Case Number: 3300471/2015, 3300480/2015, 3300485/2015, 3300483/2015, 3300478/2015, 3300484/2015, 3300481/2015, 3300479/2015, 3300475/2015, 3300487/2015

EMPLOYMENT TRIBUNALS

Claimants			**Respondent**
1. Mr G Turpie	**2. Mr S Johnson**	**v**	**Veolia ES (UK) Limited**
3 Mr Panagiodis	**4. Mr G Kowalowski**		
5. Mr S Hunter	**6. Mr Panagiodis**		
7. Mr Harding	**8. Mr C Kelynack**		
9. Mr Davies	**10.Mr B Mahlangu**		
11. Mr D Dwight			

Heard at: Watford **On**: 5 to 8 June 2017

Before: Employment Judge Skehan

Appearances

For the Claimant: Ms M de Savorgnani (Counsel)
For the Respondent: Mr S Cheetham (Counsel)

JUDGMENT

1. Mr Turpie's claim for unauthorised deduction from his wages in respect of unpaid holiday pay pursuant to the Working Time Regulations 1998 is successful, to the extent set out below, and the Respondent is ordered to pay to Mr Turpie the agreed sum of **£1317.66** in addition to the sum of **£1100** in respect of employment tribunal fees within 14 days from the date of this judgment.

2. Mr Kowalowski's claim for unauthorised deduction from his wages in respect of unpaid holiday pay pursuant to the Working Time Regulations 1998 is successful, to the extent set out below. This claim has been listed for a remedy hearing at **Watford Employment Tribunal**, Radius House, 51 Clarendon Road, Watford WD17 1HP to start at 10.00am or so soon thereafter as possible on **12 September 2017.**

3. Mr Harding's claim for unauthorised deduction from his wages in respect of unpaid holiday pay pursuant to the Working Time Regulations 1998 is struck out in accordance with Rule 37 of the ET Rules and dismissed.

4. Mr Davies' claim for unauthorised deduction from his wages in respect of unpaid holiday pay pursuant to the Working Time Regulations 1998 is struck out in accordance with Rule 37 of the ET Rules and dismissed.

5. Mr Mahlangu's claim for unauthorised deduction from his wages in respect of unpaid holiday pay pursuant to the Working Time Regulations 1998 is struck out in accordance with Rule 37 of the ET Rules and dismissed.

6. The above decision and reasons below are binding on each of the claims of Mr Panagiodis, Mr Johnson, Mr Hunter, Mr Dwight & Mr Kelynack. In accordance with Rule 36 of the ET Rules, any of these parties may, within 28 days after the date on which the employment tribunal sent a copy of the decision to a party, apply in writing for an order that the decision does not apply to, and is not binding on them. These cases have been listed for final determination and for a remedy hearing at **Watford Employment Tribunal**, Radius House, 51 Clarendon Road, Watford WD17 1HP to start at 10.00am or so soon thereafter as possible on **12 September 2017.**

REASONS

Preliminary Issues

1. The first preliminary issues to be determined prior to the start of this hearing was the claimants' application dated 24 May 2017 to amend the claims of Mr Turpie and Mr Dwight to add the holidays they have taken since the submission of their claim forms to date. The Respondent objected to this application. The application was allowed at the commencement of the hearing and I do not set out the reasons other than to note that no submissions were made or consideration given to whether the claims were time barred where there had been a series of deductions and where more than 3 months had elapsed between those deductions as provided in Fulton & others V Bear Scotland Limited UKEATS/0010/16/JW ("Bear Scotland") and Lock v British Gas Trading Ltd [2014] I.C.R.813 ("Lock"). The inadvertent consequence of allowing the claimants' amendment was highlighted following the determination of liability in this matter but prior to the determination of remedy. Counsel for the claimant submitted that the tribunal was bound by the case of Amey Services Limited & Enterprise v Aldridge and others UKEATS/0007/16/JW ("Amey") and prevented from considering any time barring issues effectively dis-applying the three-month rule established in Bear Scotland and Lock. The respondent applied for a reconsideration of the order to extend time to allow the amendment to the claims of Mr Turpie and Mr

Dwight during the course of the hearing in accordance with Rule 71 of schedule 1 The Employment Tribunals (Constitution etc) Regulations 2013 ("the ET Rules"). The application was made on the basis that there had been a failure to consider the full extent of the limitation issues, which was an error of law. Following the reasoning of Amey, the application for a reconsideration was successful and the earlier order allowing the amendment of the claims was revoked. The matter was considered again and I heard oral submissions from both parties.

2. The basis for Mr Turpie and Mr Dwight's application to amend their claims was set out in the claimants' counsel's opening notes. In considering the application afresh, I was referred to the relevant presidential practice direction, that gave claimants claiming holiday pay an alternative to lodging new claims at three month intervals. There was a debate as to whether or not the claimants met paragraph 3 of that presidential Practice Direction and whether there was a deficiency of the particulars given by the claimant within their application. However, the practice direction makes clear that I must also consider the application in accordance with the usual principles. The case of Amey as relied upon by the claimant, provides a useful reminder of what must be considered with particular reference to the cases of Selkent Bus Co v Moore [1996] ICr 836, Rawson v Doncaster NHS Primary Care Trust UKEAT/0022/08 and Newsquest (Herald and Times) Ltd v Keeping UKEATS/0051/09. A time bar issue is an essential component of the decision to grant or refuse an amendment and I consider these matters in relation to each claim.

3. Mr Turpie's claim for guaranteed holiday was within the statutory limitation period on 24 May, when the application was presented and this was how it was initially argued. However, I have found below that the holiday entitlement in question was 'non-guaranteed' and voluntary and, because of this, the amended claim is out of time. I have discretion to extend statutory limitation only on the basis of the 'reasonably practicable' rule. The last deductions in respect of holiday taken in September were made in October 2016. Similarly, Mr Dwight's claim is out of time. His application of 24 May relates to deductions made in September 2016, some eight months after the deduction and five months after the claim should be brought. The explanation provided by counsel for the claimants was that the claimants, although represented, did not have effective legal representation in place. It is well established that where legal representatives, particularly specialist legal representatives, are appointed, it is presumed that it was reasonably practicable to present the claims in time. I note that this is an important factor in relation to considering the application, but is not necessarily a decisive factor, so I continue.

