Neutral Citation Number: [2019] EWCA Civ 947

Case No: A2/2018/1173/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE MR JUSTICE SOOLE
UKEAT/0398/17/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2019

Before :

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

EAST OF ENGLAND AMBULANCE SERVICE NHS TRUST	**Appellant**
- and -	
NEIL FLOWERS AND OTHERS	**Respondents (Claimants)**

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- -

Paul Nicholls QC (instructed by **Mills & Reeve LLP, Cambridge**) for the **Trust**
Sean Jones QC (instructed by **UNISON Legal Services**) for the **Claimants**

Hearing date: 15th May 2019

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Approved Judgment

Lord Justice Bean:

1. The Claimants are all employed by the Appellant Trust in a range of roles concerned with the provision of ambulance services. They brought a claim before an employment tribunal sitting at Bury St Edmunds (Employment Judge Laidler sitting alone) alleging unlawful deductions from their holiday pay. Their case is that the calculation of that holiday pay should take account of overtime in two categories, known as non-guaranteed overtime and voluntary overtime. The claim is made pursuant to the terms of the Claimants' contracts and alternatively under Article 7 of the Working Time Directive. Since it is accepted that the Trust is an emanation of the State, the non-contractual claim has been brought under the Directive rather than under the domestic provisions of the Working Time Regulations 1998.

2. Non-guaranteed overtime occurs where an employee of the Trust is carrying out a task which must be completed after the end of the shift. Examples are when caring for patients to whom an ambulance has been sent or dealing with a call made to emergency services. In such circumstances, the obligation to complete the task continues beyond the end of the shift. In return, the employee is entitled to payment for this shift overrun.

3. Employees may also be offered voluntary overtime. The statement of agreed facts records that:

> "21. 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. The ET held that the Claimants' contractual terms and conditions entitled them to have non-guaranteed overtime taken into account in the calculation of their holiday pay, but not to have their voluntary overtime taken into account. As to the claim under the Working Time Directive, this was conceded by the Trust in respect of non-guaranteed overtime but not in respect of voluntary overtime. The ET accepted the Trust's argument that voluntary overtime was in a different category in respect of the statutory claim as well as the contractual one.

5. The Claimants appealed to the Employment Appeal Tribunal, contending that voluntary overtime should have been taken into account (under both the contract and the Directive) in the calculation of holiday pay. The Trust cross-appealed against the finding that non-guaranteed overtime should have been taken into account under the contract.

6. In the EAT the case was heard by Soole J sitting alone. He allowed the Claimants' appeal on the contractual claims. He also held, following Simler P in the earlier EAT decision of *Dudley MBC v Willetts* [2018] ICR 31, that the voluntary overtime should have been taken into account under the Directive. He dismissed the Trust's cross-appeal against the finding that non-guaranteed overtime should have been taken into account under the contract.

7. Soole J gave an extempore oral judgment. No application was made to him for permission to appeal to this court either at the conclusion of the judgment or within seven days thereafter pursuant to paragraph 25.1 of the EAT Practice Direction. The

Trust did, however, apply to this court for permission to appeal. I granted permission on 28 November 2018 on the grounds that the question of whether the calculation of holiday pay should take account of voluntary overtime was an issue of some general importance which justified consideration by the Court of Appeal.

The contractual claim

8. The Claimants' contractual terms are to be found in the NHS Terms and Conditions of Service Handbook, a collective agreement popularly known as "Agenda for Change". We were shown some extracts. Section 3 deals with eligibility for and the calculation of overtime payments: it is preceded by a sentence in Clause 2.9 stating that "any extra time worked in a week above standard hours will be treated as overtime and Section 3 will apply". Section 4 introduces the concept of high cost area supplements. Section 5 deals with a type of supplementary payment known as a recruitment and retention premium: such premia are subdivided into two categories, short term and long term, each of them expressed as cash sums separately identifiable from basic pay. Provisions for unsocial hours payments for ambulance staff are contained in Annex 5: such pay enhancements are to be paid as a fixed percentage addition to basic pay in each pay period.

