31 December 2023.

9. The parties also informed the tribunal at the commencement of the hearing that agreement had been reached insofar as the Claimant accepted the data and methodology of calculation for the quantum of commission payable for each day's leave taken contained in the Respondent's counter schedule of loss. I shall refer to this schedule as the "agreed schedule of loss" in this judgment. However, a dispute still remained as to the period over which the non-payment of commission should be accounted for. i.e. whether it should date back two years from the effective date of termination on 31 December 2023 or 25 February 2024 when the claim form was filed.
10. At the beginning of the hearing the Respondent presented a 13-page skeleton argument accompanied by a 318 page authorities bundle. The tribunal was advised that this had been served on the Claimant seven days prior to the hearing which was confirmed by the Claimant. The tribunal (albeit without the benefit of any detailed consideration of the contents of the skeleton argument at that juncture) questioned whether an application for leave to amend might be required on the part of the Respondent in the circumstances. The situation was explained to the Claimant who indicated that he would prefer to avoid further delay in the proceedings and wished to proceed without any further consideration of this issue.
11. Judgment was reserved, but on the next working day after the hearing the Claimant referred the tribunal to the recent decision of the Watford employment tribunal in the case of Mr H Ashfar & Others v Addison Lee Limited Case Numbers: 3306435/2020 & Others, 2207566/2021 & Others, 2203454/2021-2203455/2021. However, for the reasons explained below, it transpired that, due to the factual circumstances of this case, it was not necessary to consider this authority in this instance.

### **The Issues**

12. It was agreed by the parties the tribunal would have to consider the following in respect of matters of liability and quantum:

#### **Issue 1**

Was the Claimant only entitled to holiday pay at basic rate or should commission have been included.

- a. The Claimant asserts that he is entitled to rely on Lock v British Gas Trading Ltd [2014] ICR 813 and its associated Court of Appeal decision in British Gas Trading v Lock and another [2017] ICR as authority for the proposition that commission should have been included.
- b. The Respondent's position is that, in light of the Supreme Court's decision in Lipton v BA Cityflyer [2024] UKSC 24, section 6 of the European Withdrawal Act 2018, as amended by Retained EU Law (Revocation and Reform) Act 2023 now strips out EU law from the definition of UK law that

is now called assimilated law. Accordingly, sections 221-224 of the Employment Rights Act 1996 as referred to by regulation 16 of the Working Time Regulations 1998, apply with their full force to this claim thus precluding the payment of commission as part of holiday pay.

### Issue 2

If Lock still applies, can the Claimant still rely on this authority in the final nine months or other shorter period of his employment given that commission was paid nine months in arrears and during this period the Claimant was looking for alternative employment and, it is alleged by the Respondent, would not be dissuaded from taking holiday leave because of any fear of losing commission.

### Issue 3

Should the Claimants claim be limited to deductions dated from 26 February 2024 by reason of section 23(4A) Employment Rights Act 1996 because he presented his claim on 25 February 2024 or is the correct date 31 December 2023 as claimed by the Claimant.

## **Findings of Fact**

13. The Claimant received a basic salary of £30,000 per annum. In addition to this he was entitled to receive commission at a rate of 10% of the net value on all new business to existing clients and 2.5% on renewals and the increased value on renegotiations that he secured. The Respondent's Statement of Main Terms of Employment states that "*..initial payments are made on a monthly basis.... providing we have received at least 25% of the fee from the client (or 15% for five year contracts). If not, it will be paid at the end of the calendar month following receipt of 25% or 15% of the fee respectively.*" The Claimant confirmed in his statement that, in practice, commissions are received approximately nine months after the start of the date of any new business agreement.
14. During cross-examination the Claimant confirmed that he formed the intention to leave the Respondent's employment sometime during the summer of 2023. More specifically he agreed that he had updated his CV on "Indeed" on or about 13 June 2023 and further updated it on 21 June 2023.
15. On 1 December 2023 the Claimant sent the Respondent a letter of resignation by email which was accepted the same day by the Respondent. Claimant worked four weeks' notice and left the Respondent's employment on 31 December 2023.
16. The Claimant took no leave in the first two months of 2023 as per the agreed schedule of loss.

## **The Law**

17. S. 27(1) Employment Rights Act 1996 ("ERA") defines "wages" as any sums payable to the worker in connection with his employment.