4. The other issue identified in both of these claims was that there was a break of more than three months between the relevant deductions. In Mr Dwight's case, not only is the last deduction of September 2016 outside the statutory time limit, the previous deduction was more than three months earlier, falling foul of the three month limit on a series of deductions as provided in Bear Scotland and Lock. Mr Turpie is in a similar position in that the last deduction is subject to the statutory time limit point and there is more than a three month gap between the it and the previous deduction. The claims should have been brought by Mr Turpie within three months of November 2015 and October 2016 and Mr Dwight within three months of September 2015 and September 2016. The claimants' submission is that I can make a decision, confined to the facts of these cases, that the amendment is in the interest of justice, noting the balance of hardship to the claimant and relative injustice to the respondent. To do

otherwise would make the claimant's EU remedy entirely ineffective. The respondent's counsel argues that the implementation of article 7 is a matter of domestic law and the potential incompatibility with EU law is a matter that has been decided in the higher courts, namely in the cases of Bear Scotland and Lock.

5. On consideration of the application, there is a problem for the claimants at every turn. While I may well be minded to use my discretion to allow the claim through where the only issue I identified was a failure to comply with Practice Direction paragraph 3, and where I considered that the respondent had all the relevant information in respect of the holiday entitlement in any event, but when considering the limitation issues, more serious problems arise. The fact that it would have been reasonably practicable for the claimant to present the application within the statutory time limit, coupled with the last minute approach from the claimant's solicitors strongly favours refusing the application. I accept Mr Cheetham's submissions that the senior courts have addressed the implementation of article 7 in Bear Scotland and Lock. I do not consider that it is open to me to depart from this position and effectively allow the Claimants to circumvent the 3 month rule by submitting late applications to amend their claims. For these reasons and taking in to account the balance of hardship to the claimant and the injustice to the respondent, I consider that the application must fail and I do not allow the amendment as requested. Counsel for both the claimant and the respondent confirmed that they considered this order to have no effect on the liability judgement as set out below

3. The second preliminary issue was the respondent's application to strike out the claims of Messrs Davies, Mahlangu, Dwight and Harding for failing actively to pursue their claims. This was a claim was subject to considerable case management by the employment tribunal. It was the Claimants who requested that there should be "sample" – i.e. lead – Claimants at the preliminary hearing on 1 November 2016. Directions were given at that preliminary hearing including that witness statements be exchanged by 12 May 2017. On 17 January 2017, the Tribunal ordered that there should be five lead Claimants. These included Messrs Davies, Mahlangu, Dwight and Harding.

4. Counsel for the claimants confirmed that there had been considerable confusion on the part of her instructing solicitors who had incorrect contact details for the claimants. Mr Davies and Mr Harding were only contacted by the claimants' solicitor in May and they thereafter refused to participate within the hearing. No witness statements were prepared on their behalf. Mr Davies and Mr Harding had refused to attend tribunal to give evidence. Counsel for the claimant confirmed that a statement had been prepared on behalf of Mr Mahlangu. This statement had been sent to him to check. He was informed that he must revert to solicitors the following day or they would be a risk that his claim would be struck out by the employment tribunal. However, Mr Mahlangu did not contact his solicitors to confirm his statement. No further contact had been made by Mr Mahlangu to progress his claim.

5. Rule 37 of the ET Rules provides that at any stage of the proceedings, a Tribunal may strike out all or part of a claim on grounds including: that the manner in which the proceedings have been conducted by or on behalf of the claimants has been unreasonable; for non-compliance with any of these Rules or with an order of the Tribunal; or that it has not been actively pursued. When considering the circumstances set out above, I conclude that the manner in which the proceedings

have been conducted by or on behalf of Messrs Davies, Mahlangu and Harding in failing to provide evidence to the employment tribunal, particularly where they had been identified as lead claimants has been unreasonable, they have not complied with the order of EJ Smail to exchange witness statements by 12 May 2017 and this matter has clearly not been actively pursued by them. In the circumstances the claims of Messrs Davies, Mahlangu and Harding are struck out in accordance with the provisions of Rule 37 of the ET Rules.

6. Mr Dwight was in a different situation from the above claimants. Mr Dwight had only been contacted by the claimants' solicitors on 2 May, and informed of the hearing. Mr Dwight had already booked holiday and for this reason Mr Wright wished to participate but was unable to attend the employment tribunal. Counsel for the claimants acknowledged that the claimants solicitors were aware of the potential hearing date on 1 November 2016 and other than confusion in respect of contact details and a heavy workload, no explanation was put forward as to why Mr Dwight had not been informed of the hearing in good time. Taking Mr Dwight's particular circumstances into account, I declined to strike out Mr Dwight's claim. The previous practice management directions were amended to relieve Mr Dwight of his obligations as a lead claimant and it was ordered that Mr Dwight's claim be considered alongside the remaining non-lead claimants.

