EMPLOYMENT TRIBUNALS

Claimants:	**Mr Z J Lock (and others)**
Respondents:	**(1) British Gas Trading Limited** **(2) Secretary of State for Business, Innovation and Skills**
Heard at:	**Leicester**
On:	**4 and 5 February 2015**
Before:	**Employment Judge Ahmed (sitting alone)**

Representation

Claimants:	**Mr Michael Ford (one of Her Majesty's Counsel) and Mr Simon Cheetham (Counsel)**
British Gas:	**Mr John Cavanagh (one of Her Majesty's Counsel)**
Secretary of State:	**Mr Adam Tolley (one of Her Majesty's Counsel)**

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. In relation to the claimant's complaint of an unlawful deduction of wages, the Working Time Regulations 1998 should be read so as to be consistent with Article 7 of Council Directive 2003/88/EC (formerly Council Directive 93/104/EC) such that appropriate words should be added to domestic legislation to bring the calculation of a week's pay in conformity with Council Directive 2003/88/EC.

2. Regulation 16(3) of The Working Time Regulations 1998 is to be interpreted and applied as if it had the following paragraph added to it:

> *(e) as if, in the case of the entitlement under Regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration which varies with the amount of work done for the purpose of section 221.*

REASONS

Background

1. In these proceedings, Mr Lock brings a complaint of an unlawful deduction of wages, namely unpaid holiday pay. He is the lead claimant for a very large number of claims lodged both in this and other regions of the Employment Tribunals. The case already has something of a long history. It was presented to the tribunal as long ago as 10 April 2012. In November 2012, it was referred to the Court of Justice of the European Union ("CJEU"). Following the judgment of the CJEU (**Lock v British Gas** [2014] ICR 813), the case has been remitted back to this tribunal for determination of various issues in accordance with domestic law.

2. In broad terms, this case now concerns a potential conflict between European (EU) law and domestic legislation. The question is whether in the light of the decision of the CJEU in this case, domestic law, in the form of the Working Time Regulations 1998 ("WTR"), can be read consistently with EU law and if not whether words can and should be added in interpreting those regulations so that the calculation of a week's pay is in conformity with EU law.

3. It is important to stress what this case is not about. It is not about whether a worker should as a matter of EU law have commission included in his holiday pay. The CJEU has already decided that issue - commission payments of the type earned by Mr Lock *must* be taken into account. That is no longer open to debate. Equally, this case does not concern whether any other form of remuneration (such as discretionary bonuses, for example) ought to be taken into account in determining holiday pay.

4. Putting it as simply as possible, the difficulty for Mr Lock is that whilst he is on annual leave, he does not generate any commission. As a consequence he is paid reduced remuneration when he returns to work. That, as the CJEU noted, has an adverse financial impact on a worker and may deter him from actually taking annual leave. Such a deterrent is, as the Advocate General and (at paragraph 22) the CJEU point out is, *"all the more likely in a situation ... in which commission represents on average 60% of the remuneration"*.

5. For the purposes of this hearing, there is no factual dispute and no oral evidence has been offered. I am invited to apply, which I do, the findings of fact set out by Employment Judge Blackwell with some very minor amendments which are not in dispute. They are set out in the Annex to the order signed 1 October 2012 when he referred the matter to the CJEU.

6. The precise identification of the issues for this hearing was agreed at a preliminary hearing before Employment Judge Milgate on 30 June 2014. Five issues were identified and they are as follows:

6.1 to determine the effect of the CJEU ruling on these claims and in particular whether the WTR are capable of being read purposively so as to be consistent with European law and/or whether words should be added to the domestic legislation so that the calculation of a week's pay is in conformity with European law (the "liability issue");

6.2 if the WTR can be read purposively and/or if words can be added, whether the relevant commission scheme(s) operate in such a way that they effectively compensate for periods of annual leave so that even if such a scheme is unlawful no further money is due to the claimants;

6.3 if holiday pay is found to be due, what is the correct reference period for determination in the calculation of such holiday pay;

6.4 whether the principles in the CJEU decision [of this case] apply solely to the four weeks leave referred to in Regulation 13 WTR or whether they apply to the whole of the 5.6 weeks leave granted by Regulation 13A;

6.5 to quantify the claim, if necessary.

7. Issue 6.4 is no longer in dispute. It is agreed that this decision is relevant only to the four week leave period granted by Regulation 13 WTR and not the additional period granted by Regulation 13A.

8. Issues 6.2, 6.3 and 6.5 are set aside for determination at a later date depending on the outcome of this hearing.

9. A further issue, identified at the preliminary hearing before Employment Judge Milgate is also no longer in dispute. That was an argument that the Court of Appeal's decision in **Evans v The Malley Organisation Ltd (trading as First Business Support)** [2003] ICR 432, a case referred to in more detail below, was distinguishable so that regardless of EU law, a week's pay should be calculated under section 221(3) of the Employment Rights Act ("ERA") rather than section 221(2) ERA. That argument is no longer being pursued.

10. In coming to my decision on the first of those issues, which is the only one that currently falls to be decided, I have taken into consideration the carefully prepared skeleton arguments of Mr Michael Ford QC and Mr Simon Cheetham (of Counsel) on behalf of the claimants, Mr John Cavanagh QC on behalf of British Gas and Mr Adam Tolley QC on behalf of Secretary of State for Business, Industry and Skills ("BIS"). I am grateful to all of them for their helpful and detailed submissions which are, as one would expect, of very high quality.

11. This hearing was originally listed for October 2014. It was adjourned, on the application of BIS (supported by British Gas), to enable the Employment Appeal Tribunal (EAT) to give its decision in the joined appeals of **Bear Scotland Ltd v Fulton and others; Hertel (UK) Ltd v Woods and others; Amec Group Ltd v Law and others** [2015] IRLR 15 ("**Bear Scotland**"). **Hertel** and **Amec** were also tribunal decisions of this region. Those cases raised a number of issues, two of which are very similar to the present – namely to determine what European law required by way of paid annual leave in respect of non-guaranteed overtime and whether the rule of conforming interpretation permitted an interpretation of domestic law to give effect to EU law.

12. The adjournment proved fortuitous as it resulted in a detailed and comprehensive judgment from the EAT on a number of legal arguments which are also raised here. **Bear Scotland** has been referred to extensively at this hearing, although the scope and application of that decision is disputed. I understand that despite being granted leave to appeal to the Court of Appeal, it is not the intention of any the parties in **Bear Scotland** to appeal the EAT's decision.

13. The relevant facts are as follows:

    13.1 Mr Lock was employed by British Gas initially from 1 February 2010. I should add that since the referral to the CJEU, Mr Lock has now found alternative employment elsewhere.

    13.2 Mr Lock's salary at the material time was £14,670.00 pay annum. In addition he was contractually entitled to the benefits of a commission scheme. Whilst on contractual leave Mr Lock was paid at the rate of his basic salary of £1,222.50 per month. His claim relates to holiday leave he took on 19 - 30 December 2011 and statutory holiday on 26 and 27 December 2011 and 2 January 2012.