9. Section 13, headed "Annual Leave and General Public Holidays" contains the crucial paragraph:-

> "13.9 Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payment for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received if he or she had been at work. This would be based on the previous three months at work or any other reference period that may be locally agreed."

10. Soole J, accepting the Claimants' construction, held:-

> "30. ... First, I consider that the purpose of the first sentence of clause 13.9 is to provide that holiday pay shall include the identified "regularly paid supplements". It does not expressly define the other components of "pay".
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> 31. Secondly, I see no good reason to construe the references to "pay" in a way which confines it to basic pay and excludes overtime. The natural interpretation that overtime is part of pay and the pay structure is confirmed by clause 2.9 of section 1, which provides the link to the overtime provisions in section 3.
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> 32. Thirdly, such construction of "pay" is further supported by the second sentence of clause 13.9. The clause must be read as a whole. Its objective intention is to maintain the overall level of remuneration which the employee would have received if working. I do not accept that the second sentence merely provides calculation machinery for the first sentence. However,

> even if it is so confined, that calculation is of pay which includes overtime pay.
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> 33. Fourthly, this construction accords with the background context of the WTD. I was told that clause 13.9 appeared in its current form in 2009. As Simler P's analysis in *Dudley* demonstrates, the European Court had by at least 2006 established the principle that, for the duration of annual leave within the meaning of the Directive, remuneration must be maintained: paragraph 60 of her judgment. It makes obvious sense for the contract to march in step with the WTD so far as possible.
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> 34. Fifthly, I do not accept that the Claimants' case involves a rewriting of the contract. It is a question of construction. In my judgment there is no good basis to construe clause 13.9 so as to exclude overtime in the calculation of holiday pay.
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> 35. In consequence of this construction and contrary to the Tribunal's conclusion, I see no basis to distinguish between non-guaranteed and voluntary overtime. In this case, the calculation will be based on the three-month period identified in the final sentence of clause 13.9."

11. For the Trust Mr Paul Nicholls QC accepted that in a case such as this where the facts have been agreed and the issue is a question of interpretation of a contract (or a statutory provision, whether European or domestic) there is no primacy to be given to the decision of the ET: indeed we were scarcely referred to it. He submitted, however, that Soole J in the EAT reached the wrong conclusion as to the interpretation of the contract.

12. Mr Nicholls' first point is that the construction favoured by Soole J would, he says, deprive the first sentence of Clause 13.9 of any meaning. If holiday pay were to be calculated simply on the basis of what the individual would have received if he or she would have been at work based on the previous three months of work then the second and third sentences of Clause 13.9 would achieve that.

13. I disagree. It is right to say that the first sentence might more naturally come after the second and third sentences rather than before them. But it is clear to me that the reference in the first sentence to certain specific types of payment is for the avoidance of doubt. Some elements, such as (for example) recruitment and retention premia, which are expressed as cash sums, might well be the subject of a dispute as to whether they should be taken into account if they happened to have been paid, say, 11 weeks before the holiday period. Their express inclusion in clause 13.9 puts the issue beyond doubt.

14. Mr Nicholls' skeleton argument then states:-

> "The [Trust] submits that paragraph 13.9 means that employees will be entitled to pay during their holiday and then set out additional elements of pay which will be taken into account. Thus, when the paragraph says "pay during annual leave will

> include…", it sets out the elements which should be taken into account in addition to basic pay".

15. The last five words of this submission expose the weakness in the Appellant's argument. If the intention of those who negotiated the collective agreement had been to draw a distinction in Clause 13.9 between basic pay and overtime payments it would have been easy to do so. The clause could have said that during annual leave the employee would receive basic pay plus certain specified supplements, but it did not. The word "basic" is not used. Nor is the word "overtime".

16. The next argument for the Appellants is based on the use of the wording "regularly paid supplements". Mr Nicholls submits:

> "It was common ground that overtime was not a regularly paid supplement. The [Trust] submits that it follows that, not being a regularly paid supplement, overtime payments do not fall to be taken into account in the calculation of holiday pay".