18. The provisions of s.13 of the ERA state:

S.13(1) An employer shall not make a deduction from wages of a worker employed by him unless:

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

19. S.13(2) ERA In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised:

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

20. S.13(3) ERA Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

21. S.23(1) ERA provides that a worker may present a complaint to an employment tribunal that their employer has made a deduction from their wages in contravention of section.

22. Lock v British Gas Trading Ltd [2014] ICR 813 in this case the ECJ was asked to consider a referral from an employment tribunal sitting in Leicester for a preliminary ruling on the following questions:

(1) Where a worker's annual pay comprises of basic pay and commission payments made under a contractual right to commission; the commission is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's work; commission is paid in arrears and the amount of commission received in a given reference period fluctuates according to the value of sales achieved and contracts entered into and the time of such sale; during periods of annual leave, the worker does not undertake any work that would entitle him to those commission payments and accordingly does not generate commission in respect of such periods; during the pay period which includes a period of annual leave, the work is entitled to basic pay and will continue to receive commission payments based on commission earned earlier; and his average commission earnings over the course of the year will be lower than they would be if the work had not taken

leave, because, during the leave period, he will not have undertaken any work that would entitle him to commission payment; does article 7 of directive 93/104/EC, as amended by directive 2003/88... Require that member states take measures to ensure that a worker is 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?

(2) What are the principles which inform the answer to question 1?

(3) If the answer to question 1 is “yes”, what principle (if any) are required to be adopted by member states in calculating the sum that is payable to the worker by reference to the commission that the worker would or might have earned if he had not taken annual leave?

23. Article 7 of Directive 2003/88/EC states:

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 allowance in lieu, except where the employment relationship is terminated.

24. At the time Lock was being considered the position under the law of England and Wales was as follows:

a. Regulation 13 of the Working Time Regulations 1998 (WTR) implemented the working time directive 93/104/EC, as replaced by directive 2003/88. Specifically it provided for four weeks/20 days leave.

b. Regulations 16(1) and 16(2) WTR incorporated ss. 221 to 224 of the Employment Rights Act 1996 (ERA) in respect of the method of calculation of a week's pay which was subject to further subsections within regulation 16 which are not relevant to this matter.

c. S. 221 ERA states:

(1) This section and ss. 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 s. 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.

25. Prior to Lock the leading authority on the question of whether commission payments could form part of an employee's remuneration was Evans v Malley Organisation Ltd t/a First Business Support [2003] ICR 432 where the Court of Appeal was asked to consider the application of section 221 ERA in circumstances where a salesperson who was paid a basic wage and commission of 25% on the value of sales received only a basic wage in respect of holiday pay. The Court of Appeal ruled that the Claimant was not entitled to receive commission as part of holiday pay. The court noted that commission payments did not depend on the length of the Claimant's working week and his pay was not linked to the number of hours worked, but instead depended on the success he enjoyed in making sales. In short the Court determined that for the purposes of s. 221 ERA a worker was only entitled to be paid for work done rather than on the basis of the results of work done.
26. Accordingly, prior to Lock the interpretation of section 221 ERA under the domestic law of England and Wales was settled insofar as regulation 16 WTA did not permit the recovery of commission under regulation 13.
27. In Lock the harm that the ECJ was seeking to address in interpreting article 7 of Directive 2003/88 was the risk that an employee who receives commission as well as basic pay may be dissuaded from taking leave because they would not generate commission whilst on leave. Thus although the financial impact would not be suffered immediately i.e. at the time leave was taken a loss of commission would be suffered at a later date (paragraphs 21 to 23 of the judgment in Lock.)
28. The ECJ went on to conclude at paragraph 24 of Lock:
- “Having regard to the foregoing considerations, the answer to the first and second questions is that article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary.”
29. Lock was considered by the Court of Appeal in British Gas Trading Ltd v Lock [2016] EWCA Civ 983. At that stage there was no dispute that article 7 of Directive 2003/88/EC required commission to be included in holiday pay. The dispute was whether the Working Time Regulations 1998 giving domestic effect to the directive could be interpreted as incorporating that requirement. The Court of Appeal read down the WTR regulations and added the following words to a new regulation 16(3)(e) which provided:
- (e) as if, in the case of the entitlement under regulation 13, a worker with normal working hours whose remuneration includes results-based commission shall be deemed to have remuneration which varies with the amount of work done for the purpose of section 221.
30. Although the Court of Appeal made clear that it was not seeking to decide all possible cases under regulation 13 and expressed its findings as being limited to

the facts in Lock, this judgment had the effect of incorporating commission into the holiday pay of workers with normal working hours, at least in cases where the facts were similar.