    13.3 Mr Lock was only entitled to the benefit of the scheme which was designed "to provide an incentive to encourage and reward individual performance", if and only if, sales he had negotiated had 'gone live', which means that the customer had begun to take gas from British Gas.

    13.4 Mr Lock had three methods of achieving a sale. First, there is 'cold calling', where the customer has not requested a call and the prospects of sale are therefore much lower. The second category is described as 'hot leads' where a potential customer has already been contacted by British Gas - the conversion rate for such is much higher. The third category is described as 'upgrades', which involves existing customers who are not under contract, persuading them to enter into a contract. The conversion rate for upgrades is still higher.

13.5 In addition to his basic salary, Mr Lock earned a commission which was based purely on success, that is a sale he has negotiated must result in the customer beginning to take energy products from British Gas. The amount of commission earned by Mr Lock was greatly in excess of his basic salary.

13.6 Further, the amount of work done by Mr Lock in normal working hours did not vary in the sense that payment was not based on the amount of work done. Rather, payment of commission was based on the outcome of that work, whether fortuitous or due to good performance.

13.7 The amount of the commission was not based upon the amount of work he carried out during a particular period. Rather, it was dependant upon the outcome of his work; that is, the number and type of new contracts that were entered into.

13.8 During the period covered by his annual leave, the claimant's pay included his basic pay and commission which he had earned in previous weeks. As he was not carrying out any work during his period of annual leave, he was not able to make new sales or follow up on potential sales during that period. Accordingly, he was not able to generate commission during his period of annual leave. He was entitled to 25 days holiday per annum plus public and bank holidays.

The relevant EU law and statutory provisions

14. The legal contextual background concerns Council Directive 2003/88/EC of the European Parliament (formerly Council Directive 93/104/EC) (hereinafter "the WTD" or "the Directive").

15. Article 7 of the WTD deals with annual leave and provides:

> "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."

16. To implement the WTD into domestic law, the UK government introduced The Working Time Regulations 1998 ("WTR"). It did so pursuant to Section 2(2) of the European Communities Act 1972, which provides a general power for implementing Treaty obligations by secondary legislation. It is not in dispute the existence of the WTR is wholly due to the obligation on the UK government to implement the WTD and for no other reason. The 1998 Regulations deal with a number of matters such as maximum working time, rest periods, annual leave and pay for annual leave.

17. The provisions that deal with annual leave and payment for periods of annual leave are found at Regulations 13 and 16.

18. Regulation 13 of WTR states:

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

19. Regulation 16 states:

"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 ..... 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."

20. The reference to the "1996 Act" is to The Employment Rights Act 1996 ("ERA"). The Regulations therefore import the concept of a week's pay from existing domestic legislation.

21. The relevant provisions of the ERA are sections 221, 222 and 224. They are as follows:

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.

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.

224 Employments with no normal working hours

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

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—
(a) where the calculation date is the last day of a week, with that week, and
(b) otherwise, with the last complete week before the calculation date.

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

22. The statutory scheme distinguishes between workers who have normal working hours (to whom sections 221 and 222 apply) and those who do not, to whom section 224 applies. Section 221(3) applies where remuneration varies with the amount of work done. It may loosely be described as cases where the employee is undertaking 'piece work'. Mr Lock was not engaged in piece work. Section 222 ERA applies to cases where the remuneration varies according to the time of work, often referred to as 'shift work'. Mr Lock did not work shifts.

23. If this was a case where Mr Lock did not have normal working hours, section 224 ERA would apply and there would be no difficulty because of the way a week's pay is calculated under that section. Unfortunately, that would be contrary to the agreed facts. Mr Lock *did* have normal working hours and I am bound by that earlier finding. It is agreed, and if it was not agreed I would be satisfied, that sections 221(3), 222 and 224 ERA have no application to this case. The relevant statutory provision is section

221(2) ERA.

24. These statutory provisions were described by Auld LJ in **Bamsey v Albon Engineering and Manufacturing plc** [2004] ICR 1083 as "complicated". They are, according to Mr Cavanagh, specific and clear and there should be no difficulty in their application.

25. Before dealing with the domestic interpretation of those provisions, it is necessary to consider some of the recent CJEU cases on holiday pay.

26. It is unlikely that Mr Lock's case would have got very far had it not been for the CJEU's decision in **British Airways v Williams** (at [2012] ICR 847 and upon its return to the Supreme Court at [2012] ICR 1375). **Williams** concerned airline pilots whose annual leave pay was governed by the Civil Aviation (Working Time) Regulations 2004. The relevant provisions of the Aviation Directive, which gave rise to the Aviation Regulations (neither of which it is necessary to set out here) were identical in all material respects to the WTD. The annual pay of pilots employed by British Airways consisted of three elements: basic pay, a flying pay supplement and a time away from base allowance. Part of it consisted of expenses some of which were treated as remuneration and thus taxed. British Airways calculated holiday pay on basic pay alone. The claimants argued that the second and third elements should also have been taken into account under the Aviation Regulations.

27. The CJEU in **Williams** made a number of important observations which are relevant to these proceedings. The observations at paragraphs 23-26 are particularly noteworthy:

> "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.
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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 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)."
> [emphasis added]

28. Unfortunately, the CJEU did not specify what the "relevant reference period" might be for the purposes of paragraph 26 of its decision. However it did make it clear, importantly, that a worker must receive normal remuneration for periods of annual leave which is comparable to periods of work. That raised questions as to whether the UK's method of calculating holiday pay was consistent with the terms of Article 7 of the WTD.

29. **Williams** was not the first case to cast doubt on whether the statutory method of calculating holiday pay was in line with EU law. Earlier, **Robinson-Steele v RD Retail Services Ltd** [2006] ICR 932 on 'rolled-up' holiday pay and **Stringer v Revenue and Customs Commissioners** [2009] ICR 932, relating to annual leave pay for workers on long-term sickness absence both raised concerns.

30. We then arrive at the decision of the CJEU in Mr Lock's case, delivered in May 2014. At paragraph 11 of the judgment the CJEU said:

> "Given that Mr Lock did not carry out any work during his period of annual leave, he was not able to make any new sales or follow up on potential sales during that period. Accordingly, he was not able to generate commission during that period. Since this had adverse effects on the salary Mr Lock received during the months following his annual leave, he decided to bring an action before the referring tribunal for outstanding holiday pay in respect of the period from 19 December 2011 to 3 January 2012."

31. At paragraph 16, it went on to say:

> "Although the wording of Article 7 of Directive 2003/88 does not give any express indication as regards the remuneration to which a worker is entitled during his annual leave, the Court has already stated that the term 'paid annual leave' in Article 7(1) means that, for the duration of 'annual leave' within the meaning of that Directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest..."