7. The third issue to be determined was whether Mr Kowalkowski should be added or substituted as a lead claimant. Counsel for the claimants proposed that the remainder of the claims be dealt with by Mr Turpie, who was an established lead claimant and Mr Kowalkowski. The addition of Mr Kowalkowski as a lead claimant was initially opposed by the respondent as there had been no attempt either to agree this or seek the Tribunal's permission. However, it appeared that, in light of the relative value of the claims, the fact that the evidence relied upon was mainly documentary evidence that was available to the employment tribunal within the bundle, Mr Kowalkowski had exchanged a witness statement, was present at employment tribunal and ready to go, it would be in accordance with the overriding objective set out within Rule 2 of the ET Rules to allow Mr Kowalkowski to be added as a lead claimant. This would allow the cases to be dealt with in ways which are proportionate to the complexity and importance of the issue, avoid delay and save expense. For these reasons, leave was provided for Mr Kowalkowski to be added as a lead claimant. As the hearing progressed it became apparent that any findings made in respect of Mr Turpie and Mr Kowalkowski alone, may not necessarily assist in determining the remainder of the claimants' claims. It was also apparent that the issues remaining in respect of the other claimants could be addressed from the available documentation contained within the employment tribunal bundle. In accordance with the overriding objective with a view to dealing with the matter justly, proportionately, avoiding delay and saving expense, and with the agreement of counsel for both parties, I heard evidence and submissions from both parties in relation to all of the remaining claimants. I have made factual findings within the below reasons relevant to those claimants. I note that all of the remaining claims have been listed for a final determination and remedy in Watford Employment Tribunal on 12 September 2017 set out above.

Issues

8. We considered the issues to be determined by the employment tribunal in respect of the claimants Mr Turpie and Mr Kowalkowski at the commencement of the hearing. These were:
    a. whether the claimants worked guaranteed, non-guaranteed or voluntary overtime; and
    b. where overtime was classed as voluntary, whether or not it was worked with sufficient regularity to form part of 'normal remuneration'.

The law

9. The law, so far as it applied to this particular case, was noncontroversial. Article 7(1) of the Working Time Directive 2003 (the Directive) provides that 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. The Working Time Regulations 1998 (WTR) implement the Directive:

    "13 - Entitlement to annual leave

    (1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

    …

    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] 1, at the rate of a week's pay in respect of each week of leave.

    (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

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

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

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

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

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

    …

10. Sections 221-224 of the Employment Rights Act 1996 (ERA) distinguish between employees with "normal working hours" and those with "no normal working hours"

    Section 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.

11. The ERA further distinguishes in s234 between guaranteed overtime (to be calculated as part of normal working hours) and non-guaranteed overtime (not to be taken into account in determining the normal working hours.

    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).

Relevant case law

12. Art. 7(1) is a provision from which the Directive allows no derogation and the right must be regarded as a particularly important principle of EU social law, Williams v British Airways Plc [2012] 1 C.M.L.R. 23, para 17. The right to “paid annual leave” under the Directive means that for the duration of ‘annual leave’ within the meaning of the directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest, Williams, para 19 citing the principle laid down in Robinson-Steele and Others, para 50. The purpose of the requirement is to put the worker, during that leave, in a position which is comparable to periods of work. The CJEU adopted the Advocate General Trstenjak’s views and held that holiday pay must be determined “in such a way as to correspond to the normal remuneration received by the worker” Williams, paras 20-21.

13. The principle was confirmed in Lock v British Gas Trading Ltd [2014] I.C.R.813 para 16, in circumstances where the commission payable on a monthly basis depended not on the amount of time worked but on the outcome of that work, which could not be performed while on annual leave, Lock, paras 8, 11. Where the amount received by the worker is composed of several components, a specific analysis must be carried out to determine the normal remuneration, Williams, para 22.

14. The specific enhancements to pay in Williams were deemed to fall into three general categories:

- Components of pay which are linked intrinsically to the performance of the tasks which a worker is required to carry out. Such aspects must be taken into account for the purposes of calculating holiday pay. Williams, para 24

- Components which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks do not need to be taken into account in the calculation of holiday pay. Williams, para 25.

- Components of total remuneration which relate to the personal and professional status of the worker. These must be maintained during a work's paid annual leave. Williams, para 28

15. As for the first category of supplement, 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. That assessment must be carried out on the basis of of an average over a reference period which is judged to be representative, Williams, para 26. Advocate General Trstenjak in Williams further considered that allowances which reward a worker's readiness to work at different times, such as overtime pay, have been recognised as pay, and logically the first category would necessarily include pay supplements for overtime, shift allowance and comparable payments. Advocate General's Opinion, paras 77-78.

16. "Normal remuneration" has since been interpreted by the EAT in Bear Scotland v Fulton [2015] ICR 221 as any pay which is normally received, although the Tribunal was considering the recoverability of non-guaranteed overtime in that case.

> Despite the subtlety of many of the arguments, the essential points seem relatively simple to me. "Normal pay" is that which is normally received. As Advocate General Trstenjak observed in Williams, there is a temporal component to what is normal: payment has to be made for a sufficient period of time to justify that label. In cases such as the present, however, where the pattern of work is settled, I see no difficulty in identifying "normal" pay for the purposes of EU law, and accept that where there is no such "normal" remuneration an average taken over a reference period determined by the Member State is appropriate. (para 44)

17. Patterson v Castlereagh Borough Council [2015] NICA 47, a judgment of the Northern Ireland Court of Appeal, concerned voluntary overtime the claimant worked. The CA ruled that there is no reason in principle why voluntary overtime should not be included in the calculation of holiday pay, concurring with a concession made by the Respondent in that case. It also considered that it is a question of fact for each tribunal to determine whether any particular allowance/overtime is a sufficiently permanent feature of the remuneration to trigger its inclusion.

18. In essence when dealing with voluntary overtime, the Tribunal should ask itself whether, on the evidence, there was a sufficiently intrinsic link between the overtime and the employee's work, relevant to which will be its "permanency", which word connotes not just regularity, but the extent to which the employee can rely upon its occurrence.

The Evidence

19. I heard evidence from Mr Turpie and Mr Kowalkowski on behalf of the claimants and Mr Griffith (contract manager at the Camden depot) and Mr Allen (senior contract manager at the Bromley depot) on behalf of the respondent. The witnesses gave evidence on their oath and there was limited cross examination. I'm grateful to all of the witnesses who were open and forthcoming in giving their evidence and assisting the employment tribunal. I was referred to a large bundle of documentation extending to 457 pages and page references within this judgement referred to pages within the employment tribunal bundle.

