EMPLOYMENT TRIBUNALS

Claimant: Flowers & Others

Respondent: East of England Ambulance Trust

HEARD AT: BURY ST EDMUNDS **ON**: 5th- 9th March 2017
29 March 2017 (in chambers)

BEFORE: Employment Judge Laidler

REPRESENTATION

For the Claimant: Ms V Webb (Counsel)

For the Respondent: Mr P Nicholls QC
Mr N de Silva (Counsel)

RESERVED JUDGMENT

1. **Contractual claim:**

   1.1 In respect of the 'shift overrun' non-guaranteed overtime this is part of the Claimants contractual obligations and as such forms part of their pay for the purposes of calculating the Claimants annual leave. There has therefore been unauthorised deductions in respect of contractual holiday pay as a consequence of the Respondents failure to include the shift overrun non-guaranteed overtime in the calculation.

   1.2 Voluntary overtime is something the Claimants are not required to do and is not part of pay for the purposes of calculating the Claimants annual leave. There has been no unauthorised deductions in this respect.

2. **Working Time Regulations (WTR) Claim**

   2.1 The Respondent accepts that the 'shift overrun' non-guaranteed overtime should be taken into account in determining

statutory holiday pay under the WTR or WTD and, if necessary, it is possible to construe the WTR to mean that such payments should be taken into account in performing the calculation of holiday pay under the WTR and the tribunal has also reached that conclusion.

2.2 There has therefore been unauthorised deductions from the wages of those Claimants who, in the 3 months prior to any period of leave, undertook such non-guaranteed overtime.

2.2 Voluntary overtime cannot form part of normal pay where there was no requirement to do it and the regularity at which it was carried out varied depending on the Claimants own circumstances and those of the Respondent. It should not be taken into account in performing the calculation of holiday pay under the WTR.

REASONS

1 At a Preliminary Hearing held on the 30 September 2016 this hearing was listed to take place over 8 days. A telephone Preliminary Hearing was however also listed for the 2 February 2017 to discuss the number of witnesses, whether it had been possible to agree any facts and to review that time estimate. At that hearing the agreed facts were still being finalised but it was suggested that a 4 day hearing might be more appropriate. By letter of the 23 February 2017 the Respondents advised that the parties agreed with a time allocation of 4 days and subsequently confirmed they had agreed a joint statement of agreed facts and intended to call a total of 7 witnesses. The time allocation was reduced to 4 days as requested. There was not however time for the Judge to conclude her deliberations within that allocation and further time was needed for her to finalise those.

Preliminary matters discussed

2 On the first morning of the hearing the following matters were discussed: -

Liability only

2.1 It was agreed by all that there were initial principles of liability to be determined and that this hearing would be focused on those and not remedy.

Witnesses

2.2 Mr Sharp was the only Claimant to give evidence and it was agreed he would be heard on the afternoon of the first day after the Judge

had carried out some reading. The Respondent's witnesses were to be heard on the second day with submissions on the third day.

The case of Mr Rudd

2.3 The Claimant's representative requested that the case of Mr Rudd be stayed. Her instructing solicitors had not been able to obtain detailed instructions from him. Although there was further information and a Schedule of Loss for him in the bundle the schedule had not been updated. The Respondent objected to a stay submitting that the fact the Claimant had not provided instructions was not good grounds for a stay. His claim should be proceeded with.

2.4 The Judge determined that the claim of Mr Rudd should be heard along with all the others and further orders made if necessary in relation to remedy.

Kevin Freeman

2.5 Employment Judge Sigsworth granted an application dated 20 February 2017 to include deductions in respect of holiday dates between 19 November 2016 and 20 February 2017. This had been anticipated at his hearing on the 2 February 2017 and was not objected to by the Respondent. It did not include Mr Freeman.

2.6 The Claimants solicitors then applied on 27 February 2017 on behalf of Mr Freeman to include the deductions for the above period. It had not been dealt with prior to this hearing

2.7 There was no objection to this application from the Respondent and Mr Freeman was also granted leave to amend.

The Issues

3 The following were agreed as the issues in the case: -

Claims under section 23 Employment Rights Act 1996 ('ERA') (contractual claims)

3.1 What do the Claimants' terms and conditions of employment provide in terms of the inclusion of overtime payments in any calculation of holiday pay? In particular:

a. What is the effect of section 13.9 of the NHS Terms and Conditions of Service Handbook?

b. Is the position in respect of 'non-guaranteed overtime' and 'voluntary overtime' the same or different, in terms of

inclusion of payments in the calculation of contractual holiday pay?