17. This cannot be right: it is as if, instead of the clause beginning "pay during annual leave will *include* regularly paid supplements" it had begun "pay during annual leave will *comprise* regularly paid supplements". That would lead to the absurd position where neither basic pay nor overtime formed the basis of calculation, but only supplements.

18. The next way of putting the point is contained in paragraph 38 of the Trust's skeleton argument:

> "… it is submitted that what is even more compelling is that the parties have expressly included some types of payment and, not withstanding that overtime is identified in the contract as a form of payment, it has been omitted from paragraph 13.9. Thus the drafters of the contract went back through the contract and identified types of payment falling within sections 2, 4 and 5 as being taken into account in the calculation of holiday pay but they conspicuously glossed over and did not mention section 3 – overtime – as a type of payment which should be taken into account. The Claimants' argument that paragraph 13.9 means that overtime should be taken into account in determining holiday pay is a type of payment which has deliberately not been mentioned."

19. Like Soole J, I reject the argument that the omission from the clause of an express reference to overtime must be taken to represent a deliberate decision by the parties that it should be excluded from the calculation of holiday pay. To do so would result in many cases in annual leave payments which fall well short of being a calculation of pay "on the basis of what the individual would have received had he/she been at work". I agree with Soole J that the natural interpretation of the clause is that overtime is part of pay. The clause must be read as a whole. The second sentence does not, as the Trust's submissions suggest, merely provide a machinery of calculation to supplement the first sentence.

20. I would therefore uphold the decision of Soole J that under Clause 13.9 of "Agenda for Change" the Claimants have a contractual entitlement to have voluntary overtime taken into account for the purposes of calculating holiday pay. I also agree with Soole J that there is no basis for distinguishing between voluntary and non-guaranteed overtime payments for this purpose.

The Working Time Directive claim

21. In a strict sense this makes it unnecessary to consider the position under the WTD. But since part of the reason why I granted permission for an appeal to this court was to enable the Trust to argue that Simler P's decision in *Dudley MBC v Willetts* was wrong, and since that issue (unlike the contractual issue) has implications for employees throughout the workforce not limited to the NHS, I consider that we should deal with that question as well. Since the issue has been raised in the present case, and argued with great skill by Mr Jones for the Claimants and Mr Nicholls for the Trust, it would be wrong to leave it to be raised in a future appeal which may not reach this Court for some time. Employers need to know whether the decision in *Willetts* was correct.

22. Article 7 of the Directive stipulates a minimum period of at least four weeks of paid annual leave and states expressly that it may not be replaced by an allowance in lieu. The Directive does not, however, specify the amount of pay that is to be received during any period of annual leave. This question was considered by the European Court of Justice ("the CJEU") in three references from UK courts between 2006 and 2014. In *Robinson-Steele v RD Retail Services Ltd* [2006] ICR 932 the CJEU stated that "for the duration of annual leave within the meaning of the Directive, remuneration must be maintained". In *British Airways PLC -v Williams* [2012] ICR 847 Advocate General Trstenjak summarised the effect of *Robinson-Steele* as being that "the level of holiday pay must correspond exactly to that of normal remuneration"

23. In *Williams* the payments in issue were flying pay supplement and "time away from base" allowance, both of which arose from duties that the Claimant pilots could be required to perform under their contracts of employment and did not relate to additional voluntary duties. The Advocate General took the view that both supplements were material components of pay.

24. In its judgment the CJEU referred to its conclusion in *Robinson-Steele* that for the duration of annual leave remuneration must be maintained and that workers must receive their normal remuneration for that period of rest. The Court continued:-

> "20. 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: see *Robinson-Steele*, para 58 and *Stringer*, para 60.
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> 21. As the Advocate General states in point 90 of her opinion, it follows from the foregoing 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 European Union law.
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> ...
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> 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.
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> 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.
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> 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 ..."