20. The respondent is a private company operating in the area of recycling and waste management within the UK. They cover recycling collection, domestic waste collection, garden waste collection and ancillary collection operations covering fly tipping, bin delivery, bin repairs, missed bin collections, paperbacks collections and special collections.

21. Mr Griffith gave some background information in relation to the claimants working hours. Within the Camden depot, the respondent runs three shifts: 06 .00 - 14:00 hours, 14:00 hours to 22:00 hours and 22:00 hours to 06:00 hours. These three shifts operate Monday to Friday and form the operatives' normal working hours. In addition, the respondent operates the same three-3 shifts on Saturdays and Sundays albeit with the morning shift reduced from 45 rounds as it is during the week to 15 rounds on a Saturday and eight rounds on a Sunday. The respondent is required to provide trade services over the weekend, for example to supermarkets and restaurants and the respondent relies upon the goodwill of its staff to undertake overtime and allow the respondent to meet its contractual obligations at the weekends. Mr Griffith said that although there are people within the depot on different forms of contract for various reasons, terms such as working hours and overtime rates and the way in which holiday pay is calculated is broadly consistent across the workforce irrespective of the type of contract that any particular employee may be on.

22. Mr Griffith explained the concept of 'work to finish'. This applies to all operatives and it means that operatives will work until they have completed their rounds and once they have done so, they were able to go home no matter what the time is. This means that more often than not, the operatives will finish work well before the scheduled finish time however they still get paid up to the finish time. In the event that the round takes longer, and they work beyond the allocated finish time the operatives would still get paid the same amount. It is effectively operated on a give-and-take basis. The employees don't complain as they normally finish early so it is ultimately an arrangement which is beneficial to them. This means that all of the overtime worked by employees is generally only paid for work undertaken at the weekend or on bank holidays or on an employee's nonworking days. The only time where ordinarily the respondent would pay over time during the week, would be

where there has been a breakdown of the vehicle or some other incident which has delayed the crew completing the work. When that happens, the crew wait for a new vehicle in order to complete the round and the respondent ordinarily pays overtime to the additional time worked in those particular circumstances.

23. Mr Griffith said that all overtime worked by operatives of the Camden depot was purely voluntary it was entirely up to the operatives whether they work any overtime or not and different staff had different attitudes. Some operatives want to work as many hours as possible and take as much overtime as is available however, in contrast, others did not want to work any overtime at all. There was no pressure placed on operatives to work overtime and in reality, respondent was never short of volunteers as most operatives want to work as much of it as the cat as they can. It was a bigger issue for the respondent to make sure that overtime was distributed fairly among those who want to work it. To ensure that overtime is distributed fairly, the respondent set up overtime rotas. It is entirely up to the operative whether they go on the rota or not. They are free to come off the rota at any time if they want to. The respondent does not require any operative to give any reason or explanation for coming off the rota. If they do come off the rota, they can be put back on the rota at any time and this request will be considered when the next rota is drawn up. Once the rotas are allocated, there is an expectation that the operative will turn up and work it. If they cannot, they must tell the respondent in advance to allow the respondent to arrange for somebody else to work that shift instead. Where overtime is worked, employees are paid at the rate of:
    a. Monday to Friday: time and a third;
    b. Saturday: time and a half;
    c. Sunday: double time.

24. All operatives are paid back holidays regardless if they work are not as this is designated holiday. Those that do work received double time on top.

25. I also heard evidence from Nick Allen in respect of the arrangements at the Bromley depot. Mr Allen was responsible for overseeing the management of overtime at Bromley. Mr Allen described the overtime worked the Bromley site is all being on a voluntary basis apart from the Bromley employees been required to work good Friday and every Saturday following a bank holiday Monday. This is referred to as the catch-up Saturday overtime and accepted by the respondent to be guaranteed contractual overtime. The rota system in Bromley worked in a similar way to that in Camden as set out above.

Mr Turpie

26. Mr Turpie's is employed by the respondent as a HGV driver/supervisor at the Camden site. His holiday year runs from 1 April to 31 March each year. Mr Turpie's contract of employment is contained within the employment tribunal bundle at page 150. His contract states "normal hours of work: 40 hours per week **(plus reasonable overtime as required**).". The reference to overtime is highlighted in bold in the contract. Mr Turpie confirmed that his normal contractual hours are 37.5 per week not 40 hours.

27. Mr Turpie assists the management team with a booking on and off process at the start and end of every shift that he works. This includes the issuing of keys/vehicles and worksheets to the operatives on the shift. Mr Griffith explained that the

respondent considered that the foremen were put in a position of trust because they are reliable. In light of their position, they are requested to assist the managers with the booking on and off and it can often be chaotic in the morning. Mr Griffith describes this additional task is entirely voluntary, explaining that the respondent likes foremen to do it. He also explained under cross examination that, in reality, all of the foremen undertake this work. And he wasn't aware of any foreman who declined to undertake these particular additional hours.

28. The Respondent operates a rota system for foremen whereby they each work one weekend in four. Mr Griffith said that the one in four weekend work could be distinguished from normal overtime weekend work as it was more important to the respondent. Mr Turpie accepted in cross examination that this overtime was voluntary. Mr Griffith describes this overtime work as regular work. The records within the employment tribunal bundle show that Mr Turpie consistently worked his one weekend in four. Mr Turpie chose to do as much overtime as he could, so there is, on average, one further weekend per month when Mr Turpie did this additional overtime. Mr Turpie said in evidence that these were worked as part of his duty to cover breakdowns "once a week or once a fortnight". They were paid at the rate of 1.33 x hourly rate. During cross-examination Mr Griffith said that these ad hoc overtimes could amount to 1 to 2 occasions per week, due to the condition of the respondent's fleet of vehicles

Mr Kowalkowski

29. Mr Kowalkowski's claim spans between 2 May 2014 and 19 September 2014. Mr Kowalkowski is said to have three types of overtime. It is accepted by both parties that Mr Kowalkowski was contractually required to work on the catch-up Saturday after the bank holidays. This work was paid at double time. For the sake of completeness, I refer to the memorandum of agreement between the respondent and the TGWU contained a page 392 of the bundle. In addition to working his contractual catch up Saturdays, Mr Kowalkowski worked as much overtime as it could. Mr Kowalkowski's attitude to overtime was that he would not say no to working overtime in case he was not given any more by the respondent. Mr Allen confirmed that Mr Kowalkowski was sought after by the respondent in respect of overtime due to his HGV licence and was generally 'at the front of the queue;' for overtime.