31. In Lipton v BA Cityflyer Ltd [2024]UKSC 24 the Supreme Court considered the effect of Brexit on the application of EU law following the end of the transition period i.e. IP Completion Day - 31 December 2020 and, in particular, the effect of the European Union (Withdrawal) Act 2018 (WA18).

32. The court held at paragraph 18 of the judgment:

“If the law which formed part of domestic law because of the UK’s membership of the EU had simply ceased to have effect on IP completion Day, that would have left large gaps in our legal system dealing with many important aspects of our lives. S. 2, 3 and 4 of the Withdrawal Act 2018, as amended by the Withdrawal Agreement Act 2020, dealt with carrying forward EU enactments and rights into domestic law after IP completion Day.”

33. At paragraph 21 of the judgment the Court explained that:

- a. “S. 5 (4) of the Withdrawal Act 2018 provided that the EU Charter of Fundamental Rights was not part of domestic law on or after IP completion day, although rights that existed in domestic law irrespective of the Charter remained;
- b. Para of schedule 1 to the Withdrawal Act 2018 effectively prohibited any further recognition of general principles of EU law in cases decided after Brexit. Further, para 3 limited the application of such general principles which had been recognised before IP completion day by providing that there is no right of action in domestic law after IP completion day based on a failure to comply with those general principles. It also precluded any reliance on general principles to disapply or quash any enactment or rule of law or to decide that any conduct was unlawful.”

34. At paragraph 52-53 of the judgment court set out the provisions of ss. 2, 3, 4 and 5 WA18 as it applied to claims prior to 1 January 2024. The relevant extracts are repeated below:

S.2 saving for EU-derived domestic legislation

(1) EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day.....

(3) this section is subject to s. 5 and schedule 1 (exceptions to savings and incorporation) and s. 5A (savings and incorporation: supplementary)....

S.4 Saving for rights etc under section 2(1) of the European Communities Act



1972

- (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day-
- (a) are recognised and available in domestic law by virtue of section 2 (1) of the European communities act 1972, and
- (b) are enforced, allowed and followed accordingly, continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
- (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they-.....
- (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).
- (3) This section is subject to section 5 and schedule one (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary)....

S.5 Exceptions to savings and incorporation

- (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day.
- (2) Accordingly, the principle of the supremacy of EU law continues to apply on and after IP completion day so far as relevant to the interpretation, this application or quashing of any enactment or rule of law passed or made before IP completion day.....
- (4) The Charter of Fundamental Rights is not part of domestic law on or after IP completion day.
- (5) Subsection (4) does not affect the retention in domestic law on or after IP completion day in accordance with this act of any fundamental rights or principles which exist irrespective of the Charter...
- (6) Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect.”

35. By a majority the Supreme Court held obita dicta that WA18 is:

“.... a complete code by which Parliament dealt comprehensively with the application in the United Kingdom of EU law following IP completion day. According to the complete code analysis, where a set of facts occur pre-Brexit which, having regard to EU law which applied at that time, gives rise to a cause of action, the Claimant’s right to pursue that cause of action is brought forward as part and parcel of the bringing forward of the law itself under whichever of sections 2, 3 or 4 is relevant. The scope of that cause of action is subject to whatever limitations are placed upon it by other provisions of the Withdrawal Act 2018 as is clear, for example, from the previous restricting Francovich damages claims.”

36. S.6 of WA18 states:

“Interpretation of retained EU law-

- (1) A court or tribunal—
- (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and
  - (b) cannot refer any matter to the European Court on or after IP completion day.
- (2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.
- (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
- (a) in accordance with any retained case law and any retained general principles of EU law, and
  - (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.
- (4) But—
- (a) the Supreme Court is not bound by any retained EU case law,
  - (b) [the High Court of Justiciary is not bound by any retained EU case law in certain circumstances]
  - (ba) a relevant court or relevant tribunal is not bound by any retained EU case law so far as is provided for by regulations under subsection (5A), and
  - (c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.
- (5) In deciding whether to depart from any retained EU case law by virtue of subsection (4)(a) or (b), the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law." .....
- (7) In this Act—
- "retained case law" means—
- (a) retained domestic case law, and
  - (b) retained EU case law;
- "retained domestic case law" means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they—
- (a) relate to anything to which section 2, 3 or 4 applies, and
  - (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
- "retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—
- (a) relate to anything to which section 2, 3 or 4 applies, and
  - (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
- "retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or

subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);  
"retained general principles of EU law" means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—

- (a) relate to anything to which section 2, 3 or 4 applies, and
- (b) are not excluded by section 5 or Schedule 1, (as those principles are modified by or under this Act or by other domestic law from time to time)."