32. At paragraphs 18-19, the CJEU dealt squarely with the argument on behalf of British Gas that the objective of Article 7 of WTD was already being achieved by its current arrangements of paying commission within holiday pay which included earned commission some time earlier:

> "18. Having regard to that case-law, British Gas and the United Kingdom Government submit that, under national legislation and practice, the objective of Article 7 of Directive 2003/88, as interpreted by the Court, is achieved, given that the applicant in the main proceedings received, during his period of paid annual leave, a salary comparable to that earned during periods of work, since he received, during that period, not only his basic salary but also commission resulting from sales which he had achieved during the weeks preceding that period of annual leave.
>
> 19. That argument cannot be accepted."

33. At paragraphs 21 to 23 we find key passages of the decision:

> "21. However, it must be noted that, notwithstanding the remuneration received by the worker during the period in which he actually takes his annual leave, he may be deterred from exercising his right to annual leave, given the financial disadvantage

which, although deferred, is nonetheless genuinely suffered by him during the period following that of his annual leave.

22. As British Gas conceded at the hearing, the worker does not generate any commission during the period of his annual leave. Consequently, as is apparent from paragraph 8 above, in the period following that of his annual leave the worker is paid only reduced remuneration comprising his basic salary. That adverse financial impact may deter the worker from actually taking that leave, which, as the Advocate General's Opinion, is all the more likely in a situation such as that in the main proceedings in which commission represents on average over 60% of the remuneration received by the worker.

23. Such a reduction in a worker's remuneration in respect of his paid annual leave, liable to deter him from actually exercising his right to take that leave, is contrary to the objective pursued by Article 7 of Directive 2003/88 (see, to that effect, inter alia, **Williams and others**, paragraph 21). In that regard, the fact that that reduction in remuneration occurs, as is the case in the main proceedings, after the period of annual leave, is irrelevant."

34. Accordingly, the ruling was that:

"Article 7(1) .....must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary.

The methods of calculating the commission to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave must be assessed by the national court or tribunal on the basis of the rules and criteria set out by the case-law of the Court of Justice of the European Union and in the light of the objective pursued by Article 7 of Directive 2003/88."

The position in domestic law

35. The statutory provisions of the ERA had been considered earlier by the Court of Appeal in **Bamsey v Albon Engineering and Manufacturing** [2004] ICR 1083. Mr Bamsey was contractually required to work 39 hours a week with substantial compulsory, but not guaranteed, overtime. Over the 12 weeks prior to him taking a period of annual leave he worked an average 60 hour week but was paid for his holiday on the basis of a 39 hour week only. His claim was that he should have been paid at a rate which included his overtime hours. The Court of Appeal held that non-guaranteed overtime was not included. Auld LJ, who gave the leading judgment, held that the Directive said nothing as to how the payment should be calculated leaving that matter for Member States to deal with by "national legislation and/or practice."

36. Even more problematic was the Court of Appeal's earlier decision in **Evans v The Malley Organisation (t/a First Business Support)** [2003] ICR 432. The facts of **Evans** are materially identical to those of Mr Lock's case. Mr Evans was a sales representative on normal working hours engaged in work which involved results-based commission. He was only paid commission if the client went ahead and entered into a contract. Commission represented the greater part of his overall remuneration.

37. In **Evans** the Court of Appeal decided that the commission payments in question were not to be included in the calculation of a week's pay. The reasoning of all three judges is relevant to these proceedings. At paragraphs 23 and 24 of his judgment, Lord Justice Pill said:

> "23.... the distinction between subsection (2) and subsection (3) of section 221 [of the ERA] turns on whether or not the employee's remuneration does or does not vary with the amount of work done in the normal working hours. I am unable to conclude that it does. Work is done and the amount of work done does not depend on the number of contracts obtained. Time spent attempting unsuccessfully to persuade a client to sign a contract is as much work as a successful encounter with the client. I am not able to read the expression 'amount of work done' as meaning that amount of work and that part of the work which achieves a contract. The amount of work resulting in a contract may vary, but the results achieved by the work is a different concept from the act of working.....
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> 24... the reference to commission in subsection (4) does not require or permit or contracts which commission he is a part of the remuneration to be placed within subsection (3)."

38. Lord Justice Judge (as he then was) broadly agreed with Lord Justice Pill and (at paragraphs 35, 37 and 38) said:

> "...therefore the payment of commission did not depend on the length of his working week, and his remuneration for employment was linked, not with the amount of work which he did, but with its success... taken on their own, admirable though they are, hard work and skill which produced no contracts entitled him to no more than his basic salary.
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> Unlike the appeal tribunal, I do not believe that section 221(4) overrides section 221(3) or, as seems to be implicit in its decision and were supported in arguments by Mr Cohen that cases in which commission forms part of a remuneration package must automatically be treated as falling within section 221(3). Rather, section 221(4) amplifies section 221 and, where the remuneration does in fact vary with the amount of work done, enables commission and bonuses and similar payments to be included in the calculation of an employee's week's pay."

39. Lady Justice Hale (as she then was) also giving a reasoned judgment said (at paragraph 43):

> "...there are several good reasons to conclude that although this remuneration varied it did not vary "with the amount of work done": (i) "work done" would ordinarily mean tasks undertaken, such as researching potential clients, making telephone calls, writing letters, meeting potential clients: it would not mean "success achieved"...; (ii) the ordinary meaning of the "amount" of work done would refer to its quantity and not to its quality or its results; (iii) the variation in remuneration in this case was not " with" the amount of work done in the period but with success achieved as a result of work done in a completely different period, usually in nine months earlier; (iv) the concept of averaging over 12 weeks is difficult to fit with the concept of success fees relating to a completely different period."

40. It is worth noting, as referred to in the comments of Lord Justice Judge, that at the EAT stage HHJ Wilkie QC (as he then was) interpreted the statutory provisions differently. The EAT's view was that section 221(4) ERA had the effect of overriding the normal meaning of section 221(3) ERA, with the result that someone who receives payment by way of

commission, which is not payment by reference to the amount of work done but payment by reference to the varying result of the work done, is provided for by section 221(3) ERA and not 221(2). As Mr Ford QC points out, if the matter had rested at the EAT, the present difficulties might not have arisen.

41. There can be little doubt that **Evans** is no longer consistent with the emerging jurisprudence on holiday pay in the light of the decisions of the CJEU in **Williams** and this case, nor it is not argued that it can be. **Evans** was decided long before both those CJEU decisions and the possible meaning of paid annual leave in Article 7 was never argued before the Court of Appeal in **Evans**. **Williams** requires the worker to receive "normal remuneration" during periods of annual leave. The interpretation of a week's pay in **Evans** leaves no room for that.

42. Mr Cavanagh QC submits, and I agree, that having regard to the Court of Appeal's judgment in **Evans**, domestic legislation cannot, in accordance with the normal rules of statutory interpretation, be read so as to require employers to take results-based commission payments into account when calculating pay for annual leave. Mr Cavanagh QC submits that British Gas should not be criticised for its approach to holiday pay. The payments they made were in accordance with the law as understood at the time. It does not appear that anyone for over a decade had suggested that the law was otherwise. Insofar as it is necessary to say so, no criticism is levelled at British Gas and certainly no criticism of their approach is intended by me in this decision. I do not however understand Mr Cavanagh QC to be saying that in light of the decision in **Evans,** I must decide in favour of British Gas (and if he is saying as much, I disagree). His argument appears to be more nuanced – it is that **Evans** explains why the answer is so clear on the basis of the interpretation of domestic rules that a conforming interpretation is not permissible.