30. Mr Kowalkowski refers to pages 97 and 98 of the employment tribunal bundle being the detailed breakdown of his overtime hours. The additional voluntary overtime carried out by Mr Kowalkowski covers some other weekends and ad hoc weekdays and these identifiable through his payslips, which show as follows. I refer to the employment tribunal bundle pages 395-404:

page	Earnings period	Overtime
395	7.12.13-3.1.14	1 x Saturday "Non. Pen. 02.00" – 7.60 hrs
396	4.1.14-31.1.14	2 x Saturday "Non. Pen. 01.00" – 15.20 hrs total 1 x Sunday "Non. Pen. 02.00" – 6 hrs
397	1.2.14-28.2.14	No overtime
398	1.3.14-28.3.14	No overtime
399	29.3.14-25.4.14	1 x weekday "Non. Pen. 1.00" – 7.60 hrs 1 x weekday "Non. Pen. 1.50" – 4.50 hrs
400	26.4.14-23.5.14	4 x weekday "Non. Pen. 1.50 – 39.50 hrs total

		1 x Saturday “Non. Pen. 1.50” – 7.00 hrs 2 x Saturday “Non. Pen. 02.00” – 15.20 hrs total 1 x Sunday “Non. Pen. 02.00” – 6.00 hrs
401	24.5.14-20.6.14	5 x weekday “Non. Pen. 1.50 – 54.50 hrs total 3 x Saturday “Non. Pen. 1.50” – 18.00 hrs total 1 x Saturday “Non. Pen. 02.00” – 7.60 hrs 2 x Sunday “Non. Pen. 02.00” – 12.00 hrs total
402	21.6.14-18.7.14	4 x weekday “Non. Pen. 1.50 – 62.00 hrs total 1 x Saturday “Non. Pen. 1.50” – 7.00 hrs 1 x Sunday “Non. Pen. 02.00” – 6.00 hrs
403	19.7.14-15.8.14	1 x weekday “Non. Pen. 1.50 – 3.50 hrs 1 x Saturday “Non. Pen. 1.50” – 7.00 hrs 1 x Sunday “Non. Pen. 02.00” – 6.00 hrs
404	16.8.14-12.9.14	3 x weekday “Non. Pen. 1.50 – 54.50 hrs total 3 x Saturday “Non. Pen. 1.50” – 24.00 hrs total 1 x Saturday “Non. Pen. 02.00” – 7.60 hrs 1 x Sunday “Non. Pen. 02.00” – 6.00 hrs

31. Mr Kowalkowski ’s evidence was that, having children he takes most of his holidays during the summer holiday time in July. He tends to take four weeks together to go back to Poland. It is booked in one block to keep his travel costs down. Mr Kowalkowski notices that his wages after going on holiday are a lot less as he only gets basic pay during that time. Mr Kowalkowski says that he can really see the difference when he’s away for four weeks.

Mr Dwight

32. Mr Dwight’s claim spans between 2 May 2014 and 19 September 2014. Mr Dwight’s was employed as a driver in Camden and as such is an similar to Mr Turpie insofar as Mr Turpie was also a driver. I did not hear from Mr Dwight but was referred to documentation relating to his circumstances. Mr Dwight’s Contract of employment at page 185 and at clause 7.2 it states that ”in certain circumstances it may be necessary to adjust or exceed the hours in order to ensure that your duties in accordance with the terms of employment are properly performed subject to the working time regulations 1998.” Mr Dwight was said to be weekend overtime agreed by the parties to be voluntary. The evidence in relation to Mr Dwight’s overtime is contained at page 87 and 88 of the employment tribunal bundle

Mr Johnson

33. Mr Johnson’s claim spans between 2 May 2014 and 6 February 2015. Mr Johnson was employed as a loader in the Camden depot. I did not hear from Mr Johnson but was referred to documentation relating to his circumstances. The evidence in relation to Mr Johnson is contained at pages 120 and 121 of the employment tribunal bundle. Mr Johnson undertook voluntary weekend overtime and Mr Griffith accepted during cross examination that Mr Johnson regularly undertook two weekends a month overtime.

Mr Panagiodis

34. Mr Panagiodis’ claim spans from 15 November 2013 to 12 December 2014. Mr Panagiodis was employed as a driver at the Camden depot similar to Mr Turpie and Mr Dwight. I did not hear from Mr Panagiodis but was referred to documentation relating to his circumstances. Mr Panagiodis is said to have undertaken voluntary

weekday and weekend overtime. The evidence in relation to Mr Panagiodis working pattern is contained at page 101 in the bundle. I do not set it out here other than to note the unusual reference to 82 hrs overtime as undertaken by Mr Panagiodis at page 101 of the bundle remains unexplained. In addition I have had the benefit of seeing the entirety of Mr Panagiodis overtime worked between January 2012 and December 2014 at pages 102 to 109 of the bundle.

Mr Hunter

35. Mr Hunter's claim spans between 22 August 2014 and 12 December 2014. Mr Hunter was employed as a loader in the Bromley site. Mr Hunter is said to undertake: "contractual catch up Saturdays" and voluntary overtime as set out in page 117 of the bundle. I did not hear from Mr Hunter but was referred to documentation relating to his circumstances. Mr Allen said that Mr Hunter was off on long-term sick and described his pattern of overtime as irregular. Mr Hunter's claim is for a short period and during this period he appears to have undertaken only one instance of voluntary overtime on 1 September 2014. Looking at the remainder of the figures it appears that Mr Hunter, for reasons unexplained, has worked only three "catch up Saturdays". He worked additional voluntary overtime once in March 2013, once in June 2013, once in September 2013, once in November 2013, twice in December 2013, three times in January 2014, once in August 2014 and once in September 2014.