37. In Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89), the ECJ mandated that national courts must interpret national law in a way that is consistent with the requirements of EU law, even if that requires a "purposive" or "strained" interpretation.

38. Retained EU Law (Revocation and Reform) Act 2023, ...s. 22 Commencement, transitional and savings... "(5) Sections 2, 3 and 4 do not apply in relation to anything occurring before the end of 2023."

39. European Union (Withdrawal) Act 2018, s.1B Saving for EU-derived domestic legislation for implementation period... subsection 7:

"In this Act "*EU-derived domestic legislation*" means any enactment so far as-....

- (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972"...

40. European Communities Act 1972, s. 2 General implementation of Treaties subsection 2:

"Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme , make provision—

- (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

- (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid. In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions

or conditions (if any) as may be specified by the Order in Council.”

41. S. 23(4) of the ERA as inserted by The Deduction from Wages (Limitation) Regulations 2014 (S.I.2014/3322), states:

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.

### **Application of the law**

#### **Issue 1**

42. For the purposes of this case which deals with matters arising in the period between 31 December 2020 and 31 December 2023 retained EU law is defined in s. 6(7) of the European Union (Withdrawal) Act 2018 (WA18) to include EU derived domestic legislation i.e. the domestic legislation which continued to be domestic law under section 2 of WA18, including UK primary and secondary legislation which gave effect to EU directives immediately before the end of the transition period.
43. EU directive 93/104/EC, which was replaced by directive 2003/88/EC, was implemented in the UK in the form of the Working Time Regulations 1998 (WTA 98). Accordingly, I find that the WTA 98 falls within the definition in s. 1B(7)(a) of WA 18 and thus constitutes EU derived domestic legislation.
44. Ss. 2, 3 and 4 of the Retained EU Law (Revocation and Reform) Act 2023 (REUL 23) which amongst other things repeal s. 4 and amend s.6 of the WA 18 do not apply in relation to anything occurring before the end of 2023 (see s. 22(5), REUL 23) and so are not applicable in this case.
45. S. 6(3) of the WA 18 requires retained EU law, so far as it was unmodified after the end of the transition period, to be interpreted in accordance with a defined body of retained EU case law, retained domestic case law, and retained general principles of EU law until a relevant domestic court departs from that body of law, or until UK legislation modifies the relevant retained EU law. This is in line with the principles of purposive interpretation set out by the ECJ in Marleasing.
46. S. 6(4)(ba) of WA 18 states:
- “a relevant court or relevant tribunal is not bound by any retained EU case law so far as is provided for by regulations under subsection (5A)”
47. I am not aware for any such regulation applying to this tribunal.
48. In line with the foregoing I find that the ECJ judgment in Lock and the subsequent Court of Appeal judgment in British Gas constitute respectively retained EU case law and retained domestic case law. Moreover, there has been no amending

legislation during the period in question i.e. before 31 December 2023 nor any departure by a domestic court from the Lock or British Gas principles.

49. Accordingly, I find that this tribunal is bound by the ECJ judgment in Lock and Court of Appeal decisions in British Gas.

50. However, if I am wrong in this analysis, I will now consider the first issue as set out earlier in my judgment.

51. The Respondent contends that this tribunal has to consider whether the ECJ principles in Lock can still be applied to the facts of the Claimant's claim. The Respondent argues that the interpretation of EU retained law is constrained by s.5(4) WA 18 insofar as the Charter of Fundamental Rights is not part of domestic law after IP completion day. Moreover, this case arose after IP completion day i.e. when the Charter of Fundamental Rights was not part of UK domestic law and thus the Claimant did not benefit from the Charter's protection. The Respondent asserts that, absent the Charter being part of the context of the interpretation of article 7 of directive 2003/88/EC, it cannot be said that the ECJ would have reached the conclusion that precluded UK domestic law excluding commission from sales as being remuneration for the purposes of regulation 16 WTA. If I find that to be the case then Lock is no longer binding on this tribunal and the domestic methodology for assessing holiday pay (as expounded in Evans) currently only applicable to regulation 13A WTR, will also apply to a regulation 13 claim.