3.2 What is the relevant series of deductions, if any, in respect of each individual Claimant?

Claim under Regulations 13, 16, 30(1)(b) WTR 1998, Article 7 WTD and section 23 ERA 1996

3.3 Has Article 7 of the WTD and/or Regulation 16, read in conformity with Article 7 WTD, been breached in respect of the provision of 4 weeks paid annual leave under Regulation 13 in respect of each Claimant? In particular:

a. Should the pay in respect of annual leave be calculated with reference to overtime?

b. Is the position in respect of 'non-guaranteed overtime' and 'voluntary overtime' the same or different, in terms of inclusion of payments in the calculation of Regulation 13 holiday pay?

c. Do each of the Claimants receive overtime payments with sufficient frequency as to amount to 'normal remuneration'?

d. Alternatively:

i. Do each of the Claimants receive non-guaranteed overtime payments with sufficient frequency as to amount to 'normal remuneration' and

ii. Do each of the Claimants receive voluntary overtime payments with sufficient frequency as to amount to 'normal remuneration'?

Agreed Facts

4 The parties had been encouraged at the Preliminary Hearings to attempt to agree some of the factual issues and the following represents what was agreed.

The Claims

4.1 The Claimants claim unlawful deductions from wages (from their holiday pay), based upon:

4.1.1 Contractual entitlements; and/or in the alternative
4.1.2 Statutory entitlements (i.e. under Regulation 13 of the Working Time Regulations 1998 ("WTR") and Article 7 of Council Directive 2003/88/EC in accordance with the

Judgment in Bear Scotland Limited & Others -v- Fulton (UKEATS/0047/13)).

4.2 The Claimants claim that the following elements of pay have not been (but should be) included in the calculation of holiday pay:

4.2.1 Payments received in respect of work outside normal hours (*this aspect was not pursued at this hearing)*;
4.2.2 Payments received in respect of non-guaranteed overtime;
4.2.3 Payments received in respect of voluntary overtime.

Contractual Terms

4.3 All of the Claimants are employed under contracts of employment which incorporate the NHS Terms and Conditions of Service (known as "Agenda for Change").

4.4 All of the Claimants have normal working hours under their respective contracts of employment.

4.5 All of the Claimants have an entitlement to contractual annual leave. Contractual annual leave entitlements are determined by reference to:

4.5.1 The contract of employment (which reflects the entitlement set out in NHS Terms and Conditions of Service);

4.5.2 Section 13 of NHS Terms and Conditions of Service, which states that staff will receive the entitlement to annual leave and general public holidays as set out in the table below (subject to provisions on NHS reckonable service set out in Section 12 of the NHS Terms and Conditions of Service):

Length of service	Annual leave and general public holidays
On appointment	27 days + 8 days
After five years' service	29 days + 8 days
After ten years' service	33 days + 8 days

4.5.3 The Respondent's Annual Leave Policy (which reflects NHS Terms and Conditions of Service and which makes clear that all entitlements refer to whole time equivalents, which apply pro rata for part-time employees).

4.6 Contractual annual leave entitlements for all of the Claimants are calculated in hours, rather than days, in accordance with Section 13.5 of the NHS Terms and Conditions of Service. The contractual entitlements expressed in hours are set out in the Respondent's Annual Leave Policy as follows:

Length of service	Annual leave and general public holidays Equivalent Time expressed in hours

On appointment	27 days + 8 days 60 hours	202.5	hours	+
After five years' service	29 days + 8 days 60 hours	217.5	hours	+
After ten years' service	33 days + 8 days 60 hours	247.5	hours	+

4.7 Notwithstanding paragraph 6, in the interests of ease of calculation in these proceedings, the Respondent agrees to adopt the Claimants' methodology for calculation insofar as the Claimants refer to days of annual leave, rather than hours.

4.8 In accordance with paragraph 7, the contractual annual leave entitlement for each Claimant (having regard to their NHS reckonable service and to their full time or part time status) is as set out in the table at paragraph 30 below.

4.9 Entitlement to pay in respect of annual leave is determined in accordance with Section 13.9 of the NHS Terms and Conditions of Service Handbook which states:

"Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work. This would be based on the previous three months at work or any other reference period that may be locally agreed."

4.10 Payment for "work outside normal hours" is a pay enhancement which Ambulance staff may be entitled to under Annex 5 (previously Annex E) of the NHS Terms and Conditions of Service, if they are required to work unsocial hours.