25. In paragraphs 24, 25 and 26 of the judgment in *Williams* the court uses the phrase "the tasks which the worker is required to carry out under his contract of employment". Mr Nicholls emphasises the word *required*. He submits that the use of the word draws a distinction between compulsory and voluntary overtime.

26. The claimant in *Lock v British Gas Trading Ltd* [2014] ICR 813 was a salesman much of whose normal remuneration consisted of commission. He earned a basic salary of £1222.50 per month plus variable commission which depended not on the amount of time worked but on the outcome of that work, namely the number and type of new contracts concluded. His average monthly commission in 2011 was £1912.67 (that is to say substantially more than the basic salary element of his pay). Advocate General Bot considered the commission to be part of Mr Lock's "normal remuneration". He stated at paragraph 32:-

> "Although the amount of commission may fluctuate from month to month … such commission is nonetheless permanent enough for it be regarded as forming part of that worker's normal remuneration. In other words, it constitutes a constant component of his remuneration. …

> In my view an intrinsic link does therefore exist between the commission received each month by a worker such as Mr Lock and the performance of the tasks he is required to carry out under his contract of employment."

27. This approach was expressly endorsed by the CJEU. The court stated:-

> "26 In this respect, it should be observed at the outset 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 (see *Williams and Others* EU:C:2011:588, paragraph 21).
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> 27 Where the remuneration received by the worker is composed of several components, the determination of the normal remuneration to which the worker in question is entitled during his annual leave requires a specific analysis (see *Williams and Others* EU:C:2011:588, paragraph 22).
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> 28 As stated at paragraph 7 above, that is the case regarding Mr Lock's remuneration. As a sales consultant employed by a commercial company, he receives remuneration composed of a fixed monthly salary and variable commission linked to the contracts entered into by the employer resulting from sales he achieves.
>
> 29 In any specific analysis, for the purpose of the case-law cited above, it is established that any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided and included in the calculation of the worker's total remuneration must necessarily be taken into account for the purposes of calculating the amount to which the worker is entitled during his annual leave (see *Williams and Others* EU:C:2011:588, paragraph 24).
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> 30 In addition, the Court has stated that all components of total remuneration relating to the professional and personal status of the worker must continue to be paid during his paid annual leave. Thus, any allowances relating to seniority, length of service and to professional qualifications must be maintained (see, to that effect, Case C-471/08 *Parviainen* EU:C:2010:391, paragraph 73, and *Williams and Others* EU:C:2011:588, paragraph 27).
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> 31 By contrast, according to that same line of case-law, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment need not be taken into account in the calculation of the payment to be

> made during annual leave (see *Williams and Others* EU:C:2011:588, paragraph 25).
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> 32 In the case in the main proceedings, as the Advocate General observed at points 31 to 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.
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> 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."

28. Again Mr Nicholls refers to the use in paragraphs 29 and 32 of the judgment of the by now familiar phrase "the tasks he is required to carry out under his contract of employment", and emphasises the word "required", but the facts of the *Lock* case, and the conclusion which the CJEU drew, seem to me to point the other way. Mr Lock was not required under his contract to achieve a particular level of sales. It is true that the commission element of his pay did not depend on the number of hours he worked. But it did depend, no doubt, on (for example) the number of calls he made in a day or in a week. If it was crucial to the court's reasoning to draw a distinction between sales achieved outside normal working hours and sales achieved within normal working hours it is very surprising that they did not say so.

29. Both sides before us relied on *Bear Scotland Ltd -v- Fulton* [2015] ICR 221. That concerned non-guaranteed overtime: as in the present case, this was work which the employer was not obliged to provide but which the employee was obliged to perform on request. Langstaff P, sitting in the EAT, said:-

> "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 EU law and accept that, where there is no such "normal" remuneration, as 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 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".

30. Mr Jones submits that paragraph 44 supports his case. Mr Nicholls, on the other hand, submits that the emphasis which he places on the use of the word "required" in *Williams* and *Lock* is supported by the emphasis given to the phrase "required to carry out" by Langstaff P in paragraph 45.