43. I am afraid I cannot accept that last proposition. The statutory provisions cannot properly be described as 'specific and clear'. If they were, the judgment of the EAT in **Evans** would undoubtedly have been different. The interpretation of the statutory provisions in **Evans** was only one interpretation and other interpretations, were also available. In any event, the clarity or otherwise of the provisions is not the primary issue when it comes to considering a conforming interpretation. In at least one domestic case – **Rowstock v Jessemey** [2014] ICR 550, dealt with below – the clarity of the domestic provision was not an obstacle to giving effect to EU law. It is certainly not argued before me that the interpretation of domestic law, as set out in **Evans**, can somehow be read consistently with the interpretation of Article 7 of WTD as now understood. To my mind, the position in domestic law – in accordance with the Court of Appeal's decision in **Evans** – is at least as clear as the position in EU law and the two are, unfortunately, diametrically opposed to each other.

The decision of the EAT in **Bear Scotland**

44. The first issue in **Bear Scotland**, broadly, was whether non-guaranteed overtime had to be included in annual leave pay. If so, that led to the second which was whether a conforming interpretation could be applied so as to make the WTR compliant with EU law.

45. Having found that pay relating to non-guaranteed overtime was part of the claimants' "normal remuneration" and therefore had to be included in holiday pay for the purposes of Article 7 of the WTD, the EAT went on to insert additional words into Regulation 16(3)(d) so as to interpret it in line with the Directive.

46. After rejecting a submission that the CJEU in **Lock** may have misunderstood its own judgment in **Williams**, Mr Justice Langstaff P in **Bear Scotland** (at paragraphs 29 to 30) went on to say:

> "...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] ICR 932 CJEU and **Stringer v Revenue and Customs Commissioners** [2009] ICR 932. **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'.*"

47. That being so, I now turn to the submissions. Mr Ford QC begins his submissions by referring to the 'Marleasing principle' (see **Marleasing v La Comercial Internacional de Alimentaciòn SA** [1992] 1 CMLR 305) which is generally understood to mean that there is an obligation on domestic courts, when interpreting national legislation which implements a Directive, to do so as far as possible in the light of the wording and purpose of the Directive. It is dealt with in more detail below. Mr Ford QC submits that the duty of interpretation is, if anything, even stronger where a domestic measure is intended to implement the Directive, as was the case with the WTR. Mr Ford QC submits that the specific issue of whether Regulation 16 WTR can be interpreted in accordance with the case law of the CJEU has effectively been resolved by the decision in **Bear Scotland**, the ratio of which is equally applicable to Mr Lock's case. Even if the decision in **Bear Scotland** is not strictly determinative of these proceedings, the ratio nevertheless is. In exercising the duty to interpret domestic law in accordance with the result to be achieved by the Directive, he submits that the national court must consider the whole body of rules of national law and it is permissible for a domestic court to adopt a different interpretation of a domestic provision when giving effect to community law than it adopts in a purely domestic context. Mr Ford QC argues that policy issues are not sufficient to count against a conforming

interpretation, as was the case in **Bear Scotland**. He submits that it is irrelevant that there may be other means of achieving conformity.

48. In terms of the wording to be employed, Mr Ford QC submits that it is not even a requirement of a conforming interpretation that it should be capable of precise formulation, so long as it reflects the proper meaning of EU law. The precise words do not matter so long as the end to be achieved is clear and specific and the means of doing so involves a tribunal awarding compensation in accordance with its usual domestic functions. He points out that neither the principles of legal certainty nor non-retrospectivity were barriers to a conforming interpretation in **Bear Scotland**.

49. Mr Tolley QC supports in principle the submissions made by Mr Ford QC both in respect of the approach that should be taken in relation to **Bear Scotland** and the approach to conforming legislation generally. He submits that it is possible to take an approach analagous to the EAT in **Bear Scotland** (there in relation to overtime, here in relation to commission) and find a way of interpreting the WTR so as to give proper effect to the Directive in line with the interpretation placed upon it by the CJEU.

50. Mr Tolley QC submits that inserting words into Regulation 16 WTR in order to give effect to the Directive is in line with the interpretation of that Directive and moreover that it 'goes with the grain' of the legislation. Mr Tolley QC submits that the decision in **Evans** proceeded on the basis of a linguistic analysis of the statutory wording of section 221 ERA but no submissions were made in that case as to the effect of the Directive or the obligation of the national courts to adopt a conforming interpretation. He submits that it cannot be said that the UK Parliament had set its face against a conforming interpretation such that it must be rejected.

51. Mr Cavanagh QC for British Gas submits, firstly, that **Bear Scotland** is not binding on this tribunal as regards the outcome. That case was about non-guaranteed overtime and this is about something completely different. He submits that the analysis required is entirely different. **Bear Scotland** offers no answers to the issue of results-based commission. Mr Cavanagh QC accepts that I am not bound to find in favour of the respondent merely because of the decision in **Evans** but submits that **Evans** is of crucial importance because it explains why the position is so clear on the basis of domestic rules of interpretation. Mr Cavanagh QC suggests that in utilising a conforming interpretation I would be going too far. In effect, the tribunal would be giving horizontal effect to a Directive (that is, allowing all claimants, not just those who are employed by the State or an emanation of the State, to rely on it in proceedings against their employers) whereas at best the Directive can only have vertical effect.

52. In particular, Mr Cavanagh QC submits that it is not permissible to apply a conforming interpretation for the following reasons:

52.1 to do so would be '*contra legem*' (literally, contrary to the law), disregarding a clear and applicable domestic statutory provision;

52.2 to do so would be to distort the meaning of UK legislation;

52.3 the domestic statutory language is "specific and clear";

52.4 that any conforming interpretation would be "diametrically opposed to the thrust of the legislation";

52.5 a conforming interpretation would be "directly at odds" with the domestic statute;

52.6 a conforming interpretation can only be adopted if the domestic legislation is open to an interpretation that is consistent with the Directive - and it is not;

52.7 such an interpretation would depart from a "fundamental feature" of the domestic legislation;

52.8 the interpretation would prevent the limitation set out in s221(2) from having an effect;

52.9 this is not a case in which there is a lacuna in the domestic legislation which can be filled in by a purposive interpretation as UK legislation specifically deals with the point;

52.10 it is clear beyond doubt that Parliament intended that the same definition of a "week's pay" as had been used for many years in UK statutory employment law, and which was set out in sections 221-224 of the ERA, should be used for holiday pay purposes;

52.11 the clear, conventional interpretation of the Regulations is what Parliament plainly intended;

52.12 the suggested conforming interpretation that the claimants seek would go against the grain of the domestic legislation. The ET would be passing from the realms of interpreting legislation into making legislation.