4.11 Annex 5 is entitled "Provisions for unsocial hours payments for ambulance staff: Working outside normal hours". The relevant sections of Annex 5 state:-

"Pay enhancements will be given to staff whose working pattern in standard hours, but excluding overtime and work arising from on-call duties, is carried out during the times identified below:

- for staff in pay bands 1 to 7 any time worked before 7:00 am or after 7:00 pm Monday to Friday, and any time worked on Saturdays, Sundays or Bank Holidays" (paragraph 2)

"The pay enhancement will be based on the average number of hours worked outside these times during the standard working week, and will be paid as a fixed percentage addition to basic pay in each pay period. The enhancement will be pensionable and count for sick pay, but will not be consolidated for purposes of overtime or any other payment. Once the average has been agreed, the payment will not normally change because of small week to week variations in the shifts worked. It will, therefore, be

payable during short periods of leave or training. It will, however, be re-calculated if there is a significant change in working pattern." (paragraph 3)

"The enhancement will be paid as a percentage of basic salary each month, subject to a maximum of 25 per cent for staff in pay bands 1 to 7…." (paragraph 5)

4.12 Non-guaranteed overtime is paid at the appropriate rate under Section 3 of the NHS Terms and Conditions of Service as follows:

4.12.1 For full-time employees, the overtime rate is time-and-a-half (i.e. 1½ times the hourly rate provided by basic pay plus any long-term recruitment and retention premia), with the exception of overtime on public bank holidays, which is paid at double time;

4.12.2 Part-time employees receive payments for any additional hours at plain time rates until their hours exceed standard hours of 37½ hours a week;

4.12.3 Staff may request to take time off in lieu as an alternative to overtime payments. If they choose to do so, that time off in lieu of overtime payments is paid at plain time rates.

4.13 Voluntary overtime is paid at the appropriate rate under Section 3 of the NHS Terms and Conditions of Service as follows:

4.13.1 For full-time employees, the overtime rate is time-and-a-half (i.e. 1½ times the hourly rate provided by basic pay plus any long-term recruitment and retention premia) with the exception of overtime on public bank holidays, which is paid at double time.

4.13.2 Part-time employees receive payments for any additional hours at plain time rates until their hours exceed standard hours of 37½ hours a week.

Statutory Entitlements

4.14 All of the Claimants have an entitlement to statutory annual leave under Regulation 13 of the WTR.

4.15 The Claimants' entitlement to statutory leave under Regulation 13 (having regard to their full time or part time status) is as set out in the table at paragraph 30 below. The Regulation 13 entitlement is included in (not additional to) the totals for contractual entitlement set out in that table.

Work Outside Normal Hours

4.16 All of the Claimants receive monthly payments for work outside normal hours except Odette Ewing and Lesley Wicks.

4.17 For those Claimants in receipt of this pay enhancement, the enhancement is paid each month, on top of basic pay, and is paid regardless as to whether or not the Claimants have taken any holiday leave in the current or previous month or months. The rate of the enhancement is calculated in accordance with Annex 5 of the NHS Terms and Conditions of Service and does not fluctuate based upon whether or not any annual leave has been taken.

Non-guaranteed Overtime

4.18 All of the Claimants are or have sometimes been required to work non-guaranteed overtime, except Claire Thundercliffe and Wendy Peters.

4.19 Such non-guaranteed overtime consists of shift overruns (referred to at the Respondent as "incidental overtime").

4.20 There is a dispute between the parties as to whether some of the Claimants receive payments for non-guaranteed overtime with sufficient frequency as to be normal remuneration.

The Respondent's position at this hearing.

4.21 At paragraph 6 of its Skeleton argument the Respondent stated that:

> '(ii) turning to the statutory claims, on reflection, the Respondent accepts that non-guaranteed overtime should be taken into account in determining statutory holiday pay under the WTR or WTD and, if necessary, it is possible to construe the WTR to mean that such payments should be taken into account in performing the calculation of holiday pay under the WTR;'

And further at paragraph 15:

> '15. As is explained more fully below, the Respondent now accepts that, under the law as it presently stands and in particular the present influence of EU law, it should, when calculating holiday pay under the WTR, include non-guaranteed overtime (shift overruns) calculated over a suitable reference period. It disputes the claim that it should include voluntary overtime for the purposes of holiday pay under the WTR, however. It denies that either element should be included in the contractual calculation.'

Voluntary Overtime

4.22 None of the Claimants are or have ever been required or expected to volunteer for overtime shifts and all of the Claimants are and have always been completely free to choose whether or not to work any voluntary overtime shifts.

4.23 Staff at the Respondent can express an interest in working voluntary overtime shifts at any time. If staff do not wish to express such an interest, there is no obligation or expectation upon them to do so and never has been.

4.24 The Respondent is not required or expected to offer voluntary overtime shifts or any particular amount of such shifts.

4.25 If the Respondent does not have sufficient staff to cover the voluntary overtime shifts that are offered, alternative arrangements are made. For example, changes are made across the shift (non-emergency journeys are rescheduled or Ambulance crews are adjusted so that some vehicles are single crewed), or bank or agency staff are booked instead.

4.26 Even if (which the Respondent denies), pay for voluntary overtime is as a matter of law part of normal remuneration and is required to be included in the calculation of holiday pay, there is a dispute between the parties as to whether some of the Claimants receive payments for voluntary overtime with sufficient frequency as to be normal remuneration.

Payment for Annual Leave Made by the Respondent

4.27 The Respondent includes regularly paid supplements (such as payments for work outside normal hours) in pay during annual leave.