52. The Respondent further asserts that the ECJ's reliance on the Charter in Lock was not mere reliance upon a general principle of EU law. But even if that is not the case, the Respondent relies on paragraph 3(1), schedule 1 of WA 18 which states:

“(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.  
(2) No court or tribunal or other public authority may, or not after IP completion day-  
(a) to supply or quash any enactment or other rule of law, or  
(b) quash any conduct or otherwise decide that it is unlawful,  
because it is incompatible with any of the general principles of EU law.”

53. Based on the foregoing the Respondent asserts that this tribunal cannot use the principle of Supremacy in trying to reach a conforming interpretation.

54. The Respondent has laid great emphasis on the importance of article 31(2) of the European Charter of Fundamental Rights (the Charter) as the context of the interpretation of the interpretation of Article 7 of directive 2003/88/EC. In particular quoting paragraphs 14 – 15 of the judgment in Lock:

“14. According to the court's settled case law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogation and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104 itself, a Directive now codified by Directive 2003/88: see *KHS AG v Schulte* (Case C-214/10) [2012] ICR D19;

*[2011] ECR I-11757, para 23 and the case law cited. That right is, moreover, expressly guaranteed by article 31(2) of the Charter of Fundamental Rights of the European Union, which article 6(1)FEU recognises as having the same legal value as the treaties.*

*15. In that context, article 7 of Directive 2003/88/EC must be interpreted in the light of its wording and of the objective pursued by it”.*

55. In relation to the significance of the Charter I note the Attorney General's opinion in Stringer at para 48:

“However, in interpreting article 7 of Directive 2003/88/EC, it should be borne in mind that the right to minimum paid annual leave was not upheld for the first time in the Working Time Directive: it has long been included, together with an indication of the period of leave guaranteed, amongst fundamental social rights recognised by international law. At international level this fundamental right is mentioned, for example, in article 24 of the Universal Declaration of Human Rights, which the United Nations General Assembly adopted on 10 December 1948 by Resolution 217 A (III), which confers on everyone the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”

56. I also note that s.5(4) of WA 18 s.5 states that “subsection (4) does not affect the retention in domestic law on or after IP completion day in accordance with this act of any fundamental rights or principles which exist irrespective of the Charter...”. [My emphasis]

57. I regard this as evidence that the ECJ would still have had regard to the “fundamental” right to paid annual leave irrespective of whether Article 31(2) of the Charter had been taken into account. Furthermore, s.5(4) WA 18 acknowledges that such rights should continue to be recognised.

58. Moreover, it is not clear to me that article 31(2) of the Charter really adds anything to the wording of article 7 of directive 2003/88/EC, at least insofar as the entitlement to paid leave is concerned. Article 31(2) states:

“Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave”

59. Article 7 of directive 2003/88/EC states:

“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 allowance in lieu, except where the employment relationship is terminated.”

60. Whilst I concede that reference was made to the Charter as being part of the context of the interpretation of Article 7 in Lock it is also clear that the ECJ felt that Article 7 needed to be interpreted in accordance with its own wording (see para 15 of Lock).
61. The Charter was a factor taken into consideration by the ECJ, but I do not agree that it was the only consideration which drove the ECJ's interpretation of directive 2003/88/EC. The ECJ's judgments in earlier cases dealing with Article 7 of directive 2003/88/EC such as Robinson-Steele v RD Retail Services Ltd 2006 ICR 932 or Stringer and ors v Revenue and Customs Commissioners 2009 ICR 932 made no mention of the Charter. Moreover, the Charter was only mentioned briefly in later cases such as British Airways plc v Williams and ors 2012 ICR 847 para 18 and in Lock itself as quoted above.
62. The ECJ in Lock drew extensively on the authorities referred to above in reaching its decision. In particular:
- a. "...The Court has already stated that the term "paid annual leave" in article 7(1) means that, for the duration of the "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: see Robinson-Steel ...and... Stringer."
  - b. "The amount paid in respect of both his annual leave and the sales achieved by him during the weeks preceding the period of his annual leave enables the worker to take the leave to which he is entitled: see Robinson-Steel."
  - c. "Such a reduction in a worker's remuneration in respect of his paid annual leave, liable to deter him from actually exercising his right to take that leave, is contrary to the objective pursued by article 7 of Directive 2003/88/EC: see British Airways plc v Williams ...para 21."
63. In my assessment the ECJ's decision making process in Lock was driven by a careful consideration of the previous case law on Article 7 of directive 2003/88/EC. The Charter was referred to in para 14 as set out above, but only in the context that the rights set out in Article 7 of directive 2003/88/EC were also expressly guaranteed by Article 31(2) of the Charter.
64. Whilst it is impossible to state what the ECJ would have decided in Lock in the absence of the Charter, I am not persuaded on the balance of probabilities that the Charter was the major determining factor in reaching its decision and that, in its absence, the ECJ would have reached a different conclusion.
65. Finally, the rationale behind the drafting of WA 18 was to try to ensure consistency and stability in relation to the application of EU derived domestic legislation whilst the UK was transitioning away from the European Union. If the Respondent's contentions are correct, then it would seem that European case law providing guidance on the interpretation of retained EU law would be open to challenge on the basis of the domestic dis-application of some elements of European law, for example the Charter of Fundamental Rights of the European Union. This