53. I shall deal firstly with the impact of the decision in **Bear Scotland** on this case. Although nothing may turn on it, the significance of that case to the present was implicitly appreciated by those representing the respondent, as otherwise it is unlikely they would have agreed to the liability hearing of

this case being postponed if the issues were neither relevant or similar. As it is, many of the arguments put forward on behalf of the respondents in **Bear Scotland**, albeit not by Mr Cavanagh QC, have re-surfaced here.

54. I can see no difference in principle between pay in respect of non-guaranteed overtime and pay in respect of commission. Both represent types of normal remuneration. They are two sides of the same coin. No distinction would ordinarily be made in an unlawful deduction of wages claim between overtime pay and commission. I see no reason for doing so here.

55. To my mind the points mentioned in paragraph 52 above have already been the subject of judicial consideration in **Bear Scotland**. All of them have also been rejected, with the possible exception of points 8 and 9. For example, point 5 is dealt with at paragraph 64 of the EAT judgment. Points 1, 2, 5 and 12 are the subject of submissions at paragraphs 47 and 48 of the judgment. Concerns as to the unintended horizontal effect of the Directive are referred to at paragraph 47. The judgment deals with point 12 at paragraph 64 and so on. Put shortly, the majority of the arguments relied on by Mr Cavanagh QC have been run and rejected. The rest are, with respect, are of no real substance. The argument that a conforming interpretation would prevent the limitation in section 221(2) from having effect is entirely circular. As to point 9, conforming interpretations are not necessarily about dealing with lacunae. They often concern tensions between EU and domestic law, a distinction I should add I make purely for the sake of convenience – EU law is of course part of domestic law.

56. I recognise that the fact that the arguments above have already been run and rejected in **Bear Scotland** need not necessarily inhibit British Gas from running them again, and indeed it did not, but insofar as I am not bound by the ratio of **Bear Scotland**, I would respectfully adopt the reasoning of the EAT in that case. That would be, as Mr Ford QC puts it, a short answer to the case, but in the event that I am required to take the long way round, I shall do that too.

The Marleasing principle

57. It is important to preface what follows by reiterating the point that the purpose for which the WTR were introduced was to comply with the WTD. When interpreting such regulations, particularly those introduced to implement a Directive, there is an obligation on national courts to interpret them in accordance with what is known as 'the Marleasing principle'.

58. The Marleasing principle was set out at paragraph 8 of the judgment of the CJEU in **Marleasing SA v La Comercial Internacional de Alimentaciòn SA** (C-106/89) [1992] 1 CMLR 305 where the Court said:

> "In applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC."

59. The principle has been considered for our purposes by the CJEU in (in chronological order) **Kolpinghuis Nijmegen** (C-80/86) [1989] 2 CMLR 18, ("**Kolpinghuis**"), **Pfeiffer and others v Deutsche Rotes Kreuz, Kreisverband Waldshut eV** (Cases 397-403/01) [2005] ICR 1307, ("**Pfeiffer**"), **Adeneler and others v Ellinikos Organismos Galaktos** (C-212/04) [2006] IRLR 716, ("**Adeneler**"), **Impact v Ministry of Agriculture and Food** (C-286/06) [2008] IRLR 552, ("**Impact**") and **Dominguez v Centre Informatique du Centre Ouest Altantique** (c-282/10) [2012] IRLR 321("**Dominguez**").

60. It has also been considered fairly recently by the domestic courts, notably by the Court of Appeal in **Vodafone 2 v Revenue and Customs Commissioners** [2010] Ch 77 ("**Vodafone 2**") and **Rowstock Ltd v Jessemey** [2014] ICR 550 ("**Rowstock**"), by the EAT in **Innospec Ltd and another v Walker** [2014] ICR 645 ("**Innospec**") and by the Supreme Court in **Swift v Robertson** [2014] 1 WLR 3438. In addition there is guidance on the approach to be adopted towards conforming interpretation in cases concerning Convention rights from the House of Lords in **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 ("**Ghaidan**").

61. The most recent CJEU case to consider the Marleasing principle in detail is **Pfeiffer**. This was a reference to the CJEU by the German labour Court. It was also a case concerning working time and in particular the lawfulness of the 48 hour working week. The principles are summarised at paragraph 119 of the judgment:

> "Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time which is set at 48 hours by article 6(2) of Directive 93/104 is not exceeded."

62. In **Kolpinghuis,** the CJEU (at paragraph 13) pointed out that:

> "However, that obligation on the national court to refer to the content of the Directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity."

63. **Kolpinghuis** was a case about criminal proceedings. Mr Cavanagh QC submits however that that the relevant principles are the same. One can readily appreciate that concerns as to legal certainty and retroactivity would be of greater concern where criminal, as opposed to civil liability, was involved. The distinction is therefore not unimportant. To my mind **Kolpinghuis** is no real value to the present proceedings and I derive little assistance from it.

64. Arguments as to legal certainty and non-retroactivity were considered and dealt with by Langstaff P in **Bear Scotland** (at paragraph 69), on issues far closer to home than those in **Kolpinghuis**, where he said:

> "Neither legal certainty nor its alter ego, the principle of non-restropectivity, assists to determine the construction to be adopted. This is not a case – such as **Innospec** or **O'Brien v Ministry of Justice** [2013] ICR 773 EAT (Sir David Keene) – in which there was no legislation at the relevant time which provided for liabilities which were first identified much later, nor is **Williams** a ruling of such a wholly exceptional sort as was **Barber v Guardian Royal Exchange Assurance Group** (C-262/88) [1990] ICR 616."

65. Before dealing with the CJEU decision in **Pfeiffer**, I think it is worth considering some passages in the (second) opinion of the Advocate General Ruiz-Jabaro in that case. At paragraph 18 he said:

> The facts of these cases distinguish them from other situations previously examined by this court, where the legislation of a member state had not been amended to comply with a Directive within the prescribed period or had not been properly amended. Here, conversely, Germany has passed a law to transpose the letter and spirit of Directive 93/104 into its domestic law. I presume that it intended to act properly, since there is nothing to suggest a deliberate intention to circumvent its duty of good faith under article 10 EC.

66. The final sentence seems to apply aptly to the UK government's intention to implement the Directive. Moreover, Advocate General Ruiz-Jabaro draws a distinction between civil and criminal proceedings (at paragraphs 38) which distinguishes the application of the principles of legal certainty and non-retroactivity between civil and criminal cases:

> "Those findings in **Arcaro**, nevertheless cannot, of themselves, be extended to cover cases now under examination, as contended by some of the member states who have made representations, for several reasons. First, the proceedings involving Mr Arcaro were not between two individuals, since he was the defendant in criminal proceedings."

67. That passage appears to underline the importance of the distinction between civil and criminal cases in relation to the application of the principles of legal certainty and non-retrospectivity.

68. To my mind the most authoritative guidance as to the application of the Marleasing principle is set out in **Pfeiffer** in particular at paragraphs 111-113:

> "111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.
>
> 112. That is a fortiori the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. *The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned.*
>
> 113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a Directive, the national court is bound to interpret national law, so far as possible, in the light of the

wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive and consequently comply with the third paragraph of Article 249 EC." [my emphasis]

69. The CJEU goes on to say:

"116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the Directive.