4.28 The Respondent does not include payments for non-guaranteed or voluntary overtime in pay during annual leave.

The Claimants

4.29 The Claimants claim in respect of the holiday dates set out in the Further Particulars of Claim and do not make any claim in respect of dates prior to those set out in the Further Particulars of Claim.

4.30 The Claimants commence their holiday year on the dates set out in the table in paragraph 30. It is agreed that the Claimants take their annual leave in each holiday year in the following order:

4.30.1 Regulation 13 WTR leave;

4.30.2 Regulation 13A WTR leave;

4.30.3 Contractual annual leave in excess of Regulation 13 WTR entitlement.

4.31 The particular circumstances of each Claimant are as set out in the following table: (at the end of this decision)

The Tribunals Findings

5 The tribunal heard from George Sharp on behalf of the Claimants and from the following on behalf of the Respondents:

- Lisa Benstead, Business Support Manager for Non-Emergency Services
- Jemma Cracknell, Business Support Manager to a Locality Director.
- Simon King, Sector Head for Bedfordshire and Luton in Emergency Operations
- Steven Moore, Senior Specialist Manager
- Lindsey Stafford-Scott, Director of People and Culture
- Paul Vinters, EOC (Emergency Operations Centre) Manager

6 From the evidence heard the tribunal finds the following facts to be read in conjunction with the Agreed Facts.

The Contractual position

7 Clause 13.9 of the NHS Terms and Conditions of Service Handbook provides that the calculation of pay for annual leave will include "regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements." This is agreed between the parties in the agreed facts set out above. The contract has specific provisions regarding these "regularly paid supplements.".

8 The first supplement referred to is any "recruitment and retention premia" and that is dealt with at section 5. This provides as follows: –

"5.1 a recruitment and retention premium is an addition to the pay of an individual post or specific group of posts where market pressures would otherwise prevent the employer from being able to recruit staff to and retain staff in, sufficient numbers for the posts concerned, at the normal salary for a job of that weight…

5.4 recruitment and retention premia will be supplementary payments over and above the pay the post holders receive by virtue of their position on their pay band, any high cost area supplements, or any payments for unsocial hours or on call cover."

9 Section 2 of the contract deals with the requirement to maintain round-the-clock services. It specifically states the agreement will not apply to ambulance staff and that they will continue to receive unsocial hours' payments in accordance with Annex 5 and Annex 6. Annex 5 is cited above in the agreed facts.

10 The high cost area of supplement is set out in section 4. This provides: -

"high cost area supplements will apply to all NHS staff groups in the areas concerned who are covered by this agreement. The supplements will be expressed as a proportion of basic pay (including the value of any long

term recruitment and retention premium), but subject to a minimum and maximum level of extra pay."

11. In tab 6 of its bundle the tribunal had extracts from the terms and conditions of each of the Claimants. Not all the pages had been provided. In most of these there is a similar clause dealing with overtime. For example in the statement of Peter Bendell (Paramedic) clause 4 provided as follows: -

"Overtime hours are those worked in excess of 37.5 per week irrespective of contracted hours (averaged across the rota where appropriate). Therefore, part-time staff will be paid for additional hours at plain time rates until hours exceed 37.5 hours per week.

There is a single harmonised rate of time and a half for all overtime, with the exception of work and general public holidays, which will be paid at double time. Overtime payment will be based on your hourly rate provided on a basic day plus any long term recruitment and retention premia…

All overtime hours should be agreed with the local manager, and, where time in lieu cannot be given, will be paid at time and a half of the basic hourly rate. The overtime rate applicable on Bank Holidays has been agreed locally and is paid at double the basic hourly rate.

End of shift over time should be aggregated to the nearest fifteen minutes and recorded on your timesheet. Payment for this will be made monthly in arrears."

12. In Faith Ecuyer's contract (Patient Liaison assistant) clause 6 provided: -

"Overtime payments will be made in accordance with the National Terms and Conditions of Service Handbook.

In accordance with the National Terms and Conditions of Service Handbook all staff in pay bands 1 to 7 will be eligible for overtime payments.

Overtime hours are those worked in excess of 37.5 per week irrespective of contracted hours (averaged across the rota where appropriate). Therefore, part-time staff will be paid for additional hours at plain time rates until hours exceed 37.5 hours per week (averaged across the rota where appropriate). The staff not working on a rota, this will be as averaged over the calendar month.

Overtime payment will be based on your hourly rate provided on a basic day plus any long term recruitment and retention premia.

All overtime hours should be agreed, where possible, in advance, with your manager, and, where time in lieu cannot be given, will be paid at time and a half of the basic hourly rate with the exception of work on general public holidays, which will be paid at double time.

End of shift overtime should be aggregated to the nearest fifteen minutes and recorded on your timesheet. Payment for this will be made monthly in arrears."