31. In *Dudley MBC v Willetts* [2018] ICR 31 Simler P had to consider whether regular but voluntary overtime should be taken into account under Article 7. She was referred to *Williams, Lock* and *Bear Scotland.* She held:-

> "36. There is no doubt that the right to paid annual leave is a particularly important principle of EU social law, enshrined in Article 31(2) of the Charter. There is no provision for its derogation in the WTD. Recital 6 to the WTD requires account to be taken of the principles of the ILO Convention with regard to the organisation of working time. The ILO has adopted paragraph C132 which is the source of the requirement that the full period of holiday to which a worker is entitled should be paid at a rate that is "at least his normal or average remuneration". There is also no doubt that payments in respect of overtime (whether that be compulsory, non-guaranteed or voluntary), constitute remuneration as a matter of domestic and EU law.
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> 37. EU law requires that normal (not contractual) remuneration must be maintained in respect of the four-week period of annual leave guaranteed by Article 7. That overarching principle means that the payments should "correspond to the normal remuneration received by the worker" while working: see *Williams* and *Lock*. The purpose of this requirement is to ensure that a worker does not suffer a financial disadvantage by taking leave, which is liable to deter him from exercising this important right from which there can be no derogation.
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> 38. It follows in my judgement, that the CJEU in *Williams*, having expressly endorsed the conclusion of the Advocate General at paragraph 90.2, did not purport to set a narrower test at paragraph 24 of its judgment that would have the effect of restricting the application of the overarching principle.
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> 39. Having set out the overarching principle, the CJEU made clear that the division of pay into different elements cannot affect a worker's right to receive "normal remuneration" in respect of annual leave. In each case the relevant element of pay must be

assessed in light of the overarching principle and objective of Article 7 which is to maintain normal remuneration so that holiday pay corresponds to (and is not simply broadly comparable to) remuneration while working (paragraphs 22 and 23).

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

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

42. Mr Jones' argument [for the employers] places too much weight on the reference to tasks required to be carried out under the contract of employment. This was not an issue in *Williams* or *Lock*. In *Williams* the court was deciding whether the payments were intrinsically linked to work done by the claimants for the employer or whether they reimbursed expenses incurred by them; and not to whether the work was compulsorily required under the contract or done on a voluntary basis. Furthermore at paragraph 32 of *Lock* in particular, the CJEU appears to treat work within the company as synonymous with the performance of tasks required to be carried out under the contract of employment.

43. Furthermore, the exclusion as a matter of principle of payments for voluntary work which is normally undertaken would amount to an excessively narrow interpretation of normal

> remuneration that gives rise to the risk of fragmenting of pay into different components to minimise levels of holiday pay. It would result in a risk of a worker suffering a financial disadvantage that might deter him from exercising these rights contrary to the underlying objective of Article 7. It would carry the risk identified by Advocate General Trstenjak of employers setting artificially low levels of basic contracted hours and categorising the remaining working time as "voluntary overtime" which does not have to be accounted for in respect of paid annual leave. This is not a fanciful but a real objection to the Respondents' argument as demonstrated by the current proliferation of zero hours contracts.
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> 44. It seems to me that applying the overarching principle established by the CJEU in *Williams* and *Lock*, in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis to justify the description "normal", the principle in *Williams* applies and it will be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration.
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> 45. Accordingly, the Employment Tribunal in the present case made no error of law in finding that remuneration linked to overtime work that was performed on a voluntary basis could be included in normal remuneration for calculating holiday pay.
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> 46. If I am wrong and there is a requirement of an intrinsic link, the link is between the payment in question and tasks which a worker is required to carry out under his contract of employment, and I consider that this test is satisfied here. Absent a contract of employment, the specific agreement or arrangement made for voluntary overtime would not exist. The duties or tasks carried out in either case are the same. It seems to me that the contract of employment constitutes an umbrella contract in that sense. Whatever the position in advance of a particular shift, it seems to me that once the Claimants commenced working a shift of voluntary overtime or a period of standby duty or callout, they were performing tasks required of them under their contracts of employment even if there was also a separate agreement or arrangement. The payments made were all directly linked to tasks they were required to perform under their contracts of employment and, once those shifts or standby periods began, they were in no different position from an employee who is required by his contract to work overtime or be on standby or attend callouts."