117. In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the Directive, must, when applying the provisions of national law specifically intended to implement the Directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the Directive (see, to that effect, the judgment in Case C-456/98 **Centrosteel** [2000] ECR I-6007, paragraphs 16 and 17)."

70. It then summarises the position:

"119. Accordingly, it must be concluded that, when hearing a case between individuals, *a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive.* In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.
(emphasis added)"

71. The analysis of the relevant law in **Pfeiffer** is in my view entirely consistent with the approach suggested by Mr Ford QC and Mr Tolley QC. According to **Pfeiffer**, it must be presumed that the Member State intended to fulfil entirely its obligations under the Directive. There is no evidence to rebut that presumption. In exercising its discretion the court must consider the whole body of rules of national law and to interpret them so far as possible in the light of the Directive, which we can having regard to the interpretation given by the CJEU in **Williams** and this case. **Pfeiffer** has been cited with approval in the subsequent UK Supreme Court case of **Swift v Robertson** [2014] 1WLR 3438.

72. Mr Cavanagh QC refers to **Adeneler** and in particular to paragraphs 110 and 111 of the judgment where the CJEU said:

"110. It is true that the obligation on a national court to refer to the content of a Directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see, by analogy, case C-105/03 **Pupino** [2005] ECR I-5285, paragraphs 44 and 47).

> 111. Nevertheless, the principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and *applying the interpretative methods recognised by domestic law,* with a view to ensuring that the Directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see **Pfeiffer** and others, paragraphs 115, 116, 118 and 119)." (emphasis added)

73. **Adeneler** was a case concerning Greek legislation where a Directive had been transposed late into national law. The issue was whether, if a Directive is transposed late, must the national court interpret its domestic law from the time it came into effect or from the time when the national measure implementing it came into effect.

74. There is nothing particularly remarkable about **Adeneler**, nor does it appear to add anything previously unsaid in relation to the Marleasing principle. **Adeneler** was a case about when the duty to interpret domestic law in line with a Directive arose. It is not inconsistent with **Pfeiffer** nor do the italicised words at paragraph 111 of the judgment necessarily assist the first respondent. Those words must be read in conjunction with the remainder of the sentence.

75. **Impact** is relied upon by Mr Cavanagh QC as an "important case". The issue there was whether a particular provision of Irish law had retrospective effect. This was once again a case of a Directive being implemented late. Civil Servants on fixed term contracts claimed that they had been treated less favourably than permanent comparators. Ireland had implemented the EC Fixed Term Work Directive 1999/70 into Irish legislation by means of The Protection of Employees (Fixed Term Work) Act 2003 but had done it late. Because of the late implementation, the claims were part based directly on EU law and partly on domestic law. The problem for the claimants was that there was a rule of Irish law which precluded retrospective application unless there was a "clear and unambiguous indication to the contrary".

76. The CJEU held that in these circumstances the Marleasing principle did not require the Irish legislative provisions to be interpreted in accordance with the Directive. At paragraphs 99- 104, it said:

> "99. The requirement that national law be interpreted in conformity with Community law is inherent in the system of the EC Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them (see, inter alia, **Pfeiffer**, paragraph 114, and **Adeneler** paragraph 109).
>
> 100. However, the obligation on a national court to refer to the content of a Directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see case 80/86 **Kolpinghuis Nijmegen** [1987] ECR 3969, paragraph 13, and **Adeneler**, paragraph 110; see also, by analogy, case C-105/03 **Pupino** [2005] ECR I-5285, paragraphs 44 and 47).

> 101. The principle that national law must be interpreted in conformity with Community law nonetheless requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the Directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see **Pfeiffer**, paragraphs 115, 116, 118 and 119, and **Adeneler**, paragraph 111)."
>
> 102. In the present case, since, according to the information given in the order for reference, domestic law appears to include a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, it is for the referring court to ascertain whether there is a provision in that legislation, in particular in the 2003 Act, which contains such an indication capable of giving retrospective effect to s.6 of the 2003 Act.
>
> 103. In the absence of such a provision, Community law – in particular the requirement for national law to be interpreted in conformity with Community law – cannot be interpreted as requiring the referring court to give s.6 of the 2003 Act retrospective effect to the date by which Directive 1999/70 should have been transposed, as the referring court would otherwise be constrained to interpret national law *contra legem*.
>
> 104. In the light of the foregoing.....in so far as the applicable national law contains a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70 is required, under Community law, to give that provision retrospective effect to the date by which that Directive should have been transposed only if that national legislation includes an indication of that nature capable of giving that provision retrospective effect.

77. The circumstances of **Impact** seem to me to be very different to the present case. In that case there was a domestic rule of statutory interpretation which precluded retrospective application. There is no such rule under consideration here. That distinction alone sets it apart.

78. Moreover, it is clear from the opinion of the Advocate General that the Irish Parliament had seemingly set its face against the implementation of the Directive. At paragraph 88 of the footnotes to his opinion, Advocate General Kokott says:

> "According to additional information given by the respondents at the hearing before the Court of Justice, the retroactive application of the 2003 Act was the subject of debate in the Irish Parliament and was consciously rejected by the legislature."

79. There is nothing to suggest that the UK government had any similar qualms about the implementation of Directive 2003/88/EC into UK law.

80. **Dominguez** is also relied upon by Mr Cavanagh QC as an important case. This was a referral to the CJEU from a French Court on the correct interpretation of Article 7 of the Directive on the entitlement to holiday pay when a worker is off sick. Ms Dominguez went on sickness absence following an accident on the way to work. According to French law, Article L223-2(1) of the Code du Travail gave a right to paid annual leave on condition that the worker undertook actual work for a minimum period of one month during the reference period. This provision was, of course,

inconsistent with EU law. At paragraphs 67 and 68 of her opinion, Advocate-General Trstenjak said:

> "As the Court has repeatedly explained, the obligation to interpret national law in harmony with a Directive is however limited by the general principles of law, particularly the principle of legal certainty, so that the obligation cannot serve as the basis for an interpretation of national law *contra legem*.
>
> It cannot be explicitly inferred from the order for reference whether it is at all possible to interpret the national law in harmony with the Directive. It can nevertheless be concluded from an overall appraisal of the request for a preliminary ruling that the only option that remained open to the referring court so as to achieve an interpretative outcome in harmony with the Directive was apparently to disregard the legislative provision at issue. In view of the fact that in its order for reference the referring court reiterated the case law of the Court on the limits attaching to this method of interpretation it can be assumed that interpretation in harmony with the Directive is impossible in the main proceedings without an interpretation of national law *contra legem*."