Mr Kelynack

36. Mr Kelynack's claim spans from 4 April 2014 to 12 December 2014. Mr Kelynack is employed as a loader in the Bromley site. Mr Kelynack said to have undertaken contractual catch up Saturday overtime; and a combination of weekend and weekday voluntary overtime. I did not hear from Mr Kelynack but was referred to documentation relating to his circumstances. Mr Allen said that Mr Kelynack had his own business outside of work and very rarely did any overtime. The evidence in respect of this claimant's overtime is contained within pages 82 and 83 of the employment tribunal bundle. Mr Allen also accepted during cross examination that Mr Kelynack regularly appeared on the 'Jail Lane' rota contained at page 369 of the bundle and he regularly undertook this type of overtime.

Submissions & Determinations

37. Both counsel for the claimants and respondent provided written submissions together with their oral submissions. I'm grateful to both counsel for their assistance. My task was to determine on a factual basis, the type of overtime worked by each employee. The overtime falls within one of three catogories:
    a. guaranteed or contractual: the employer must offer it and the employee must accept it;
    b. non-guaranteed: there is no obligation on the employer to offer it but if offered, the employee is obliged to accept it; or
    c. voluntary, where there is no obligation on the employer to offer the overtime or the employee to accept it.

38. Apart from the "catch up Saturdays" worked at the Bromley site accepted by the respondent to be contractual, the respondent maintains that all forms of overtime undertaken by all claimants' are voluntary, in that there was no contractual requirement for the employer to offer it or for the employee to agree to do it. Counsel for the claimant says that the booking on and off duties undertaken by Mr Turpie, and the ad hoc duties mainly relating to breakdowns undertaken by Mr Turpie

and others are guaranteed. All of the other overtime under consideration is agreed to be voluntary.

39. Where the overtime is found to be guaranteed, both parties accept that such sums should be included within the calculation of holiday pay and applied to the entirety of the employees holiday. The parties agree that it is not automatically the case that voluntary overtime will form part of "normal pay", but a question of fact for the tribunal. That is clear from Patterson v Castlereagh Borough Council, where the Northern Ireland Court of Appeal remitted the case to the tribunal to find whether the payments were "normal". It did not provide any specific guidance on what that might be – it being a question of fact for the tribunal. In essence the Tribunal should ask itself whether, on the evidence, there was a sufficiently intrinsic link between the overtime and the employee's work, relevant to which will be its "permanency", which word connotes not just regularity, but the extent to which the employee can rely upon its occurrence. I have assessed each of the voluntary overtime payments to determine on a factual basis whether or not payment in respect of those holidays should be properly included within the definition of 'normal pay'.

40. On a general point, counsel for the claimants' submitted that in assessing the regularity of otherwise of overtime, a broad view should be taken of the overtime undertaken not only during the period of the claim but before and after that period. Counsel for the respondent submitted that a narrower approach should be taken in relation to assessing regularity commencing approximately 12 weeks prior to the date of the claim and continuing for the period of the claimant's claim. It is of course the case that the frequency, regularity and reliability of overtime may change over time. I have taken the view that the regularity of the overtime payments must be demonstrated within the period of or closely related to the claimant's claim ie the 12 week period. A pattern of regularity either before or after the actual period of the claim is, in my view, only relevant to inform an opinion as to where the benefit of the doubt should lie in cases that are considered marginal. I address each claimant separately below.

Mr Turpie

41. Although identified as a lead claimant, Mr Turpie is in a unique position as a foreman. It is accepted that Mr Turpie worked "1 weekend in 4": Mr Griffiths accepts that this overtime was offered on a regular basis to Mr Turpie as foreman. The overtime sheets at pages 92-94 of the bundle show this was indeed worked regularly, once every 4 weeks. I have no doubt that this pattern of work constitutes regularity. There is in my view an obvious intrinsic link between the overtime and the Mr Turpie's work. This work can be fairly described as regular as clockwork, it is a permanent feature of Mr Turpie's working pattern upon which he could reasonably rely. Although additional weekend overtime has been separated out from the 'one in four' category above, I see no real reason for this distinction. Mr Turpie chose to do as much overtime as he could, so there is – on average – one further weekend per month when Mr Turpie did this additional overtime. This level of overtime is in my opinion clearly regular. It is a permanent feature of Mr Turpie's working pattern upon which he can rely. Payment in respect of this type of voluntary overtime should rightly be considered to constitute 'normal pay'.

42. While the 1 hour per day booking on and off is classified as voluntary by the respondent, Mr Griffith explained that the respondent considered that the foremen

were put in a position of trust because they are reliable. The respondent wanted the foremen to carry out the duties and Mr Griffith was unaware of any foreman who chose not to carry out these extra daily tasks. This work is required to be carried out at the beginning and end of every shift. I do not criticise Mr Griffith, but I consider it more likely than not that the reality of this situation was that the foremen were obliged to carry out these booking on and booking off tasks. I consider it more likely than not that there was no real voluntary aspect to these particular hours on Mr Turpie's part. I refer to Mr Turpie's contract of employment and note his contractual obligation to undertake overtime as required by the respondent. I find these particular booking on and off as non guaranteed hours ie Mr Turpie had a contractual obligation to do them but the respondent had no contractual obligation to offer them. I consider it to be obvious that the daily duties have an intrinsic link with Mr Turpie's work. They are regular hours upon which Mr Turpie can rely. Payment in respect of these additional overtime hours, should rightly be considered part of 'normal pay'.