13. The tribunal also saw copies of timesheets from which it could be seen that these differentiated between what is known on them as "incidental overtime" and "planned overtime". It appeared from the evidence that the incidental overtime was that which has been called at this hearing the shift overrun. Lindsey Stafford-Scott confirmed in oral evidence that the Claimants payslips had not clearly separated out the overtime and neither is annual leave shown on them.

14. The tribunal accepts that clause 13.9 does not refer to overtime payments and it is satisfied that such is not in the form of "regularly paid supplements." However, it does go on to say that pay is calculated on the basis of what the individual would have received had he/she been at work.

15. It was clear, however, from the evidence that voluntary overtime is of a different nature. The claimants can be asked on a regular basis, whether they are available to do such overtime. This may be by text or email to the Respondent as to whether they wish to do it or not. There is no requirement to do it. It varies with individual and with job roles. For example, the tribunal heard from Paul Vinters the senior EOC Manager, where the operational staff are either call handlers or dispatches. The call handlers take 999 emergency calls from the public and also calls from other agencies such as the police, the fire service and neighbouring ambulance trusts. Once the information is taken by the call handler the dispatchers will be able to see the information on the computer aided dispatch system and will allocate resources accordingly. He gave evidence at paragraph 9 of his witness statement that if he needs additional staff they will be notified by text message of available further shifts which they can volunteer to do. They volunteer by phoning in or if they are on the premises speaking to the administration manager. If he does not get enough volunteers he has to run the service short staffed. He explained in oral evidence that they have put in place mechanisms whereby they shorten the 999 call and give fewer instructions. They cannot rely on bank or agency staff in view of the specialist nature of the role. His levels of overtime are invariably based on the level of absence carried within the centre.

16. Mr Vinter explained that there are 14 shifts a week (one day and one night shift). On around 12 of those shifts in Bedford they have Call Handlers on voluntary overtime. The use of overtime has a direct relationship to the number of absences. They have issues with long term sickness which they are trying to address. If they manage to significantly reduce it then there will be less use of overtime.

17. With regard to the dispatchers there are currently 3 vacancies out of 40-45 roles and maybe only one overtime shift available in a week.

18. Jemma Cracknell and Simon King gave evidence about the use of agency staff and private ambulances when the need arose. Although they would look to cover by way of voluntary overtime if necessary these options were

open to them. Lindsey Stafford-Scott explained that the Trust enters into contractual arrangements with private ambulance providers and therefore when planning in advance would know that such an arrangement was available to it. She was aware that there have been occasions when they wanted to scale down the use of the private ambulance provision but were unable to do so as they were already committed to a certain level of hours under their contractual arrangements. The schedulers would have knowledge of this availability. The tribunal therefore accepts the Respondent's evidence that, contrary to the position submitted for on behalf of the Claimants the service is not dependent on the Claimants and indeed other employees undertaking voluntary overtime. It has other methods at its disposal to cover its requirements. That is not to say the voluntary overtime is not an important resource but the Respondent does have other options available to it. This is acknowledged at paragraph 4.25 of the Agreed Facts above.

19. Mr Sharp accepted that it was a personal choice by individual employees as to whether they did voluntary overtime and that its availability depended on a number of factors including the number of job vacancies in a particular area. It also varied with the functions employees perform.

20. Mr Sharp was taken to the further information given by various other Claimants. Peter Bendell (p132A) did some voluntary overtime in January, February and March 2014 and then none until September 2015. It was however further clarified that it had been agreed that some of his time spent on a mandatory professional training update that he had been unable to do on a shift could be done and classed as overtime. Faith Ecuyer performed more voluntary overtime but there were then gaps of 2 or 3 months when she did none. Neil Flowers on the air ambulance did voluntary overtime every month between January 2014 and October 2015 and then less frequently and with some months where there was none. Mark Giddens (p164A) worked overtime every month between April 2014 and September 2016.

21 Mr Sharp was taken to other further information but accepted that given the variety between the various Claimants it could not be said that for everyone voluntary overtime was something they normally did.

Relevant Law

22. *Directive of the European Parliament and of the Council (2003/88/EC) concerning certain aspects of the organisation of working time*

> "(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations
>
> Article 7 Annual leave
>
> 1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks

in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

23. *Working Time Regulations 1998*

"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], 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.

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

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

30 - Remedies

(1) A worker may present a complaint to an employment tribunal that his employer: -

(a) has refused to permit him to exercise any right he has under:-

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; …

(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

(iv) regulation 25(3), 27A(4)(b) or 27(2); or

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) Subject to regulations 30A and 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented:-

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

24 **Employment Rights Act 1996**

221 - General

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the

period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

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

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

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

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

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

222 - Remuneration varying according to time of work

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

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

(3) For the purposes of subsection (2): -

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

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

(4) In subsection (3) “the relevant period of twelve weeks” means the period of twelve weeks ending:-

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

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

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

Relevant case law

25. *British Airways plc v Williams and others [2012] ICR 847 CJEU*

It is important in considering this case to consider the various pay components that were the subject of the proceedings. The remuneration of the pilots comprised three components: -

1 A fixed annual sum.

2 Supplementary payments which vary according to:-

(a) The time spent flying this supplement being calculated at the rate of £10 per planned flying hour

(b) The time spent away from base, the supplement in this case being £2.73 per hour.