32. Subject to the *Hein* case, to which I am about to refer, I would have been content to say that I agree with Simler P's clear and persuasive analysis and have nothing to add. The CJEU case law establishes clearly that the question in each case is whether the pattern of work is sufficiently regular and settled for payments made in respect of it to amount

to normal remuneration. There is no separate requirement that the hours of work are compulsory under the contract.

33. Since the decision of Simler P in *Willetts* and that of Soole J in the present case the CJEU has given its decision in *Hein v Albert Holzkamm GmbH* (13 December 2018, case C-385/17), which, Mr Nicholls contends, shows that Simler P and Soole J misinterpreted the CJEU case law. The Court was asked to determine whether EU law precludes a national rule, contained in a collective agreement, which allows reductions in earnings due to short-time work to be taken into account for the purposes of calculating a worker's entitlement to remuneration for annual leave.

34. Much of the judgment of the CJEU repeats the phrases familiar from the case law. Thus, at paragraph 32 they refer to *Robinson-Steele* and to *Williams* as establishing the principle that during annual leave "remuneration must be maintained and that, in other words, workers must receive their normal remuneration for the period of rest." In the next paragraph, referring to the same two previous decisions, they say that "the purpose of the requirement for 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". They note at paragraph 40 (as an apparently uncontentious fact in the case) that "remuneration paid for overtime worked by the workers is fully taken into account when calculating remuneration for annual leave". At paragraph 44, referring again to *Robinson-Steele* and to *Lock*, they say;-

> "… the purpose of normal remuneration being received during the period of paid annual leave is to allow the work to actually take the days of leave to which he is entitled… when the remuneration paid on account of the entitlement to paid annual leave provided for by Article 7(1) of Directive 2003-88 is, as in the situation at issue, in the main proceedings, less than the normal remuneration that the worker receives during periods actually worked, the worker might well be encouraged not to take his paid annual leave, at least during periods of actual work, as it would lead to a reduction in his remuneration during those periods."

35. Thus far, this is a familiar recital of the established case law. But then in paragraphs 46 and 47 the Court states (emphasis added):-

> "46. Lastly, as for the rule that overtime worked by the worker is to be taken into account for the purpose of calculating the remuneration due in respect of paid annual leave entitlement, it should be noted that, *given its exceptional and unforeseeable nature*, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7(1) of Directive 2003/88.
>
> 47. However, when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that

> the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration due under the right to paid annual leave provided for by Article 7(1) of Directive 2003/88, in order that the worker may enjoy, during that leave, economic conditions which are comparable to those that he enjoys when working. It is for the referring court to verify whether that is the case in the main proceedings."

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

37. Mr Nicholls relies on the statement in paragraph 46 that "given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of … paid annual leave"; this is to be contrasted with cases where (paragraph 47) "the obligations arising from the employment contract *require* the worker to work overtime on a broadly regular and predictable basis." This shows, he submits, that overtime does not have to be taken into account for calculating holiday pay unless it is *both* compulsory *and* "broadly regular and predictable". On this basis even the non-guaranteed overtime in the present case does not qualify.

38. Mr Jones, on the other hand, submits that the distinction being drawn in paragraphs 46 and 47 of *Hein* is between exceptional and unforeseeable payments on the one hand and broadly regular and predictable ones on the other.