43. Ad hoc days: Mr Turpie said in evidence that these were worked as part of his duty to cover breakdowns "once a week or once a fortnight". The respondent's evidence from Mr Griffith was that these hours perhaps even more regular. These overtime hours were worked when there was a problem on the shift. They were paid at the rate of 1.33 x hourly rate. I have insufficient evidence from Mr Turpie as to the circumstances in which he worked these hours to conclude that he had a contractual obligation to do so. I see no evidence to allow me to conclude that the respondent had a contractual obligation to provide this additional work. Therefore, in light of the evidence available on the balance of probabilities, I conclude that this ad hoc overtime can be properly categorised as voluntary. For the same reasons as set out above, I find that this is regular work. This type of work connected with recovering broken down vehicles and has an obvious intrinsic link with Mr Turpie's work for the respondent. Mr Turpie has the most regular pattern of overtime when compared to the remainder of the claimants.

Mr Kowalkowski

44. Mr Kowalkowski has referred to 3 different types of overtime. The "catch-up Saturdays" of which there are 5 per annum, are accepted by the respondent to be a contractual obligation on both parties and therefore not voluntary. I have addressed "some other weekend overtime" and "ad hoc weekdays" separately. Mr Kowalkowski's evidence was that he did as much overtime as was available. The documentary evidence, including the payslips are set out above show that Mr Kowalkowski regularly worked weekend overtime in addition to his catch-up Saturdays. The evidence from both Mr Kowalkowski and Mr Allen support this regularity. Mr Kowalkowski was a sought-after "go to" operative by the respondent for overtime because of both the skills and reliability. I note that there is a two-month period where Mr Kowalkowski worked no overtime. It is unlikely to be unusual for such a gap to occur. It is possible that employees may be suspended, off sick or for whatever reason unable to undertake overtime for a relatively short period. I do not consider that, when viewing the evidence as a whole, this two-month gap can be said to disrupt the regularity, permanence or reliability of the pattern of overtime is worked by Mr Kowalkowski. For similar reasons as set out above in relation to Mr Turpie I find that this regular pattern of overtime payments has the sufficient permanency to allow Mr Kowalkowski to rely upon its occurrence and as such it should be included within the definition of 'normal pay '. It can be seen from the payslips as set out above that the ad hoc weekdays overtime do not fall with the same regularity of either the weekend work or patterns established in Mr Turpie's case. There is no ad hoc overtime

worked in the first 4 earnings periods and then in each of the following earnings periods, there are 1, 4 ,5, 4, 1, 3 weekdays overtime periods respectively. I have carefully considered the respondent's submissions that there is no pattern or predictability to this overtime and It lacks sufficient "permanency" to be included within "normal pay". However, in my view it appears that a pattern of regularity in relation to these ad hoc payments can clearly be seen from the fifth earning period within the claim. From this time on there are on average three occasions of ad hoc overtime per earning period. Taking all the circumstances of Mr Kowalkowski into account I consider that his ad hoc overtime hours have the required predictability, permanency and regularity to be properly considered within 'normal pay'.

Mr Dwight

45. Mr Dwight's claim spans between 2 May 2014 and 19 September 2014. Mr Dwight was said to have only weekend overtime. Mr Dwight's overtime is contained at page 87 and 88 of the employment tribunal bundle. Counsel confirmed that there are no separate ad hoc working days in respect of Mr Dwight's. The weekend overtime is agreed by the parties to be voluntary. From the evidence available within the employment tribunal referred to above at page 87 and 88, Mr Dwight can clearly be identified as an operative who undertook regular weekend overtime. For the same reasons identified in relation to the other claimants' voluntary weekend overtime, I conclude that Mr Dwight's regular pattern of weekend overtime payments has sufficient permanency to allow Mr Dwight to rely upon its occurrence and as such should be included within the definition of 'normal pay '.

Mr Johnson

46. Mr Johnson's claim spans between 2 May 2014 and 6 February 2015. Pages 120 and 121 of the employment tribunal bundle show a regular pattern of weekend overtime as undertaken by Mr Johnson during the period of his claim. This was accepted by Mr Griffith accepted during cross examination. In my opinion, for the reasons as set out above in relation to the other claimants, this work clearly had a sufficient intrinsic link with Mr Johnston's normal work and had the required permanency in addition to regularity to allow Mr Johnson to rely upon its occurrence. For this reason, I conclude in Mr Johnston's case that he is overtime payments should be properly considered as part of 'normal pay'.

Mr Panagiodis

47. Mr Panagiodis claim spans from 15 November 2013 to 12 December 2014. Mr Panagiodis is said to have undertaken voluntary weekday and weekend overtime and neither counsel attempts to separate those types of overtime within their submissions. On examining the overtime undertaken by Mr Panagiodis during the period of his claim, I note that he worked substantial amount of overtime on regular occasions during the period of his claim. I consider that to be an intrinsic link between this work and the work normally carried out by Mr Panagiodis for the same reasons as set out above in relation to Mr Turpie. This is in my view a regular pattern of overtime. When looking at the period of the whole, the overtime is predictable and it would be reasonable for Mr Panagiodis rely upon it. For these reasons, I consider the overtime payments received by Mr Panagiodis to properly constitute 'normal pay' 'If there is any doubt in relation to whether or not Mr Panagiodis voluntary overtime working pattern meets the 'regularity' requirements. I consider that this is an appropriate scenario to examine the pattern of voluntary overtime outside of the actual dates of Mr Panagiodis' claim where the pattern of regularity is reinforced.

Mr Hunter

48. Mr Hunter's claim spans between 22 August 2014 and 12 December 2014. Mr Hunter is said to undertake contractual catch up Saturdays, these catch-up Saturdays are accepted to be guaranteed contractual overtime. Mr Hunter also undertook voluntary overtime. Mr Hunter's pattern of voluntary overtime is the least regular of all of the claimant's. Mr Allen said that Mr Hunter was off on long-term sick and described his pattern of overtime as irregular. Claimants' counsel submitted that the overtime payments should constitute normal pay on the basis that they were requested by the employer and they were more than insubstantial.