undermines the objective of WA 18 to ensure some measure of consistency during the transition period. In this regard I note that post 31 December 2023 amendments have been implemented to the WTR which have sought to codify many aspects of ECJ case law including Lock (see the addition of s. 16(3ZA)(a) of the WTA as inserted by The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (S.I. 2023/1426)) which seems to reflect the legislative aim of WA18.

66. Accordingly, I find that the Court of Appeal decision in British Gas Trading v Lock and another [2016] EWCA Civ 983 remains extant and binding on this tribunal and so the Respondent's failure to pay commission as part of holiday pay was a breach of Regulation 16 of the Working Time Regulations 1998 and s.13 of the ERA.

## Issue 2

67. It is the Respondent's case that given commission was paid nine months in arrears and during this period the Claimant was looking for alternative employment, the Claimant was not dissuaded from taking holiday leave due to any fear of losing commission because he knew that it was unlikely to ever accrue. Indeed it is clear from the agreed schedule of loss that the Claimant took his full four weeks of regulation 13 WTA holiday in 2023.

68. In support of this contention the Respondent has referred me to paragraphs 21 to 23 in the Lock judgment where the ECJ clearly identified a concern that workers may be deterred from exercising their right to annual leave in circumstances where taking that leave would result in a reduction in the worker's income which was contrary to the objective pursued by article 7 of directive 2003/88/EC. The Respondent contended that in circumstances where the Claimant was not dissuaded from taking leave Lock should not apply.

69. The Respondent's argument requires a tribunal to focus specifically on the subjective mindset of an individual worker in order to assess whether or not that worker was actually deterred from exercising a right to annual leave because of concerns regarding the loss of commission payments. I do not find that the judgment in Lock can be read in that way. It is clear that the ECJ was setting out concerns about conduct by employers which in general may deter or may be liable to deter workers from taking leave for fear of losing commission. It addressed those concerns by formulating a judgment which precluded limiting holiday pay to basic salary where a worker's pay comprised basic salary and commission payments. Nothing in the judgment indicates a requirement for a subjective case-by-case analysis of the type that the Respondent appears to be advocating.

70. In line with the foregoing I find that the Claimant is entitled to rely on Lock for the entirety of his employment with the Respondent

## Issue 3

71. Given the concession made by the Claimant at the beginning of the hearing i.e. that his claim is limited to 24 months, the only issue I have to determine is the date from which that 24 month period should be calculated. This is either the date that



the Claimant's employment came to an end i.e. 31 December 2023 or the date that the claim was commenced i.e. 25 February 2024.

72. However, upon examining the agreed schedule of loss I find that, because the Claimant took no leave in the first two months of 2022, it makes no difference to the number of days leave, and thus the amount of commission payable, whether two years is counted back from 31 December 2023 or 25 February 2024. Accordingly, I find it unnecessary to make a determination as to which date is the correct one.

### Remedy

73. The agreed schedule of loss covers the four weeks holiday pay taken in the calendar years 2022 and 2023. The unpaid commission computes to a gross figure of £8,483.60 using either 31 December 2023 or 25 February 2024 as the date from which the agreed 24 month count back period should begin. A copy of the agreed schedule of loss is appended to this judgment detailing the calculation of the unpaid commission.