81. Notwithstanding the difficulty, the Court was able to find a work-around by utilising a different Article (Article 223-4) of the same Code. The CJEU suggested that an injury travelling to work may come within the ambit of Article 223-4 instead, which would effectively sidestep the conflict between French domestic and EU law. Mr Cavanagh QC argues that nevertheless the CJEU did not disagree with Advocate-General Trstenjak's opinion in relation to the Marleasing principle and accordingly made it clear that it is for the domestic courts to determine whether it is possible to interpret the domestic legislation in line with the Directive. He draws an analogy between Article L223-2(1) of the Code du Travail and section 221 ERA, both of which, he submits, are entirely clear and, absent the ingenious method of invoking Article 223-4, the CJEU took the view (approving the Opinion of the Advocate General) that it is not open to a domestic Court or Tribunal to disregard the legislative provision in issue in pursuit of a conforming interpretation.

82. With the greatest of respect to Mr Cavanagh QC, I am not entirely sure that **Dominguez** is of any real significance in the context of these present proceedings. There was in fact no tension between domestic and EU law as it turned out in that case. Paragraphs 23-24 of the judgment of the CJEU in that case are clearly in line with the language of **Pfeiffer**:

> "It should be stated at the outset that the question whether a national provision must be disapplied inasmuch as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible.
>
> In that regard, the Court has consistently held that when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them (see, inter alia, Joined Cases C-397/01 to C-403/01 **Pfeiffer and Others** paragraph 114; Joined Cases C-378/07 to

C-380/07 **Angelidaki and Others** [2009] ECR I-3071, paragraphs 197 and 198; and Case C-555/07 **Kücükdeveci** [2010] ECR I-365, paragraph 48)."

83. I now turn to some cases on the Marleasing principle in domestic law. The first is a somewhat lengthy decision of the House of Lords in **Ghaidan**. That case primarily concerned statutory interpretation in relation to the Human Rights Act 1998 ("HRA"). Section 3 HRA requires courts to interpret both primary and subordinate legislation in such a way that they are compatible with the provisions of the European Convention of Human Rights. The extent to which it is therefore a useful guide to the Marleasing principle is open to question. Langstaff P commented on **Ghaidan** in **Bear Scotland** (at paragraph 52) to say:

"In **Ghaidan**, **Duke** had not been cited nor had **Webb v Emo** nor **White v White**. Though the House of Lords recognised the parallels between the Section 3 approach and the Marleasing principle that did not mean that the approaches were identical."

84. Mr Cavanagh QC relies in particular on a passage from the speech of Lord Nicholls (at paragraph 33) in **Ghaidan** where he says:

"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

85. Mr Cavanagh QC also refers to passages from the speech of Lord Millett at paragraphs 66- 68, the relevant parts of which are as follows:

"66..... section 3 requires the court to read legislation in a way which is compatible with the Convention only "*so far as it is possible to do so*". It must, therefore, be possible, *by a process of interpretation alone*, to read the offending statute in a way which is compatible with the Convention.

67. This does not mean that it is necessary to identify an ambiguity or absurdity in the statute (in the sense of being open to more than one interpretation) before giving it an abnormal meaning in order to bring it into conformity with a Convention right.... It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point.

68. In my view section 3 does not entitle the court to supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute."

86. Further, he refers to the following passage from the speech of Lord Rodger at paragraph 110:

"What excludes such provisions from the scope of section 3(1) is not any mere matter of the linguistic form in which Parliament has chosen to express the obligation. Rather,

> they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the Convention. The only cure is to change the provision and that is a matter for Parliament and not for the courts: they, like everyone else, are bound by the provision."

87. To my mind those passages must be read in the light of the passage at paragraph 122 of the speech of Lord Rodger:

> "Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1)."

88. **Ghaidan** been quoted at some length. However, I cannot detect any difference between the approach under the HRA and the approach to be adopted in accordance with **Pfeiffer** which would favour the respondent. The submission made by Ms Rose QC in **Bear Scotland** that the interpretative provisions under section 3 HRA were wider than required by **Pfeiffer** was rejected by Mr Justice Langstaff P (at paragraph 62) of the judgment.

89. **Ghaidan** is also relied on by Mr Cavanagh QC in support of his argument that by adding words into the Regulations, the ET would be passing from the realms of interpretation into making legislation. I do not accept that proposition for the following reasons:

    89.1 the passage from Lord Rodger at paragraph 122 of the judgment clearly does support the addition of words provided it is compatible with (in that case) Convention rights - for which we can substitute rights under the Directive;

    89.2 to add words would not be a matter of 'judicial vandalism' as described by Lord Rodger. Rather, it would be a case of construing the WTR consistently with EU law;

    89.3 Lord Rodger in **Ghaidan** (at paragraph 110) appears to contemplate a situation of ignoring the substance of the obligation, which is not the case here;

    89.4 the difficulties identified in **Ghaidan** have already been considered and dealt with in **Bear Scotland** at paragraph 54. The interpretation suggested by Mr Ford QC and Mr Tolley QC does not in my judgment 'go against the grain'.

90. I propose to deal with a few other cases which were cited from the domestic courts. **Duke v Reliance** [1988] ICR 339 was a House of Lords case where it was held that it was not possible to interpret the domestic legislation in line with the Directive.

91. **Webb v EMO Air Cargo (UK) Ltd** [1993] ICR 175 is relied on by Mr Cavanagh QC as a good example of the House of Lords refusing to apply a conforming interpretation to a domestic statutory provision because the language of the domestic statute was clear.

92. In **White v White** [2002] CMLR 1, Lord Cooke of Thornden at paragraph 31 of the judgment said:

> "It is an established rule that, even where a Community Directive does not have direct effect, it is for a U.K. court to construe domestic legislation in any field covered by the Directive so as to accord with the interpretation of the Directive as laid down by the European Court of Justice, if that can be done without distorting the meaning of the domestic legislation. Similarly the Court of Justice has held that when applying provisions of national law the national court must interpret them as far as possible in the light of the wording and purpose of any relevant Directive, even if it does not have direct effect."

93. **Vodafone 2** is a recent judgment of the Court of Appeal which was described as "authoritative" in the decision of the Supreme Court of **Swift v Robertson**. The relevant passage in **Vodafone 2** at paragraph 38 (edited for the present purposes) is as follows:

> "Counsel for HMRC went on to point out, again without dissent from counsel for V2, that: "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed'.....An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in Ghaidan's case; per Arden LJ in **R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs** [2006] STC 1252 , paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the Ghaidan case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the **IDT Card Services** case, at para 113."

94. Mr Cavanagh QC refers to **Innospec** which is an interesting case not least because it is also decision of Mr Justice Langstaff P. **Innospec** was concerned with the issue of whether EU law required same-sex partners to be given the same survivors' benefits as married partners in respect of benefits relating to service prior to December 2005. Paragraph 18(1)(b) of Schedule 9 to the Equality Act 2010 expressly stated that there could be no breach of the law against sexual orientation discrimination which consisted of doing anything which prevents a person from having access to a benefit which is payable in respect of periods of service before 5 December 2005.