26. The supplement for the time spent flying is remuneration which is fully taxable, whereas, in the case of the supplement for the time spent away from base 82%, is treated as having been paid on account of expenses and only 18%, is treated as taxable remuneration.

27. Payment for annual leave was based exclusively on the first component i.e. the fixed annual sum. The pilots contended under European Union Law that the amount paid in respect of annual leave must be based on their entire remuneration including the supplementary payments.

28 Counsel for the Claimants before this tribunal placed much emphasis on the opinion of the Advocate General in *Williams.* Whilst of assistance the tribunal accepts the submissions made on behalf of the Respondent that the emphasis should be on the Court's decision. It is clear from an analysis of the Advocate General's opinion that much consideration was given to the definition of 'pay' (paragraph 71) and that assistance was taken from several earlier reported cases (paragraph 77) many of which were equal pay cases. The Advocate General then went on at paragraph 78 to state: -

> The similarity of the – not exhaustively listed – payments mentioned above to the supplements at issue here is obvious, since they are all ultimately linked to the pilot's readiness to make himself available for work for as long as the employer considers this necessary. However, there is a difference between the two types of supplement at issue in so far as the time spent flying supplement represents direct consideration for an activity typically carried on by

> a pilot (namely the flying of an aircraft), whereas the time away from base is more in the nature of compensation for the fact that the pilot necessarily has to be away from his normal base for travel-related reasons… Irrespective of the foregoing, both supplements are monetary benefits purposely paid by the employer for a specific activity performed by the pilot, meaning that the remunerative nature of both allowances cannot be called into question.
>
> 79. Those supplements therefore constitute 'any other consideration' which the worker receives in respect of his employment relationship pursuant to Article 141(2) EC. Accordingly, those pay components also form part of 'normal remuneration' which, in accordance with the Court's case law, must continue to be paid to the worker during his period of leave. A worker is therefore, in principle, entitled to the supplements normally due to him also in respect of periods of annual leave…
>
> 81 However, the fact that a right to the supplements normally payable is recognised as being enforceable on the merits does not necessarily mean that the worker has an undiminished right to all conceivable supplements. In my view, the Court imposed a limit on that right in so far as the case law can also be interpreted as meaning that the worker is to be entitled to no more than his 'normal remuneration'. I shall now explain the consequences of that interpretation.

29. The Advocate General then went onto discuss the ‘temporal component of normal remuneration’ stating that ‘European Union law does not impose any particular approach’ and that:

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

30. It was clear in the judgment of the actual Court that a crucial aspect for it was that ‘…remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker. It also follows that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law.’ (paragraph 21). And it continued at paragraph 23: -

> ‘…although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practice governed by the law of the member states, that structure cannot affect the

> worker's right, referred to in paragraph 19 of the present judgment, to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.'
>
> 24. Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave
>
> 25 By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave.
>
> 26 In that regard, it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case law cited above, according to which Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right (see Robinson-Steele and others, paragraph 58, and Schultz-Hoff and Stringer and others, paragraph 60).'

31. In its ruling at the end the Court made it clear that all of the relevant regulations in that case: -

> '…must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.'

32. *Bear Scotland Ltd v Fulton & others*
Hertel (UK) Ltd & another v Woods and others [2015] ICR 221

The Claimants in the *Hertel* and *Amec* appeals worked under the terms of the national agreement for the engineering and construction industry. Under clause 7.4 there was an obligation to work overtime. It was an

obligation resting on the employee and there was no corresponding obligation on the employer to provide overtime to be worked. Also: -

> 20 The claimants in the Hertel and Amec cases worked on the West Burton CCTG project, in respect of which a supplementary project agreement ('SPA') was entered into between the unions and employers. This provided at clause 2.3 that it was a condition of employment on the project that all employers and their employees accepted all of the obligations of NAECI and the SPA.
>
> 21 …It was specifically provided by SPA clauses 10.5 and 10.6 both that overtime would be required during the project, but that it was not guaranteed, nor covered by any guaranteed working hours provisions, and that it did not form part of the normal working hours. It was stated that 'it will not form any part of the calculations on holiday pay entitlement'.