49. I have considered Mr Hunter's situation carefully. The respondent's evidence confirms that it relies upon the goodwill of their employees to undertake overtime and allow the respondents to meet their contractual obligations. The respondent has a requirement for a lot of overtime and has had support from the employees in meeting this requirement. I heard evidence from the claimants in relation to concerns that should they not accept overtime, they may not be offered it in the future. I heard evidence from the respondent's that shows they value the reliability of their workforce. Although all of this type of overtime is considered voluntary, It appears logical that the greater frequency the overtime is undertaken by the employee, the more likely that employee is considered to be reliable and offered further over time. This reinforces the pattern of regularity and permanency and the situation where the employee can rely upon its occurrence. However in Mr Hunter's case I find that the opposite situation occurs. He, for reasons for which he has not criticised at all, has undertaken overtime on a sporadic basis. One occasion of voluntary overtime during the period of claims does not in my view constitute a regular pattern of overtime or permanency upon which Mr Hunter can reasonably rely. When examining the period outside of Mr Hunter's claim, the sporadic nature of his overtime is reinforced. For this reason, taking all the evidence into account on the balance of probabilities I conclude that on Mr Hunter's specific pattern of overtime, payments should not be included within the definition of 'normal pay'.

Mr Kelynack

50. Mr Kelynack's claim spans from 4 April 2014 to 12 December 2014. He is said to have undertaken 'contractual catch up Saturday' overtime similar to Mr Kowalkowski as set out above and this is accepted as guaranteed contractual overtime. Mr Kelynack also undertook a combination of weekend and weekday voluntary overtime. Mr Allen noted that Mr Kelynack had his own business outside of work and rarely did any overtime however Mr. Kelynack is clearly shown on the Jail Lane rota at page 369 of the bundle and this overtime was accepted as regular by Mr Allen during cross examination, however this overtime predates the claim. The breakdown of Mr. Kelynack's claim is contained within page 82 of the bundle. It is most likely that the discrepancy in Mr Allen's evidence arises from a difference of treatment between the weekend and weekday overtime undertaken by Mr. Kelynack. Therefore, working from page 83 of the bundle, removing the five contractual catch-up Saturdays, there appears to be overtime conducted in April, May June August September November and December. I consider taking the evidence as a whole that a regular pattern can be identified within this voluntary overtime together with the required level of permanency and reliability to warrant payment for it being included within the definition of 'normal pay'.

Remedy

51. Following the liability decision, counsel for the respondent requested that the matter of remedy in respect of all claimants be reserved until the next hearing. On consideration of the matter I noted that Mr Turpie had been identified as a lead claimant in advance and therefore the parties should be in a position to calculate and agree his losses following the initial determination of liability. It was agreed between counsel for the claimant and counsel for the respondent that the outstanding sum respect of unauthorised deductions from Mr Turpie's wages relating to holiday pay was **£1317.66. I**n addition, an application was made and granted for Mr Turpie to recover the sum of **£1100** in respect of employment tribunal fees.

52. Counsel for the claimants' submitted that remedy for Mr Kowalkowski should also be considered and finalised at the hearing. I noted that Mr Kowalkowski had been added as a lead claimant at late notice, the respondent had cooperated in accordance with the overriding objective and facilitated judgement on liability to be concluded. In the circumstances, I accept that the respondent has not had a sufficient opportunity to examine the figures and the potentially complicated calculation in respect of Mr Kowalkowski's claim. It is hoped that the parties, given a sufficient opportunity to examine the figures, will be able to agree the outstanding amounts. In light of the fact that the remainder of the claimants are in a similar position, I decided that it was not in line with the overriding objective to determine remedy for any claimant other than Mr Turpie at this hearing. Mr Kowalkowski's case is listed for a remedy and cases of Mr Panagiodis, Mr Johnson, Mr Hunter, Mr Dwight & Mr Kelynack are all listed for a final determination and remedy hearing to be held at Watford Employment Tribunal on 12 September 2017.

53. For the sake of completeness, I set out a table below listing the status of all of the original claimants' claims.

	Claimant	**Job/location**	**Status**
1	Graham Turpie	Camden; HGV Driver/Supervisor	Partially successful and determined
2	Stephen Johnson	Camden	Listed for final determination & remedy hearing
3	Iordanis Panagiodis	Camden	Listed for final determination & remedy hearing
4	Grzegorz Kowalkowski	Bromley; Driver/Loader	Partially successful and listed for remedy hearing
5	Stephen Hunter	Bromley	Listed for final determination & remedy hearing all
6	*Philip Harding*	Bromley/workshop fitter	Dismissed after strike out 5 June 2017
7	*Craig Downer*	*Camden*	*Dismissed after strike out, Preliminary Hearing 28.10.15 [130]*

8	*Tounday Grant*	*Camden*	*Dismissed after withdrawal, Preliminary Hearing 28.10.15 [130]*
9	*John Greer*	*Camden*	*Dismissed after strike out, Preliminary Hearing 28.10.15 [130]*
10	*David Sweeney*	*Camden*	*Dismissed after strike out, Preliminary Hearing 28.10.15 [130]*
11	*Peter Davies*	Bromley; Loader	Dismissed after strike out 5 June 2017
12	*Benjamin Mahlangu*	Camden; Loader	Dismissed after strike out 5 June 2017
13	Denis Dwight	Camden; HGV Driver	Listed for final determination & remedy hearing
14	*Darran Rigby*	*Camden*	*Dismissed after strike out, 26.10.15 [144]*
15	*Matt Etherington*	*Bromley*	*Dismissed after strike out,26.10.15 [144]*
16	Colin Kelynack	Bromley	Listed for final determination & remedy hearing.
17	*Neil Morgan*	*Bromley*	*Dismissed after strike out, 26.10.15 [144]*

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Employment Judge Skehan

Date: ……5 August 2017…………………..

Sent to the parties on: ..5 August 2017........

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For the Tribunal Office