95. In **Innospec,** the EAT refused to apply a conforming interpretation. Paragraph 50 of the judgment sets out the reasons:

> "....There is a critical difference between interpretation on the one hand and legislation on the other. Thus in **Ghaidan** it was accepted that the interpretation chosen by a court must "go with the grain of the legislation", for this would be consistent with the legislative purpose, whereas going against that grain would constitute the court a law-maker. Lord Nicholls of Birkenhead, Lord Steyn and Lord Rodger of Earlsferry all accepted that there would be occasions when the courts could not adopt an interpretation that would make the legislation compatible with Convention rights because that would involve making policy choices which the court was not equipped to make. Though it is possible to read the legislation up (ie expansively) or down (restrictively) or to read words into the legislation, the interpretation required to make the statute in question Convention-compliant or EU law-compliant must not involve a departure from fundamental features of the legislation."

96. At paragraph 60, the EAT went on to say:

> "If, contrary to that, we had concluded that the provision was incompatible we could not have interpreted paragraph 18 so as to permit the claim, for to do so would be diametrically opposed to the thrust of the legislation in this particular respect and to the apparent intention of Parliament."

97. To my mind **Innospec** is of limited relevance to the present case. The fact that the Judge was the same in both cases actually diminishes the argument rather than enhancing it. Mr Justice Langstaff P was in the best position to decide whether the principles set out in his own previous case should be applied in **Bear Scotland.**

98. A major obstacle to a conforming interpretation in **Innospec** was that the proposed interpretation 'went against the grain'. That as I have already indicated is not the case here. **Innospec** was concerned with benefits rather than remuneration and therefore **Bear Scotland** is of much greater relevance rather than a case of 'disturbing deliberate policy choices', as Mr Justice Langstaff P put it. In any event, I understand **Innospec** is the subject of an appeal to the Court of Appeal and therefore the final word may not have been said on that case.

99. As against those cases where the courts have refused to apply a conforming interpretation (such as **Duke v Reliance**, **ICI Plc v Colmer (Inspector of Taxes) (No 2)** [1999] 1 WLR 2035, **Webb v EMO Cargo** and **Innospec**), there are of course a number of decisions which have gone the other way.

100. Reference has already been made to **Swift v Robertson** where the Supreme Court read words into the Cancellation of Contracts Regulations 2008 which apparently contradicted their literal meaning. **Litster v Forth Dry Dock** [1989] ICR 341 is a well-known example of purposive interpretation of the Transfer of Undertakings Regulations. **EBR Attridge Law v Coleman** [2010] ICR 242 was a case in which the EAT read words into the disability discrimination legislation to make it apply to so-called associative discrimination. In **NHS Leeds v Larner** [2012] ICR 1389, the Court of Appeal suggested that entire paragraphs should be read and

interpreted into Regulations 13 and 14 WTR to ensure compatibility with Article 7 of Directive 2003/88 in respect of sick workers, despite the conflict with the existing domestic provisions.

101. **Rowstock** is a recent example of applying a conforming interpretation in the field of discrimination law. Essentially, the Equality Act 2010 provided no remedy for post-dismissal victimisation. The words of section 108(7) of the Equality Act 2010 could not have been any clearer in excluding post-termination victimisation. The problem was that this was contrary to established EU law. The Court of Appeal however had no difficulty in giving effect to obligations under EU law rather than applying the strict wording of the statute. Mr Cavanagh QC puts this down to a simple rectification of a drafting error, albeit one that was not picked up or remedied in several statutory instruments amending the Equality Act 2010 shortly after that Act came into force. It is at the very least an example of how far the duty permits the implication of words necessary to give effect to obligations under EU law.

102. To summarise, my conclusions are as follows:

102.1 to the extent that the EAT's decision or ratio in **Bear Scotland** is not binding on this tribunal, the answers to the objections against a conforming interpretation in this case are broadly the same and for the reasons set out in **Bear Scotland**, they are also rejected here. Where relevant I respectfully adopt the reasoning of the EAT;

102.2 there is no difference in principle between payment for non-guaranteed overtime and payment in respect of commission so far as annual leave pay is concerned;

102.3 it is permissible, indeed necessary, for me to imply words into the WTR for it to comply with EU law. That does not 'go against the grain' or the underlying thrust of the domestic legislation. To add suitable words would not be a case of doing violence to the intention of Parliament nor to engage in judicial vandalism but rather to fulfil the duty of interpretation;

102.4 I am satisfied that the intention of Parliament when enacting the WTR was to comply with the WTD, the essential feature of which was that holidays should be paid. There is no cardinal feature of the legislation which suggests Parliament had set its face against a conforming interpretation. Similarly, there are no policy issues which militate against it;

102.5 the arguments against a conforming interpretation (in particular legal certainty, non-retroactivity and policy grounds) were not a barrier to adopting a conforming interpretation in relation to non-guaranteed overtime. I see no reason why they should be so for the purposes of commission;

102.6 to apply a conforming interpretation would be in line with the guidance of the CJEU and the principles established in domestic case law.

102.7 this tribunal is not bound by the decision in **Evans** having regard to the interpretation of Article 7 of the Directive by the CJEU in this in **Williams** and this case.

102.8 It is possible to read words into the WTR in order to overcome the present incompatibility between EU and domestic law.

103. That leaves only the question of the appropriate wording. Mr Ford QC has three possible suggestions. Mr Tolley QC has one. Mr Tolley QC suggests that the most simple and straightforward way of dealing with the problem is to add the following paragraph (e) to Regulation 16(3) as follows:

> (e) as if, in the case of the entitlement under regulation 13, the reference in section 221(2) and 221(3) to 'the amount of work done' read 'the amount or the outcome of work done'.

104. Mr Ford QC offers three possibilities. His first (and preferred) option is to add this as Regulation 16(3)(e):

> as if, in the case of the entitlement under regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration which varies with the amount of work done for the purpose of s.221.

105. His second option is as follows:

> as if, in the case of the entitlement under regulation 13, a worker whose remuneration includes commission shall be deemed to have no normal working hours so that section 224 shall apply.

106. As a third option, Mr Ford QC suggests that a composite amendment could be made to address Article 7 and Regulation 13 leave in general. Regulation 16(2) WTR could be amended by adding the italicised words below (the words in square brackets for clarity only):

> 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, *save that where those provisions result in a worker not receiving components of pay which form part of his normal remuneration [under Article 7 of Directive 2003/88/EC] in respect of the period of leave to which he is entitled under regulation 13, the worker shall be deemed to have no normal working hours and s.224 of the 1996 Act shall apply to that entitlement*, subject *in either case* to the modifications set out in paragraph (3).

107. Mr Ford's preferred option is for the first of his three versions to which Mr Tolley QC has no objection. That seems to me be to be a more satisfactory way of dealing with the matter rather than, with respect, the

somewhat artificial construction of deeming an employee to have no normal working hours when he actually does.

108. The wording suggested by Mr Tolley QC has the admirable benefit of simplicity but lacks the precision of Mr Ford's first option. The judgment shall therefore reflect the wording of the first of the suggested options by Mr Ford QC.

Employment Judge Ahmed

Date. 23 March 2015

SENT TO THE PARTIES ON

25 MARCH 2015

FOR EMPLOYMENT TRIBUNALS