33. The EAT made it clear that it was going to refer to the overtime as 'non-guaranteed overtime' finding the description that had been used of 'voluntary overtime' misleading in the circumstances of the case since:-

> 'overtime under NAECI is work which an employee if requested is obliged to perform, whereas 'voluntary overtime' is work which the employer asks an employee to do but which the employee is free of any contractual obligation to perform unless he agrees at the time to do so. 'Non-guaranteed' overtime is to be distinguished from guaranteed overtime, since in the latter case the employer is obliged by contract to offer the work, as overtime, and therefore will be liable to pay for the work even if the employer has none available to offer at the time.' (paragraph 22)

34. Reference was made to the case of *Lock v British Gas Trading Ltd* [2014] ICR 813 and paragraph 32 of the judgment in which the court said:

> '… as the Advocate General observed at points 31–33 of his opinion, the commission received by Mr Lock is directly linked to his work within the company. Consequently, there is an intrinsic link between the commission received each month by Mr Lock and the performance of the tasks he is required to carry out under his contract of employment.
>
> 33 It follows that such commission must be taken into account in the calculation of the total remuneration to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave.'

35. In *Bear Scotland,* counsel for the employer questioned the decision in *Lock* but the EAT did not accept this finding that:

> 29 … since the decision is one of the CJEU I must treat it as of the highest authority. I see no reason why I should not regard Williams and Lock as together representing a settled view expressed by the CJEU as to the meaning of Article 7. Moreover,

the approach taken in Williams and Lock is a natural development of the points adopted in the earlier cases of Robinson-Steele v R D Retail Services Ltd [2006] IRLR 386, CJEU and Stringer v Revenue and Customs Commissioners [2009] IRLR 214. Robinson-Steele related to holiday pay. It did however, contain at paragraph 58 the following general words:-

> '… the Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker during such leave, in a position which is, as regards remuneration, comparable to periods of work.'

36. In rejecting the arguments put forward by the employers the EAT found:-

> 44 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 European Union 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. Accordingly, the approach taken in Williams is unsurprising. The Court in Lock looked for a direct link between the payment claimed and the work done. In the Hertel and Amec cases, the work was required by the employer. On the evidence, the employment tribunal was entitled to think it was so regularly required for payments made in respect of it to be normal remuneration.
>
> 45 In so far as the test seeks an intrinsic or direct link to tasks which a worker is required to carry out (stressing those last four words) it would be perverse to hold that the overtime in these cases was not. In my view, therefore, Article 7 requires and required non-guaranteed overtime to be paid during annual leave. I see no scope for any such uncertainty as would persuade me to make a reference to the Court of Justice of the European Union.

37. *Patterson v Castlereagh Borough Council* [2015] NICA 47

This case concerned voluntary overtime the Claimant worked. The tribunal rejected his claim that his earnings received for carrying out voluntary overtime during his full-time employment should be included in the calculation of his entitlement for paid annual leave. The voluntary overtime was work which his employer might request Mr Patterson to do but which he was free of any contractual obligation to perform. At the appeal: -

> 'it was now common case between the parties that the tribunal had fallen into error ('the point of principle'). Mr Wolfe QC, who

> appeared on behalf of the respondent with Mr Hamill made this concession ('the concession') on the point of principle whilst at the same time contending that the tribunal had in fact not fallen into such error but had simply found that the appellant had factually failed to establish the earnings he received pursuant to voluntary overtime and which would have formed part of his normal remuneration. In short the tribunal had made a simple factual finding on the evidence, or lack of evidence, before it.'

38. The Appeal Court found the concession to be 'well made' whilst noting it had 'been deprived of any full argument on the issue and our conclusions must therefore be read in this light and with that degree of caution attached to them. For that reason our analysis of the issues on this judgment are couched in relatively short form, recognising as we do that on another day fuller argument on this issue may transpire.'

39. Having considered the authorities and in a very short decision the Court was satisfied that the concession had been correct and: -

> '…in principle there is no reason why voluntary overtime should not be included as a part of a determination of entitlement to paid annual leave. It will be a question of fact for each tribunal to determine whether or not that voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the remuneration to trigger its inclusion in the calculation.'

Conclusions

Contractual claim

40 In relation to overtime payments the tribunal has concluded it is possible to draw a distinction between the overtime which is occasioned when the shift overruns and voluntary overtime that the Claimants can choose to do.

41 All the Respondent's witnesses acknowledged that it was not open to any of the Claimants to leave their job at the end of the shift if they were in the middle of an emergency call, be it on the road to an accident or in a call centre. It was an essential requirement of their contractual role that they remain on that shift and conclude the matter that they were dealing with. This could be attending to a patient at an accident or a 999 call. This the tribunal is satisfied is part of the Claimants contractual obligations and as such forms part of their pay for the purposes of Clause 13.9 of Section 13 of Agenda for Change.