39. Mr Jones reminded us that the nature of annual leave as a fundamental right has been emphasised again and again by European legislation and case law. The policy set out in Article 7 of the Working Time Directive has been repeated in the European Charter of Fundamental Rights (chapter 31). The CJEU has repeatedly stated that there must be no disincentive to workers taking the minimum period of annual leave and that unless normal remuneration is maintained, there is a disincentive. He observes that in *Williams* the CJEU made it clear that the obligations imposed by the Directive cannot be satisfied by paying the bare minimum under the contract. He noted that in *Williams* the Advocate General had said at [77]:-

> "In principle the broad definition of pay in Article 141(2) EC covers not only the remuneration payable strictly as consideration for the work undertaken but also any additional components such as bonuses, supplements and allowances, concessions granted by the employer and ex gratia payments. The court has certainly recognised as pay, within the meaning of that provision, allowances based on the criterion of mobility, that

> is to say, allowances which reward the worker's readiness to work at different times."
>
> Consequently an allowance for inconvenient working hours …, overtime pay… and overtime pay for training course attendance, the duration of which exceeds the individual's working hours … have also been regarded as coming within the scope of that definition. Logically then, that category would necessarily also include pay supplements for overtime, supplements for working on public holidays, shift allowances and any comparable payments."

40. The Advocate General made it clear at paragraphs 81 onwards of her opinion that. "

> "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, insofar as the case law can also be interpreted as meaning that the worker is to be entitled to no more than his "normal remuneration".

She went on to note that the determination of normal remuneration requires a sufficiently representative reference period.

41. In paragraph 21 of the judgment in *Williams*, the CJEU, adopting the opinion of the Advocate General, laid down that:-

> "Remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond with normal remuneration received by the worker. It… 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 European law."

42. Mr Jones points out correctly that if Mr Nicholls is right in his interpretation of paragraphs 46 and 47 of *Hein*, the emphatic statements made in *Williams* would appear to be contradicted. Even non-guaranteed overtime would not have to be taken into account. As Advocate General Trstenjak pointed out in *Williams* and Simler P in *Willetts*, the exclusion of voluntary overtime from the calculation of holiday pay would carry the risk of encouraging employers to set artificially low levels of basic contractual hours and to categorise the remaining working time as "overtime". I agree with Simler P that the current trend, at any rate in the UK, towards zero hours contracts shows that this is not a fanciful but a very real objection to the Trust's argument. A worker under a zero hours contract, even if he or she performed an average of 30 or 40 hours work per week throughout the year, would be entitled to no paid holiday at all.

43. Mr Nicholls submitted that the present case is not one of a zero hours contract nor anywhere near it, and we should leave that problem for another case where it has occurred. It is fair to say that the present case does not involve a zero hours or very low

basic hours contract. But the widespread use of such contracts must be borne in mind when trying to decipher what the CJEU has said.

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

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

46. I have considered whether this would be an appropriate case for a reference to the CJEU. But quite apart from the fact that the UK may well withdraw from the jurisdiction of the Court in the near future, the parties to the present litigation would not be assisted by a reference. The Claimants have won their case on the basis of contract. They understandably wish the ET to proceed to determine remedy and make them an award. The rights and wrongs of the interpretation of the Directive are of no concern to them nor to the Appellant Trust.

47. Accordingly I consider that *Dudley MBC v Willetts* was correctly decided; that Soole J was right to follow it in this case; and that the Trust's appeal on the Directive issue, as well as on the contract issue, should be dismissed.

Lady Justice Asplin:

48. I agree with Bean LJ that the appeal should be dismissed both on the contract and the Directive issues for the reasons which he gives. Furthermore, I agree with his conclusions in relation to the case of *Hein*. It seems to me, as it does to him, that paragraph 46 is inconsistent with the preceding paragraphs of the judgment in that case. Furthermore, if it is to be understood in the way that Mr Nicholls suggests, it would amount to a wholly unexplained *volte face* by the CJEU. It would appear to contradict the clear statements in *Williams* and undermine the principle that an employee should not be deterred from taking proper rest by way of holiday. It would also leave the door open for the abuses to which both Simler P in *Willetts* and Bean LJ refer.

Lady Justice Nicola Davies:

49. I agree with both judgments.