42 The voluntary overtime however, the tribunal is satisfied is of a different category. This is by its very nature voluntary. There is no contractual obligation for the Claimants to perform it. Although it was submitted on the Claimants behalf that the Respondents rely upon it the tribunal is satisfied that it must have in place other options in case the take-up for voluntary overtime is not sufficient to cover all its obligations. As found, this could

be by way of agency staff or private ambulances. As an examination of the time sheets and further information demonstrated there is no pattern to the voluntary overtime. It varies depending on the nature of the role, the type of work undertaken and the needs of the organisation. It is not part of pay for the purposes of calculating the Claimants annual leave.

Claim under Working Time Regulations

43 The Claimants written submissions were put under the basis of Article 7 of the Directive, the Respondent being an emanation of the State. In oral submissions Counsel for the Claimants confirmed that she was not seeking to argue (contrary to *Bamsey v Albon Engineering & Manufacturing plc* [2004] IRLR 457 CA) that overtime could be included in the calculation of a week's pay if solely applying UK law. She did not seek to argue that overtime could be included under the Regulations and s224 of the ERA; her arguments were based on the application of EU law.

44 The Respondent made the following concession in submissions: -

'Paragraph 6…

(ii) turning to the statutory claims, on reflection, the Respondent accepts that non-guaranteed overtime should be taken into account in determining statutory holiday pay under the WTR or WTD and, if necessary, it is possible to construe the WTR to mean that such payments should be taken into account in performing the calculation of holiday pay under the WTR;'

45 This concession is in relation to what have been termed in these proceedings the 'shift overruns'. It acknowledges (paragraph 36 of submissions) that this form of overtime is 'obligatory on the part of the Claimants; the performance of the Claimants' jobs means that they may not just stop when their shift comes to an end but that they will have to continue working until their task is complete.' The Respondent accepts 'in the light of *Bear Scotland* that such overtime has to be taken into account in calculating holiday pay and the Working Time Regulations may be read as requiring that that element of pay be included in the holiday pay calculation' (paragraph 39). Further:-

'40. The Respondent also accepts that, since the WTD is directly enforceable against it and since the WTD would require shift overrun payments to be taken into account in determining holiday pay, the Claimants are at present entitled to rely on that right under the WTD against the Respondent.'

46 For the sake of completeness the tribunal would confirm that it would have come to that conclusion on the authorities.

47 The Respondent makes no such concession with regard to the voluntary overtime.

Voluntary overtime

48 The tribunal has concluded that a distinction can be drawn between the voluntary overtime in this case and the supplementary payments that the pilots were claiming in *Williams*.

49 The European Court found that those payments were intrinsically linked to the performance of the pilots' role of flying. The tribunal has concluded that the same cannot be said of the voluntary overtime in this case. It is satisfied from its findings that there was no obligation on the employees to perform the overtime in question. It was purely voluntary. Mr Vinter gave evidence which is accepted that he would need to still man the call centre, even if there were no volunteers for overtime. For example, over the Christmas and New Year period. Other witnesses explained that the Trust contracts with private ambulance providers. They must have plans in place in case overtime is not offered by employees. There was no requirement to carry this out under the contract.

50 Counsel for the Claimants places much emphasis on the opinion of the Advocate General in *Williams*. Paragraph 78 of that opinion refers to the supplements at issue in that case as "all ultimately linked to the pilot's readiness to make himself available for work for as long as the employer considers this necessary". That is not the case regarding the voluntary overtime in the case before this tribunal.

51 The tribunal has also considered the case of *Patterson*, where it must be acknowledged that the Northern Ireland Court of Appeal acting on a concession made, acknowledged that there was no reason why voluntary overtime could not fall within normal remuneration, but that it would be a matter for the relevant tribunal to determine on the facts of the case. On the facts of this case, the tribunal is satisfied that this voluntary overtime cannot form part of normal pay where there was no requirement to do it and the regularity at which it was carried out varied depending on the Claimants own circumstances and those of the Respondent.

52 In the event that the tribunal were wrong in its conclusions on voluntary overtime it accepts the alternative submission on behalf of the Respondent that it would be necessary to conduct a case by case assessment of each of the Claimants to ascertain the differing circumstances of individual Claimants, and whether or not the regularity with which the overtime was performed was sufficient for it to count as normal remuneration. This exercise has not yet been carried out and a further hearing would be required.

53. As the tribunal was not dealing with matters of remedy it has not considered and heard submissions on limitation matters as they relate to individual claimants. If remedy is not resolved between the parties such limitation issues, if any, will need to be determined at a remedy hearing.

CASE MANAGEMENT ORDERS

1. Within 28 days of the date on which these reasons are sent to the parties they are to advise the tribunal whether a remedy hearing is required and if so also provide:

   1.1 Details of the number of witnesses, if any, to be called,

   1.2 Their joint time estimate for the remedy hearing

   1.3 An agreed list of issues to be determined at that hearing

   1.4 Dates to avoid for the next 4 months

Employment Judge Laidler, Bury St Edmunds
Date: 15 May 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS