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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND
and
NORTHERN IRELAND POLICING BOARD
Appellants/Respondents:
and

ALEXANDER AGNEW and others
Respondents/Appellants:

_____

Before: Stephens LJ, Treacy LJ and O'Hara J

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This appeal and cross appeal involve consideration of the legal consequences of an acknowledged failure since the commencement on 23 November 1998 of the Working Time Regulations (Northern Ireland) 1998 ("WTR (NI) 1998") by the Chief Constable of the PSNI ("the Chief Constable") to pay appropriate amounts of holiday pay to police constables and police sergeants ("police officers"). Throughout the period since 23 November 1998 the Chief Constable calculated the amount of holiday pay by reference to basic salary. He now accepts that he was required but failed to calculate by reference to "normal pay" which includes both basic pay and matters such as overtime and various allowances over a reference period prior to the holiday.

[2] The appeal and cross appeal also involve a similar acknowledged failure by the Northern Ireland Policing Board ("the Policing Board") in respect of police support staff ("civilian employees").

[3] The acknowledgment relates to the period since 23 November 1998. However, the WTR (NI) 1998 transposed into national law in this jurisdiction Directive 1993/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time ("the 1993 Directive"). Article 18(1)(a) of the Directive

required that member states adopt laws to implement it by 23 November 1996 but the United Kingdom did not do so until 23 November 1998. The police officers and civilian employees have left open their contention that they are entitled to pursue claims back to 23 November 1996 and not merely to 23 November 1998. However, the exact date is not an issue which arises for determination on this appeal.

[4] Complaints were presented to the Industrial Tribunal ("the Tribunal") against the Chief Constable by 3,380 police officers ("the police officer claimants") and against the Policing Board by 364 civilian employees ("the civilian claimants"). The complaints were under Articles 45 and 55 of the Employment Rights (Northern Ireland) Order 1996 ("the ERO") that there had been unlawful deductions from their pay and in the alternative under Regulation 30 of the WTR (NI) 1998 and under Regulation 43 of the Working Time Regulations (Northern Ireland) 2016 ("WTR (NI) 2016") that there have been underpayments of holiday pay. We refer to both of these Regulations as the WTRs (NI). All of these claims were for the entire period from to 23 November 1996 or from the commencement of service or employment of the claimants whichever was the latest.

[5] The Appellants state that they have calculated that meeting the claims in relation to their acknowledged failures over the entire period since 23 November 1998 in relation to the police officer and the civilian claimants would cost approximately £30 million. The Appellants contend that the recoverable amounts should be restricted to a period of unlawful deduction/underpayment ending no later than three months prior to the presentation of the complaints to the Tribunal. They have calculated that if so restricted the amounts recoverable would be approximately £300,000.

[6] The parties selected lead cases and the Tribunal recognised that the determination of the complaints in those cases raised a variety of different points of law and raised questions as to the jurisdiction of the Tribunal. The Tribunal also recognised that there were no worked up calculations of financial loss on behalf of the lead claimants. In those circumstances the Tribunal resolved to deal first with the legal and jurisdictional issues and thereafter, depending on the outcome of those issues, determine at a separate hearing what if any award should be made. The Tribunal then having heard evidence and having received both written and oral submissions in the lead cases dealt with a number of preliminary issues in its detailed and comprehensive judgment dated 2 November 2018. In essence the Tribunal substantively determined those issues in favour of both the police officer and civilian claimants in effect permitting claims back to 23 November 1998.

[7] The Chief Constable and the Policing Board appealed to this court though the issues raised by their appeals are not identical. The police officer and civilian claimants have cross appealed but again the issues raised by their cross appeals are not identical. There were numerous grounds of appeal and cross appeal some overlapping and some not pursued. At the conclusion of the hearing the parties

provided a "Joint Note on the Remaining Issues on the Appeal." Those are the issues which we will consider and determine.

[8] In this judgment we will refer to the Chief Constable and to the Policing Board by those names or as "the Appellants." We will refer to the police officer claimants and the civilian claimants by those terms or as "the Respondents."

[9] Mr Beggs QC with Ms Best and Mr Rathmell appeared on behalf of the Chief Constable and the Policing Board. Mr McMillan QC and Mr Hopkins appeared on behalf of the police officer and civilian claimants. We are grateful for the assistance of both sets of counsel.

The Remaining Issues on the Appeal

[10] We set out the remaining issues as jointly identified by the parties in their note to the court subject to some amendments which we have made.

(A) The meaning of "Worker" in the ERO. Is a police officer claimant a "worker" within the meaning of article 3(3) of the ERO so that he or she can present a complaint under the ERO for unlawful deductions from pay rather than having to present a complaint for underpayment of holiday pay under the WTRs NI?

(B) The application of the EU principle of Equivalence. In the alternative to (a) if police officer claimants are not "workers" within the ERO, does the principle of equivalence require that they must be treated as being entitled to the remedy provided by Article 55 of the ERO for unlawful deductions or does it require that the remedy provided by Regulation 30 of the WTR (NI) 1998 and Regulation 43 of the WTR (NI) 2016 must be applied to afford a right to present a complaint with regard to a series of underpayments of holiday pay?

(C) The meaning of "a series of deductions." If a claim is being made with regard to a series of deductions as set out at Article 55(3) of the ERO, is the series ended, as a matter of law, by a gap of more than 3 months between unlawful deductions and/or by a lawful payment or is the question of what is a "series" a question of fact to be decided on the facts of each case? Does the Court approve the formulation by Langstaff J in paragraphs [79]-[81] of *Bear Scotland Limited v Fulton* [2015] ICR 221?

(D) Is annual leave entitlement to be taken in a particular sequence? When one is seeking to ascertain whether there has been an unlawful deduction from pay under the ERO or underpayment of holiday pay under the WTRs (NI), is one required to assume that the 4 weeks paid leave mandated by Regulations 13 and 16 of the WTR (NI) 1998 Regulations 15 and 20 of the WTR (NI) 2016 is taken first and exhausted before the worker draws on any entitlement under

Regulations 13A of the 1998 Regulations or Regulation 16 of the 2016 Regulations or other sources of entitlement to annual leave?

(E) The method of calculation of the amount of overtime to be taken into account in holiday pay. If one is required to calculate a daily rate for overtime that forms part of a worker's normal pay in order to calculate holiday pay that is due, is the lawful approach to divide the number of working days in the four weeks leave period (20) by the number of calendar days in the reference period or the number of working days in that period?

(F) The identification of the appropriate reference period. Having regard to the fact that the parties agree that the appropriate reference period for the assessment of normal pay is a question of fact in each case, is the court in possession of sufficient information to give the parties any assistance as to what is likely to be the appropriate period in the case of a claimant whose case contains no features particular to that person (for example, maternity absence, illness, reserve duty etc.)?

The layout of this judgment

[11] We have set out an introduction and have identified the remaining issues on this appeal.

[12] We will

(i) outline between paragraphs [13] and [18] the relevant principles of the ERO;

(ii) outline between paragraphs [19] and [36] the relevant principles of the Directives and the WTRs (NI);

(iii) outline between paragraphs [37] and [43] the evolving case law in relation to normal pay;

(iv) then in separate parts of the judgment headed A to F deal with each of the remaining issues as identified by the parties;

(v) finally we will set out our overall conclusion.

The ERO

[13] Part IV of the ERO provides in Article 45 that an "employer shall not make a deduction from wages of a *worker employed* by him unless- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, …." It is correctly agreed between the parties that calculation and payment of holiday pay as basic pay instead of normal pay (if

basic pay is less than normal pay) amounts to making a deduction from the wages of a worker contrary to Article 45. For ease of reference we will refer to deductions of that nature from holiday pay as "unlawful deductions." We have added emphasis to the words "worker" and "employed" as those words are relevant to the issue on this appeal and cross appeal as to whether police officers are workers or are employed for the purposes of the ERO.

[14] The ERO provides a remedy if there has been a breach of the right to receive pay free from unlawful deductions. Article 55(1) provides that a "*worker* may present a complaint to an industrial Tribunal- (a) that his *employer* has made a deduction from his wages in contravention of Article 45…." It can be seen that the procedure is to "present a complaint." We have added emphasis to the words "worker" and "employer" for the same reason.

[15] The jurisdiction of the Tribunal to consider a complaint is curtailed by Article 55(2) which provides that an "industrial tribunal shall not consider a complaint (under Article 55) unless it is presented before the end of the period of 3 months beginning with- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, …." It can be seen that Article 55(2) has the effect that an industrial Tribunal has no jurisdiction to deal with a complaint if it is presented more than three months after the date of the payment from which the unlawful deduction was made. That curtailment of the jurisdiction of the Tribunal would have a serious impact on the amount of compensation capable of being recovered where, as here, the unlawful deductions stretch back over many years. However, Article 55(2) is subject to Article 55(4) which provides that where "a complaint is brought in respect of- (a) *a series of deductions* … the (reference) in paragraph (2) to the deduction … (is) to the last deduction …." (emphasis added). Accordingly the Tribunal has jurisdiction to deal with unlawful deductions if they are part of a series of deductions and if the complaint is presented before the end of the period of 3 months beginning with the date of payment of the wages from which the last deduction was made.

[16] In summary Articles 45 and 55 of the ERO provide that:

(a) *if* the complaint is in respect of a series of deductions; and

(b) *if* the complaint is presented before the end of three months beginning with the date of payment from which the last deduction was made,

then the Tribunal's jurisdiction is not curtailed to a deduction of wages occurring three months prior to the presentation of the complaint. It is correctly accepted on behalf of the Appellants that if both of these criteria are met then the Tribunal has jurisdiction to deal with a whole series of deductions from its commencement no matter how far back in time.

[17] However, for claimants to rely on a series of deductions they have to establish that they are "workers" within the meaning of the ERO. There is no provision in the ERO equivalent to Regulation 38(1) of the WTR (NI) 1998 and Regulation 50(1) of the WTR (NI) 2016 both of which expressly provide that "… for the purposes of these Regulations, the holding, otherwise than under a contract of employment, of the office of constable shall be treated as employment, under a worker's contract, by the relevant officer."

[18] We note that the equivalent legislation in England and Wales to the ERO is the Employment Rights Act 1996 ("the ERA").

The Working Time Directives and the WTRs (NI)

(a) The Directives

[19] The 1993 Directive was superseded by Directive 2003/88/EC of 4 November 2003 which also concerned certain aspects of the organisation of working time ("the 2003 Directive"). The recitals to both Directives include a statement that "the improvement of workers safety… and health is an objective which should not be subordinated to purely economic considerations." The Directives are intended to promote health and safety at work by amongst other means, requiring workers to be given rest periods and paid holidays.

[20] Article 7 of both Directives under the heading of "Annual Leave" provide that:

> "Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."

(b) **The case law of the CJEU**

[21] In *Levez v T. H. Jennings (Harlow Pools) Ltd* [1999] I.C.R. 521 the Court of Justice of the European Union ("the CJEU") stated that it "has consistently held that in the absence of Community rules of harmonisation it is for the domestic legal system of each member state to determine the procedural conditions governing actions at law intended to ensure the protection of rights conferred on individuals by virtue of the direct effect of Community law." This is the Community principle of national procedural autonomy, see *Rewe Zentralfinanz eG v Landwirtschaftskammer fur das Saarland* (33/76) [1976] ECR 1989. The application of that principle means that it is for the UK to determine the procedural conditions governing the entitlement to four weeks' paid annual leave. The CJEU went on to state that such "independence in procedural matters is subject, however, to two conditions." "First, the rules of procedure laid down by domestic law for the exercise of rights derived from

Community law must not be less favourable than those governing similar domestic actions." That is the Community principle of *equivalence*. "Secondly, the procedural requirements for domestic actions must not make it virtually impossible, or excessively difficult, to exercise rights conferred by Community law." That is the Community principle of *effectiveness*.

[22] In *Sash Window Workshop Ltd v King* [2018] IRLR 142 the CJEU stated that the "right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by" the 2003 Directive itself. The CJEU went on to state that "the right to paid annual leave is expressly set out in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties." Furthermore that "any practice or omission of an employer that *may potentially deter* a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave" (emphasis added). We consider that a practice or procedure of paying a worker basic pay rather than normal pay has the potential to deter the worker from taking annual leave. We also consider that all that is required is the potential to deter rather than proof of actual deterrence, see *Lock v British Gas Trading Ltd* [2014] ICR 813 at paragraph [21] of the judgment of the CJEU.

[23] In *Sash Window* the CJEU also stated that "even if it were proved, the fact that Sash WW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is for the employer to seek all information regarding his obligations in that regard." In the present case the Appellants wrongly considered that police officer and civilian claimants were only entitled to basic rather than normal pay as holiday pay. That view was not challenged by the Respondents and if they considered the issue at all then it was a view which was most probably shared by them. However the obligation is on the employer to seek all information regarding his obligations and this misconception even if it was on the part of both the Appellants and the Respondents is not an answer to the complaints.

[24] The Tribunal found that the police officer and civilian claimants were "prevented" from exercising their right to annual paid leave fully in accordance with the Directive 'for reasons beyond their control.' Although this is not one of the remaining issues in the appeal we agree with ground five of the Appellants notice of appeal that the reference by the Tribunal to the claimants being "prevented" from doing anything is incorrect as the claimants could have presented complaints at any earlier stage of their choosing. However as we have indicated we do not consider that the lack of action on behalf of the claimants affects their claims. The obligation is on the employer to seek all information. We consider that this incorrect statement on the part of the Tribunal has no impact on the outcome of this appeal.

[25] *Sash Windows* concerned the carry-over of holiday entitlement. In that case the CJEU stated that "in the absence of any national statutory or collective provision establishing a limit to the carry-over of leave in accordance with the requirements of

EU law … the European Union system for the organisation of working time put in place by (the 2003 Directive) may not be interpreted restrictively. Indeed, if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that directive, which is that there should be due regard for workers' health." We consider that a restrictive interpretation should not be applied to either of the Directives or to the WTRs (NI). Furthermore we consider that the purpose of the protection of workers' health should inform the interpretation of those provisions.

(c) Transposition of the Directives into national law

[26] The Directives were transposed into national law in this jurisdiction by the WTRs (NI) both of which were made under the European Communities Act 1972. The provisions of the WTRs (NI) relevant to this appeal and cross appeal are in identical terms.

(d) The WTRs (NI)

[27] Regulation 13 of the WTR (NI) 1998 and Regulation 15 of the WTR (NI) 2016 provide that a worker is entitled to four weeks' annual leave in each leave year.

[28] Regulation 16(1) of the WTR (NI) 1998 and Regulation 20(1) of the WTR (NI) 2016 provide that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulation 13 or Regulation 15 at the rate of a week's pay in respect of each week of leave. It is also provided that Articles 17-20 of the ERO shall apply for the purpose of determining the amount of a week's pay for the purposes of the respective Regulations.

[29] It is correctly agreed between the parties that calculation of holiday pay as basic pay instead of normal pay (if basic pay is less than normal pay) involves a failure to pay holiday pay in full contrary to Regulation 16(1) of the WTR (NI) 1998 and Regulation 20(1) of the WTR (NI) 2016.

[30] The WTRs NI provide a remedy where the employer has failed to pay the whole or any part of holiday pay. Regulation 30 of the WTR (NI) 1998 and Regulation 43 of the WTR (NI) 2016 provide that a "worker may present a complaint to an industrial tribunal that his employer - … (b) has failed to pay him the whole or any part of any amount due to him …." Again as in the ERO the procedure is to present a complaint. However here the complaint is that there has been a failure to pay the whole or any part of holiday pay rather than there has been an unlawful deduction from pay. The practical effect is the same.

[31] The jurisdiction of the Tribunal to consider a complaint under Regulation 30 of the WTR (NI) 1998 or under Regulation 43 of the WTR (NI) 2016 is curtailed by Regulation 30(2) of the WTR (NI) 1998 and by Regulation 43(2) of the WTR (NI) 2016

which provides that an "industrial tribunal shall not consider a complaint under this regulation unless it is presented– (a) before the end of three months … beginning with the date on which it is alleged that … the payment should have been made; …." The effect is that the jurisdiction of the Tribunal is curtailed to a consideration of complaints presented within three months of the date upon which the payment should have been made. The impact of that curtailment in this case is obvious where the payments should have been made during the whole period since at least 23 November 1998 and yet the complaints were not presented until approximately 2015 – 2016.

[32] There is an exception to that curtailment of the jurisdiction of the Tribunal but that exception has not been relied on in these proceedings by any of the claimants. Regulation 30(2) of the WTR (NI) 1998 and Regulation 43(2) of the WTR (NI) 2016 provide that if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months then if the complaint was presented in such further period as the Tribunal considers reasonable it may be considered. As we have indicated it has not been suggested that it was not reasonably practicable for any of the complaints to be presented before the end of that period of three months. The effect is that on the facts of this case under the WTRs (NI) the jurisdiction of the Tribunal is limited to a period of three months prior to the presentation of the complaint. In contrast Article 55(2) of the ERO allows a complaint in respect of a series of deductions to be made within three months of the last deduction in the series.

[33] Regulation 38(1) of the WTR (NI) 1998 and Regulation 50(1) of the WTR (NI) 2016 provide that "… for the purposes of these Regulations, the holding, otherwise than under a contract of employment, of the office of constable shall be treated as employment, under a worker's contract, by the relevant officer." Whatever may be the position under the ERO it is clear that for the purposes of the WTRs (NI) a police officer is a worker and is entitled to make a complaint to the Tribunal. The difference however remains that under the WTRs (NI) the Tribunal has no jurisdiction grounded on complaints presented in respect of a series of deductions.

[34] The Tribunal found that the deeming provisions in Regulations 38(1) or Regulation 50(1) were superfluous and unnecessary as police officers are "workers" within the meaning of Community law and therefore would have rights under the WTRs (NI). In *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at page 481 police officers were included in the category of "quasi employees" and at page 497 it was stated that "the relationship between the police officers and the Chief Constable is closely analogous to a contract of employment." In *Perceval-Price v Department of Economic Development* [2000] IRLR 380 it was held that Tribunal chairmen were "workers" as the Community definition "requires the inclusion of all persons who are engaged in a relationship which is broadly that of employment rather than being self-employed or independent contractors." It is clear from *Frost* that the relationship of a police officer to the Chief Constable is broadly that of employment rather than being self-employed or an independent contractor. A

similar conclusion was reached in *O'Brien v Ministry of Justice* [2010] UKSC 34 in relation to part-time judges. On that basis we agree that police officers are workers within the meaning of Community law. However we do not consider that the deeming provisions are superfluous as they obviate any requirement to read down the definitions of "employer" and "employment" so as to prevent any argument that for instance the remedy under Regulation 30(1) WTR (NI) 1998 is confined to claims against an "employer."

[35] The equivalent Regulation in England and Wales to the WTR (NI) 1998 is the Working Time Regulations 1998 ("WTR 1998").

A contrasting feature between the ERO and the WTRs (NI)

[36] One of the contrasting features between the ERO and the WTRs (NI) is that civilian employees can present complaints under both the ERO for unlawful deductions and for the same amounts in the alternative under the WTRs (NI) for underpayment of holiday pay. Police officer claimants if they are not workers within the ERO are confined to presenting complaints for underpayment of holiday pay under the WTRs (NI).

Evolving case law as to "normal pay" and the response of the Chief Constable

[37] In *Bamsey v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359; [2004] ICR1083 it was held that the 1993 Directive did not require member states to ensure that workers received more pay during their period of annual leave than they were contractually entitled to earn. Mr Beggs contended and we agree that at this stage it was not appreciated that holiday pay should be calculated by reference to "normal pay."

[38] In September 2011 in *British Airways plc v Williams* [2012] I.C.R. 847 the CJEU gave a preliminary ruling as to the interpretation of the 2003 Directive. It held "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. …. Where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis. … 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, … to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment." This decision marked a striking move away from the approach adopted in *Bamsey* and from the approach adopted by the Appellants of paying basic pay as holiday pay.

[39] The CJEU returned to the issue of normal pay in its judgment delivered on 22 May 2014 in *Lock v British Gas Trading Ltd* [2014] ICR 813. The court stated "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" and that 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." Furthermore that in "any specific analysis, …, 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." Also that "in addition, … 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." However 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 need not be taken into account in the calculation of the payment to be made during annual leave." This decision also marked another striking move away from the approach adopted in *Bamsey* and from the approach that was still being adopted by the Appellants.

[40] On 4 November 2014 the Employment Appeal Tribunal delivered its judgment in *Bear Scotland Ltd v Fulton & others* holding that entitlement to paid annual leave in Article 7(1) of the 2003 Directive required that workers should receive such pay during their leave as corresponded to their normal remuneration. "Normal pay" is that which is normally received. Langstaff J stated that there is a temporal component to what is normal so that payment has to be made for a sufficient period of time to justify that label. This meant that where the pattern of work was settled there should be no difficulty in identifying normal pay. It would include payment in respect of such non-guaranteed overtime as was regularly required by the employer. If the pattern of work was not settled then an average taken over a reference period determined by the member state was appropriate. The decision in this case made it clear that the approach adopted by the Appellants of paying basic pay as holiday pay was unlawful.

[41] Despite the decisions of the CJEU in September 2011 and May 2014 and the decision in *Bear Scotland* on 4 November 2014 the Appellants continued to calculate holiday pay to police officer and civilian claimants only by reference to basic pay. Complaints were initially presented to the Tribunal by the police officers and civilian claimants in or around December 2015 and thereafter in or around 2016. It was not until 8 August 2018 that the Chief Constable stated that he was seeking Departmental approval to pay holiday pay to police officers in the future to include consideration of overtime. Unfortunately this is still to be put into effect though by letter received on 28 March 2019 the Permanent Secretary approved a change in the calculation for the year 2018 - 2019 with the increased payments being anticipated by

at the latest May 2019 back dated to 1 April 2018. This is understood to be a commitment on behalf of both of the Appellants. The calculation is being undertaken on the basis of a pragmatic rolling one year reference period prior to the commencement of the holiday and using the fraction 20/365.

[42] The lack of an earlier response to the decisions of the CJEU and in *Bear Scotland* is to be contrasted with the position in England and Wales. On 27 November 2014 the Police Federation of England and Wales intimated a claim on behalf of its members. On 8 January 2015 the *Deduction from Wages (Limitation) Regulations 2014* came into force in England, Wales and Scotland but not in Northern Ireland. Those Regulations had the effect of preventing a Tribunal from considering a complaint for a period more than two years before its presentation even if there was a series of deductions. In this way a limitation period was provided preventing the Tribunal from dealing with a whole series no matter how far back in time. Thereafter by 30 November 2015, an agreement was reached between the Police Federation and the Association of Chief Police Officers of England, Wales and Northern Ireland ("ACPO"). That agreement did not extend to Northern Ireland. It is certain that the Chief Constable was aware of the issue and of the agreement as he is a member of ACPO (now the National Police Chiefs Council). Despite being aware that it was incorrect to do so the Chief Constable persisted in paying basic pay as holiday pay.

[43] Mr Beggs candidly accepted that there was justifiable criticism of the Chief Constable's delay in responding to what he termed the catalyst case of *Bear Scotland* particularly given that he was aware of the issues given his role on ACPO. However he stated and we agree that there should be no criticism of the Appellants for relying on relevant limitation periods which is an ordinary part of litigation.

Part A

The first remaining issue on the appeal being the meaning of "Worker" in the ERO.

(i) The question posed by the parties

[44] The question posed by the parties as amended is whether a police officer claimant is a "worker" within the meaning of article 3(3) of the ERO so that he or she can present a complaint under the ERO for unlawful deductions from pay rather than having to present a complaint for underpayment of holiday pay under the WTRs NI?

(ii) The significance if police officers do not fall within the meaning of worker, the areas of agreement and the issues for consideration

[45] The significance if police officers do not fall within the meaning of "worker" in the ERO is that under the WTRs (NI) there is no provision equivalent to Article 55(4) which provides that a Tribunal has jurisdiction to deal with unlawful deductions if they are part of a series of deductions. So if police officers are not workers within the ERO then on the facts of these cases under the WTRs (NI) the jurisdiction of the Tribunal would be limited to complaints presented before the end of three months beginning with the date on which it is alleged that the payment should have been made. Furthermore police officers would have to reissue proceedings every three months to ensure that the Tribunal had jurisdiction which would not be necessary if they were able to rely on a series of deductions.

[46] An area of agreement between the parties is that the civilian employees contend and the Appellants accept that the civilian employees are workers within the ERO.

[47] There is another area of agreement between the parties when it comes to the question as to whether police officers are workers within the ERO. The Chief Constable contends and the police officer claimants accept that in accordance with domestic case law police officers are not employees and do not have a contract of employment. On this basis it was conceded that police officers would not ordinarily be workers within the definition contained in Article 3(3) of the ERO. However that concession on behalf of the police officer claimants is limited as reliance is placed on Article 243 of the ERO; it being contended that as a consequence of that Article and as a matter of statutory interpretation they do fall within the ERO definition of worker.

[48] Another issue between the parties in relation to the meaning of worker is that the police officer claimants contend that they are "workers" within the autonomous meaning of that term under Community law. On that basis it is submitted that

Article 3(3) of the ERO should be read down to comply with the autonomous meaning or alternatively that Article 3(3) should be disapplied by this court to comply with that autonomous meaning.

(iii) Proper construction of the ERO

[49] Articles 45 and 55 of the ERO confer rights on individuals who fall within the definition of the term "*worker*." Article 3 provides the meaning in the ERO not only of "*worker*" but also "employee," "contract of employment," "employer," and "employed."

[50] In relation to "worker" Article 3(3) provides:-

> "In this Order "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) *a contract of employment*, or
>
> (b) *any other contract*, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly" (emphasis added).

[51] In *Re Chambers* [2005] NIQB 27, Girvan J held that "a member of the police force of whatever rank, in carrying out his duties as a constable acts as an officer of the Crown and a public servant. His powers are exercisable by him by virtue of his office. He is not in law an employee." It is clear that police officers do not fall within Article 3(3)(a) as there is no contract of employment.

[52] The question then is whether police officers fall within the Article 3(3)(b) as being "an individual who has entered into or works under … any other contract whether express or implied …." The Tribunal found and we agree that "there is no contractual agreement" and that "police constables do not contract with anyone." Rather the terms on which police officers are engaged are regulated by the Police (Northern Ireland) Acts 1998, 2000 and 2003, together with the Police Service of Northern Ireland Regulations (Northern Ireland) 2005. They are office holders in the same way as judicial officers and members of the clergy. Apart from the submissions in relation to Article 243 we consider that police officers do not fall within Article 3(3)(b).

[53] Article 243 of the ERO lists out a series of other Articles in the ERO and then provides that those other Articles "do not apply to employment under a contract of

employment in police service or to persons engaged in such employment." The Articles which are listed as not applying do not include Articles 45 and 55. The Respondents contend that this means that Articles 45 and 55 do apply to police officers by virtue of the fact that those in police service have not been expressly excluded. However we consider that Articles 45 and 55 would apply to Harbour police and to Airport police and it is in order to maintain their rights that Article 243 is limited. That Article does not however alter the position that Articles 45 and 55 do not apply to the police officers in this case. We dismiss that part of the Respondents' cross appeal.

(iv) Whether police officers are workers within the Community law autonomous meaning

[54] For the reasons which we have set out in paragraph [34] above we consider that police officers are workers within the Community law autonomous meaning.

(v) The impact on the ERO of police officers being workers within the Community law autonomous meaning

[55] The police officer claimants contend that Article 3(3) of the ERO should be read down to comply with the autonomous meaning or alternatively that Article 3(3) should be disapplied by this court to comply with that autonomous meaning. We have not heard full argument in relation to whether a Community law concept should be applied to the ERO which is held up as the domestic comparator to the WTRs (NI). We also were not provided with the precise wording to be inserted in relation to any reading down of the ERO, see paragraph [81] below. In any event given our conclusions in relation to the principle of equivalence it is not necessary to determine this issue. For all these reasons we do not consider it appropriate to express any conclusions in relation to this issue.

(vi) Conclusions in relation to the meaning of worker in the ERO

[56] We consider that police officers do not fall within the statutory definition of a worker contained in Article 3(3) of the ERO.

[57] Police officers are workers within the autonomous Community law concept.

[58] We do not consider it appropriate or necessary to determine whether as a consequence the ERO should be read down or disapplied in part.

Part B

The second remaining issue on the appeal being the application of the EU principle of equivalence.

(i) The question posed by the parties

[59] The question posed by the parties as amended is if police officer claimants are not "workers" within the ERO, does the principle of equivalence require that they must be treated as being entitled to the remedy provided by Article 55 of the ERO for unlawful deductions or does it require that the remedy provided by Regulation 30 of the WTR (NI) 1998 and Regulation 43 of the WTR (NI) 2016 must be applied to afford a right to present a complaint with regard to a series of underpayments of holiday pay?

(ii) The Community law principle of equivalence

[60] The community law principle of equivalence requires that national remedies for breaches of Community rights must be no less favourable than those available in similar domestic proceedings, see paragraph [57] of *Revenue and Customs Commissioners v Stringer & others* [2009] 4 All ER 1205.

[61] In *Totel Ltd v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 44 Lord Hodge, delivering the judgment of the Supreme Court stated that "it is for the courts of each member state to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis: …."

[62] The essential first step for the operation of the principle of equivalence is to identify a true comparator. The judgment in *Totel* includes guidance as to identification of a comparator. "First, the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific." In that respect the domestic court must focus on the purpose and essential characteristics of allegedly similar claims. In *Levez* it was stated by the Advocate General that although "in some cases there is no difficulty in identifying "similar" forms of domestic action, in other cases it is clearly necessary to determine the ground of comparison, which in practice involves a policy decision." The Advocate General went on to state that "in principle, it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law … comply with the principle of equivalence: …." However, the Advocate General stated that there were a number of guidelines so

that domestic actions pursuing the same "objective" … as actions to enforce a Community right, or whose purpose was similar, must be regarded as similar domestic actions." Also that "in order to establish the comparability of the two systems in question, the essential characteristics of the domestic system of reference must be examined" and that task was for the national court. The CJEU in its judgment at paragraph [43] stated that in "order to determine whether the principle of equivalence has been complied with in the present case, the national court — which alone has direct knowledge of the procedural rules governing actions in the field of employment law — must consider both the purpose and the essential characteristics of allegedly similar domestic actions." It also stated at paragraph [44] that "…, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts: …"

[63] In relation to the more favourable character of a similar domestic action the test was stated by the Advocate General in *Levez* at paragraph [70] as being "whether *the procedural rules* governing (a similar domestic action) are more favourable than those laid down by domestic law … to govern the exercise of rights derived from Community law." The CJEU identified procedural rules in *Levez* when it stated that the "exercise of a Community right before the national courts must not be subject to conditions which are more strict (for example, in terms of limitation periods, conditions for recovering undue payment, rules of evidence) than those governing the exercise of similar rights derived wholly from domestic law." Also in *Levez* the CJEU identified at paragraph [51] that if the Community procedures involve additional costs and delay and are more complicated that can amount to less favourable conditions.

(iii) The Tribunal's finding in relation to equivalence

[64] The Tribunal found that there was a breach of the principle of equivalence and the Chief Constable has appealed against that finding.

(iv) The linked principle of effectiveness

[65] There is a linked principle of effectiveness which requires that national remedies for breaches of Community rights must be capable of effective exercise in practice. It is agreed between the parties that there has been compliance with the principle of effectiveness.

(v) Similar domestic proceedings

[66] As we have indicated in relation to the principle of equivalence the first issue is to identify what are the similar domestic proceedings which are to be compared to

the Community law rights so that consideration can be given as to whether the remedies for breach of the Community rights are or are not less favourable.

[67] The police officer claimants contend that the domestic proceedings similar to the Community rights under the WTRs (NI) are the Tribunal proceedings under the ERO. It is said that both are Tribunal proceedings which are informal and inexpensive procedures conferring many benefits including for instance a different regime in relation to orders for costs and the expertise of the Tribunal members. It is also said that whilst the entitlement to four weeks annual leave is in the WTRs (NI) both in effect enable claims to be presented to recover the same amounts. The ERO enables this by reference to unlawful deductions and the WTRs (NI) by reference to underpayments. Accordingly it is stated that both have the same objective of enabling proper remuneration to be paid to workers. Furthermore it is said that the purpose of both is to secure normal pay as holiday pay and that the essential characteristics of both procedures are almost identical.

[68] During the course of the hearing Mr Beggs submitted on behalf of the Appellants that similar domestic proceedings were not restricted to claims before the Tribunal under the ERO as in addition claimants could bring proceedings in the County Court or in the High Court ("civil proceedings") or could bring judicial review proceedings seeking not only declaratory relief but also damages ("judicial review proceedings"). Mr Beggs stated that civil proceedings could be brought in a representative capacity on behalf of all the police officer claimants under the WTRs (NI). He expressly agreed that civil proceedings and judicial review proceedings were "more favourable avenues open to these police officers which would not be subject to the … time restraints …" in either the ERO or the WTRs (NI) "to reduce significantly the amount of … unpaid wages to which they would otherwise be entitled." He submitted that in civil and judicial review proceedings the limitation period would restrict the amount of any award of damages so that it was calculated in respect of the period of six years prior to the date of issue of the proceedings. Treacy LJ pointed out the lack of sense in the inconsistency between the curtailment of the jurisdiction of Tribunal to in some cases three months and the defence available in civil proceedings under the Limitation (NI) Order 1989 of six years so that "mysteriously when you go to the … county court or the High Court … you can go back six years." There was no suggestion on behalf of the Appellants that this inconsistency was inappropriate. We consider that there is a further inconsistency as in civil proceedings there is a six year limitation period regardless as to whether there is a series of deductions so that the recoverable amounts are limited to the six year period. However in some cases under the ERO the Tribunal would have jurisdiction stretching back far more than six years if there was a series of deductions.

[69] Relying on civil proceedings and judicial review proceedings being the domestic proceedings similar to the Community rights under the WTRs (NI) had the obvious impact that the Appellants were understood to be conceding that the claimants would be able to recover for a period of six years prior to the

commencement of those proceedings. We were informed by the Respondents that civil proceedings had been commenced in the High Court by three Writs issued on 31 December 2015, 8 February 2016 and 24 January 2017 and that two of those proceedings had been commenced in a representative capacity. In broad terms it seemed to be conceded that these were claims permitting recovery of the unlawful deductions or underpayments from approximately 2010 onwards.

[70] The position of the Appellants was modified after the hearing by a note sent to the court office on 11 April 2019 in which it was stated that during "the course of argument in the above case, Leading Counsel for the Appellants answered "yes" to questions … as to whether police officers can bring claims in the County Court in respect of their WTR rights; and relied upon the case of *Allard v Chief Constable of Devon and Cornwall* [2015] I.C.R. 875 to demonstrate this point. It was submitted that this exchange was in connection with the EU principle of equivalence. The purpose and relevance of the Appellant's submissions and the answers given during this exchange were intended to provide an example of a cause of action for failure to pay sums due pursuant to domestic law rights, for the purpose of comparison with the subject claim based on EU law rights (the WTR claim in the Industrial Tribunal) and *not to identify an alternative forum for working time claims*. For the avoidance of any doubt, *the Chief Constable does not: a. concede that persons may bring claims in the County Court in respect of their WTR rights*; b. waive any defences which may be available to him in any such claims" (emphasis added).

[71] We note that the Appellants no longer accept that the claimants can bring civil proceedings in respect of their WTR (NI) rights. It is not necessary for us to decide whether the claimants could bring such proceedings as we do not consider that they would be similar to the WTR (NI) proceedings. In *Revenue and Customs Commissioners v Stringer & others* at paragraph [60] (as adapted to refer to the ERO and WTR (NI)) Lord Walker stated that the "comparison between procedure in an employment Tribunal and in the county court must be made in the round, and the informal and inexpensive procedure in the employment Tribunal confers many benefits. …. The relevant comparison is therefore between regulation 30(2) of the (WTR (NI) 1998) and (Article 55(2), (3) and (4) of the ERO)."

[72] Even if there is the ability to bring civil or judicial review proceedings relying on the WTRs (NI) we consider that the similar domestic proceedings are Tribunal proceedings under the ERO for the reasons given in *Stringer*. We also consider that the objective, purpose and the essential characteristics of the ERO and the WTRs (NI) are similar so that they must be regarded as similar domestic actions essentially for the reasons set out in paragraph [67] above and in addition the WTRs (NI) are linked to the ERO for the purposes of calculating the amount of a week's pay.

(vi) Whether less favourable

[73] The next issue is whether the national remedies for breaches of Community rights under the WTRs (NI) are less favourable than those available in the similar

domestic proceedings under the ERO. There is no provision in the WTRs (NI) equivalent to Article 55(4) of the ERO which provides that a Tribunal has jurisdiction to deal with unlawful deductions if they are part of a series. We consider that there is no doubt that the similar domestic remedy under the ERO is more advantageous than the Community law remedy under the WTRs (NI).

[74] We also consider that the similar domestic remedy under the ERO is more advantageous than the Community law remedy under the WTRs (NI) for another reason identified by the Tribunal. This advantage is apparent when consideration is given in the abstract but also it has factually occurred. The police officer claimants have had to present numerous new complaints to the Tribunal under the WTRs (NI) so as not to fall foul of the three month period. They have done so because if they are restricted to claims under the WTRs (NI) they would not be able to rely on the series of deductions contained in the ERO. This has led to additional costs and delay. As a result the procedures under the WTRs (NI) are obviously more complicated than under the ERO. It has placed a very considerable burden on the police officer claimants and also no doubt on the Tribunal. Again there is no doubt that the similar domestic remedy under the ERO is more advantageous than the Community law remedy under the WTRs (NI).

[75] It was submitted on behalf of the Appellants that the difference in treatment between police officers under the WTRs (NI) and civilian employees who can present a claim under both the ERO and the WTRs (NI) is not a difference in treatment by the UK between EU law rights on the one hand and domestic rights on the other. It is a difference between different types of claimants. We reject that submission. That is exactly why there is a lack of equivalence. An EU claimant relying on the WTRs (NI) is treated differently from and does not have equivalence with a claimant under the ERO.

[76] It was submitted on behalf of the Appellants that it is for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings and that time limits of three months as in the WTRs (NI), which may be extended in accordance with law, are conventional in the employment field. On this basis it was submitted that it was permissible to limit financial claims in the interests of legal certainty and the proper conduct of proceedings as set out in the WTRs (NI). We agree that it is permissible to do so provided that there is compliance with the principle of equivalence. The difficulty in this case is that there has not been compliance with that principle.

[77] We dismiss that part of the Chief Constable's appeal from the Tribunal's finding that there was a breach of the principle of equivalence.

(vii) The powers of the courts following a finding of a breach of the principle of equivalence

[78] In *Dominguez v Centre informatique du Centre Ouest Atlantique* [2012] 2 C.M.L.R. 14 the CJEU addressed both the obligation on a national court to interpret national law to comply with Community law and the obligation on a national court to disapply a national provision which is in conflict with EU law. The CJEU said at paragraph [23] that it "should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with EU law arises only if no compatible interpretation of that provision proves possible." At paragraph [27] in relation to interpretation it stated that "it should be noted that the principle that national law must be interpreted in conformity with EU law also 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." The obligation to interpret in conformity with Community law is to do so "as far as possible" see *Marleasing v La Comercial Internacional de Alimentacion* [1992] 1 CMLR 305. In UK law doing so as far as possible includes a court or Tribunal reading words into a statute or into regulations to give effect to EU legislation which the statute was evidently intended to implement, see *Pickstone v Freemans PLC* [1988] 2 ALL ER 803 and *Litster v Forth Dry Dock and Engineering Company Limited* [1989] 1 ALL ER 1134 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 57. In adopting this approach the court is concerned with interpreting and not with amending the offending provision. By spelling out the words that are to be implied, it may look as if the court or Tribunal is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the convention rights."

[79] In so far as *Dominguez* addressed the obligation on a national court to disapply a national provision which is in conflict with EU law we do not consider that it is necessary to do so in this case given our conclusions in relation to the interpretative obligation.

[80] An issue arose as to whether the interpretative obligation should be applied to the ERO or to the WTRs (NI). We consider that it should be applied to the WTRs (NI) as those Regulations transpose Community law and it is those Regulations which have to comply with the principle of equivalence.

[81] The contention on behalf of the Respondents was that the interpretative obligation should be applied to the ERO. It was said on behalf of the Respondents that words should be read into Article 3(3) of the ERO so that it referred in Article

3(3)(b) not only to "any other contract" but also to "any other arrangement." In this way it was said that police officers would then fall within the definition of a worker as they would come within the definition of "any other arrangement." However those are not the only words that would have to be read into the ERO as "employment" under Article 3(5)(b) in relation to a worker, "means employment under his *contract* and *employed* shall be construed accordingly" (emphasis added). Article 45 which contains the right not to suffer unauthorised deductions refers to a worker "*employed* by him" (emphasis added). In these adversarial proceedings there was not a sufficiently detailed alternative proposed wording advanced on behalf of the Respondents for this court to consider and so on that additional basis we consider that the interpretative obligation should not be applied to the ERO.

[82] The Tribunal choose to apply the interpretative obligation to the WTRs (NI) which are the domestic transpositions of the Directives. We consider that it was correct to do so.

[83] The Tribunal's view was that to secure equivalence between the ERO and the WTRs (NI) words needed to be and should be read into the latter to enable the Tribunal to consider underpayments of holiday pay under the WTRs (NI) if they are part of a series of underpayments. Accordingly the Tribunal read in words at the end of Regulation 30(2)(a) WTR (NI) 1998 and Regulation 43(2)(a) WTR(NI) 2016. We have considered the words suggested by the Tribunal but approach this appeal and cross appeal on the basis that the words to which we have added emphasis should be added to both Regulation 30(2)(a) and Regulation 43(2)(a)

> "An industrial tribunal shall not consider a complaint under this regulation unless it is presented– (a) before the end of the period of three months … beginning with the date on which it is alleged that … the payment should have been made *or if presented in respect of a series of payments of wages from which deductions were made, before the end of the period of three months beginning with the date on which it is alleged that the last in the series of such payments was made*; or (b) …;"

[84] It was submitted on behalf of the Appellants that even if the Tribunal was correct to perceive an incompatibility with EU law, it failed to observe some basic and constitutionally significant limitations on its interpretive powers. It was said that the Tribunal was wrong to conclude that the words which it would read in to "amend" the WTRs (NI) were "consistent with and do not exceed the grain or the purpose of the Regulations." Rather it was submitted that the decision of the Tribunal was to substantially change an important feature of domestic law which was the application of time limits, which were effectively disapplied by the Tribunal in respect of both police officer and civilian claimants

[85] We agree that the insertion of the words disapplied the application of time limits in the WTRs (NI) but we consider that this was done to achieve equivalence with the ERO and was entirely in conformity with relevant legal principles.

(viii) Conclusions in relation to equivalence

[86] We dismiss that part of the Appellants' appeal which contends that the Tribunal exceeded its powers by reading in words to the WTRs (NI). We differ from the Tribunal in relation to the words which we consider ought to be read in but this is a point of form rather than substance.

[87] In effect we dismiss this part of the Appellants' appeal.

Part C

The third remaining issue on the appeal being the meaning of "a series of deductions."

(i) The question posed by the parties

[88] The question posed by the parties is if a claim is being made with regard to a series of deductions as set out at Article 55(3) of the ERO, is the series ended, as a matter of law, by a gap of more than 3 months between unlawful deductions and/or by a lawful payment or is the question of what is a "series" a question of fact to be decided on the facts of each case? Does the Court approve the formulation by Langstaff J in paras [79]-[81] of *Bear Scotland*?

(ii) The parties submissions in relation to the meaning of a series of deductions

[89] The Appellants contend that three month periods are "conventional in Industrial Tribunals" and that the legislative intent is that all claims should be brought promptly. It was further submitted that in order to implement that legislative intent a series would be broken by a gap with a duration greater than three months. In making these submissions the Appellants relied on the judgment of Langstaff J in *Bear Scotland Limited v Fulton* at paragraphs [79]-[81] in which it was held that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.

[90] The Appellants contend that there is a bright line so that if there is a gap of three months or more between the unlawful deductions there could not be a series within the meaning of the ERO. Factually one claimant, Mr Agnew consistently took his holidays without such gaps throughout the entire period since 1998 but it is anticipated that he may be the singular exception or at least that the vast majority of claimants will have taken their holidays with gaps of three months or more.

[91] The Appellants recognised that if unlawful deductions happened every 2 months then that would be a series within Langstaff J's definition so that the Tribunal would have jurisdiction stretching back to the start of the series. However, a Tribunal would not have jurisdiction to determine a claim in respect of an individual who took holidays or received holiday pay in respect of that holiday separated by more than 3 months. It was recognized that this was a harsh consequence but it was submitted that "sometimes the law has harsh consequences." It was stated and we agree that it is perfectly legitimate for a litigant, such as the Chief Constable, to rely on a limitation period or upon a lack of jurisdiction to prevent an award of damages being made to correct a past wrong. We agree for the

reason that limitation periods or a lack of jurisdiction are reflections of the principles of finality and legal certainty.

[92] The Appellants also contend that a series is broken by a lawful payment so that for instance if a claimant did not do any overtime and did not receive any relevant allowances during the reference period for the calculation of normal pay receiving only his basic pay during that period then the amount of holiday pay would lawfully have been his basic salary. It is contended that such a lawful payment would break the series with the consequence that the Tribunal would have no jurisdiction in respect of an earlier series of unlawful deductions.

[93] The Respondents referred the court to the commentary on *Bear Scotland* in *Harvey on Industrial Relations and Employment Law*, the April 2019 issue at paragraphs [373] et seq. At paragraph [376.10] it was stated that the application of the decision in *Bear Scotland* would clearly limit the scope for retrospective holiday pay claims under the (ERO) as workers may well leave a gap of more than three months between holiday periods, thereby breaking the series. Then at paragraph [376.12] a number of points were made about Langstaff P's decision which included

> "(iii) In coming to his decision Langstaff P doubted that 'the draughtsman had in mind that a deduction separated by a year from a second deduction of the same kind would satisfy the temporal link. It would have been perfectly capable of justifying a claim at the time, and within three months of it'. However, there are policy arguments pointing in the opposite direction. Take the worker who chooses to take all his annual leave in one block, say to visit family overseas. In his first year he may not understand how holiday pay is calculated and may well feel vulnerable, especially if he is in his probationary period, and so he lets the deduction pass. Next year it happens again. Why should he lose the right to claim for a backdated series simply because the relevant events are annual – particularly as it is acknowledged in Bear Scotland that 'some events may take colour from those that come earlier or later, or both, so that factual similarities can only truly be appreciated when a pattern of behaviour is revealed'?
>
> …
>
> (v) As formulated in Bear Scotland, the 'three-month gap' rule applies to all claims made under the unauthorised deduction provisions in the (ERO). It is not restricted to claims for statutory holiday pay. It therefore applies for example to claims for unpaid bonuses or

> commissions and for claims for underpayment of the national minimum wage. In all these cases application of the rule can lead to arbitrary and unfair results – workers who take their annual leave by means of frequent short breaks will be in a more advantageous position than those who chose to take their leave in longer breaks with consequently longer gaps between them. Equally, workers paid a monthly commission will be in a better position when it comes to establishing a series of deductions than those who receive their commission on a six-monthly or annual basis."

(iii) Discussion in relation to the meaning of a series of deductions

[94] The Respondents relied on *Sash Windows* a case in which the Court of Appeal in England and Wales noted that, in preventing annual leave being carried over beyond the leave year for which it was granted, the Regulations did not necessarily ensure *an effective remedy* for breach of article 7 of the 2003 Directive, whereby every worker was entitled to paid annual leave of at least four weeks. Accordingly the Court of Appeal had referred to the CJEU for a preliminary ruling questions concerning the interpretation of article 7 of the 2003 Directive and the right to an *effective remedy* in article 47 of the Charter of Fundamental Rights of the European Union. The CJEU recognised that article 7 of the 2003 Directive did not preclude national provisions fixing a carry-over period after which the right to paid annual leave could be lost where the worker had been unfit for work for several years. However it went on to state that there could be no derogation from that entitlement in circumstances where the employer had not allowed the worker to exercise his right to paid annual leave.

[95] In the case before us the issue raised by the parties was not whether there was an effective remedy which was the issue in *Sash Windows* but whether there has been compliance with the principle of equivalence.

[96] The equivalent national law provision relied on is the concept of a series of deductions in the ERO. The proper construction of a series is a matter for national law and thereafter an equivalent concept has to be applied to the Community law rights under the WTRs (NI). *Sash Windows* is authority for the proposition that a restrictive interpretation should not be applied to the Directives but it is not applicable to the interpretation of the domestic concept of a series of deduction to which thereafter there is to be equivalence.

[97] There is no statutory definition within the ERO as to what amounts to a series of deductions.

[98] "Series" is an ordinary word though in the context of the ERO it is a series through time.

[99] Whether there has been a series of deductions through time is a question of fact.

[100] Mr Beggs agreed, in our view correctly, that a series of deductions through time does not have to be metronomic so that each deduction in the series occurs at exactly the same time interval. He accepted and we agree that a series of deductions can be constituted by deductions with a sufficient frequency of repetition but occurring at different time intervals and also we would add in different amounts.

[101] There is nothing in the ERO to suggest that the payments from which the unlawful deductions are made have to be contiguous if they are to amount to a series. Contiguous unlawful deductions is not a requirement of a series.

[102] We consider that in order to establish a series of deductions a claimant does not have to establish that every payment made to him during a particular period of time was subject to an unlawful deduction. In our view it is necessary to identify the alleged series. In these appeals the alleged series is a series of unlawful deductions *in relation to holiday pay*. There will have been appropriate payments of pay between the various holiday payments whilst the claimants were at work which will not have been subject to unlawful deductions. However identifying the series as *a series in relation to holiday pay* means that those lawful payments whilst the claimant was at work will not interrupt the series.

[103] We agree that there has to be "a sufficient similarity of subject matter, such that each event is factually linked with the next (*in the alleged series*) in the same way as it is linked with its predecessor;" see paragraph [79] of *Bear Scotland* to which we have added the words "*in the alleged series*." We do so because factual consideration as to whether there is a sufficient similarity of subject matter requires identification of what is alleged to constitute the series of deductions. For instance in this case it is only when one identifies the alleged series as being a series of deductions *in respect of holiday pay* that one sees that each unlawful deduction is factually linked to its predecessor by the common fault or unifying or central vice that holiday pay was calculated by reference to basic pay rather than normal pay. That method of calculation factually linked all payments of holiday pay whether to police officers or to civilian employees and it did so consistently since 23 November 1998.

[104] The Appellants submit that a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series.

[105] As indicated in *Harvey on Industrial Relations and Employment Law* and as conceded by Mr Beggs holding that a three month gap breaks a series of deductions leads to arbitrary and unfair results. For instance if a three month gap broke a series it would do so when the unlawful deductions occurred consistently and persistently at six monthly intervals but not when they occurred at two monthly intervals. There is nothing in the ERO which expressly imposes a limit on the gaps between

particular deductions making up a series. We do not consider that there is anything implied from the terms of the ERO which compels to such an interpretation of a series. As a matter of the proper construction of the ERO we conclude that a series is not broken by a gap of three months or more.

[106] We consider that identification of the factual link in the alleged series answers the question as to whether correct payments of holiday pay breaks the series. We consider that the factual link in these cases is the common fault of paying basic pay as holiday pay regardless of any consideration of overtime or allowances. On some occasions that common fault led to unlawful deductions but on others if the worker concerned was not paid overtime and did not receive any relevant allowance during the reference period it would have led to the correct amount being paid as holiday pay because normal pay and basic pay would have been the same. However we consider that a payment of the correct amount was still factually linked with its predecessor by the common fault of paying basic pay regardless of any consideration of overtime or allowances during the reference period. We do not consider that a series is broken by a lawful payment of holiday pay if the lawful payment comes about by virtue of the common fault or unifying or central vice that holiday pay was calculated by reference to basic pay rather than normal pay.

(iv) Conclusions in relation to this part of the appeal

[107] Whether there is a series is question of fact to be decided in each individual case.

[108] A series is not ended, as a matter of law, by a gap of more than 3 months between unlawful deductions nor is it ended by a lawful payment.

[109] We agree with the formulation by Langstaff J in paragraph [79] of *Bear Scotland* subject to the additional words *"in the alleged series."*

[110] We dismiss these grounds of the Appellants' appeal.

Part D

The fourth remaining issue on the appeal being annual leave entitlement to be taken in a particular sequence?

(i) The question posed by the parties

[111] The question posed by the parties as amended is when one is seeking to ascertain whether there has been underpayment of holiday pay, is one required to assume that the 4 weeks paid leave mandated by Regulations 13 and 16 of the WTR (NI) 1998 Regulations 15 and 20 of the WTR (NI) 2016 is taken first and exhausted before the worker draws on any entitlement under Regulations 13A of the 1998 Regulations or Regulation 16 of the 2016 Regulations or other sources of entitlement to annual leave?

(ii) The additional annual leave under the WTRs (NI) and under the service arrangements with the Chief Constable

[112] The Directives give workers an entitlement to paid annual leave of *at least* four weeks. The basic entitlement to four weeks annual leave was transposed into domestic law in this jurisdiction by Regulation 13 of the WTR (NI) 1998 and Regulation 15 of the WTR (NI) 2016. However the entitlement could be greater than four weeks. Regulation 13A of the WTR (NI) 1998 and Regulation 16 of the WTR (NI) 2016 provided an entitlement to "additional annual leave" which in the case of the police officers amounted to some 8 additional days. Furthermore the applicable service provisions entitled the police officers to some further 2 days.

[113] For the purposes of illustration we proceed on the basis that police officers are entitled to a total of 30 days annual leave (20 under the Directives and the WTRs (NI), 8 under the WTRs (NI) and 2 under service provisions).

(iii) The Tribunal's findings

[114] The Tribunal found that the 20 days leave provided by the Directives, the 8 days leave provided by the WTRs (NI) and the 2 days leave provided by the conditions of service were indistinguishable from each other. The Tribunal considered that each day of leave taken should therefore be distributed proportionately between the three sources of leave; *i.e.* 20/30 Working Time Directive, 8/30 Working Time Regulations and 2/30 conditions of service.

(iv) The ground of the Appellants' appeal

[115] The Appellants rely on the decision in *Bear Scotland*. In that case Langstaff J stated "… Regulation 13A is described in the [1998] Regulations as 'additional leave'. That suggests that the dates of it should be the last to be agreed upon during the

course of a leave year." The Appellants adopt that logic and submit that when annual leave was taken by police officer and civilian employee, they used up their minimum entitlement under the Directives first in the annual leave year. The practical significance being an increased chance of a gap of three months or more between underpayments of holiday pay and a breach of a series.

(v) The Tribunal's reasons

[116] The Tribunal set out part of its reasoning at paragraphs [279] – [280] as follows:-

> "[279] It is clear that the 20 days annual leave provided by the Directive is the minimum period mandated by EU law. However, as a matter of law, it is no less an entitlement of the individual worker and no less an obligation on the individual employer, than the eight days provided under the Working Time Regulations or the two days (or in certain cases more) provided under the conditions of service afforded to the individual worker.
>
> [280] To the tribunal, it would make no sense to treat any part of the annual leave entitlement, which comprises those three categories, differently from any other part of the annual leave entitlement or to require a strict succession of types of leave. As far as the individual employer and the individual worker is concerned, the split between these three categories has no real importance at all. Both the individual employer and the individual worker look at annual leave entitlement as a composite whole. No police officer claimant, or any civilian employee, has ever said "I have two more Working Time Directive days left before I move on to Working Time Regulations days." Neither has the Chief Constable. In the present claims, the composite leave entitlement comprises 20 days provided by the Directive, eight days provided by the Regulations and two (or more) days provided under the conditions of service. If any strict succession had been intended or even contemplated, that would have had to be laid down in legislation and would have had to deal with issues such as the carryover of annual leave."

[117] The Tribunal with respect differed from the approach of Langstaff J for the following reasons:

> "The description of the eight days or 1.6 weeks provided by the Regulations as "additional" says nothing about a strict succession of types of annual leave. If it were to do so, it would have said that in terms and it would have dealt also with the issues of succession in relation to leave provided under the conditions of service or leave provided as a carryover of other types of annual leave. It did not do so. It seems to the present tribunal that reading into the words "additional leave", the proposition that there must be a strict succession of annual leave, is a step too far."

[118] The Tribunal concluded that:

> "The (Appellants') argument is inherently illogical. The only sustainable interpretation is that days of annual leave awarded on whatever basis form part of a composite whole. Any individual leave days taken from that pot are not possible of being allocated between one category or another. Each day's annual leave therefore must be treated as a fraction of the composite whole."

(vi) Discussion

[119] We also respectfully disagree with the approach adopted by Langstaff J in *Bear Scotland*. A worker has an entitlement to all leave from whatever source and there is no requirement that leave from different sources is taken in a particular order. We agree with the reasoning of the Tribunal

(vii) Conclusion in relation to this ground of appeal

[120] We dismiss this ground of appeal.

Part E

The fifth remaining issue on the appeal being the method of calculation of the amount of overtime to be taken into account in holiday pay.

(i) The question posed by the parties

[121] The question posed by the parties is if one is required to calculate a daily rate for overtime that forms part of a worker's normal pay in order to calculate holiday pay that is due, is the lawful approach to divide the number of working days in the four weeks leave period (20) by the number of calendar days in the reference period or the number of working days in that period?

(ii) The Tribunals' findings

[122] The Tribunal posed the question:

> "Should average overtime or allowances to be calculated in relation to holiday pay be calculated by reference to 365 days, a fixed period of 260 working days, or by reference to actual days worked to work out the per day average?"

The answer set out at paragraph [277] was that "the correct solution in this respect is the figure of 365 *i.e.* calendar days."

(iii) The Respondents' appeal and submissions.

[123] That finding by the Tribunal is subject to the Respondents cross appeal.

[124] The Respondents' submit that the purpose of the divisor is to work out appropriate normal pay for a week's leave. The Respondents state that when one converts the four weeks' annual leave to 20 days' leave, the appropriate divisor must also be working days rather than calendar days in the reference period. The Respondents submit that if calendar days are used as the divisor that working days, would be divided by a divisor which includes both working and non-working days. This, it is argued, is wrong in principle.

(iv) The Appellants' submissions

[125] The Appellants submit that the Tribunal was correct to find that average pay including overtime (and in the cases of civilian employees, allowances) for the purposes of calculating holiday pay should be determined by reference to calendar days and not standard working days. It was also stated by the Appellants that a

divisor of 20/365 is more appropriate for the purposes of calculations which are intended, pragmatically, to span a year, in respect of yearly pay – overtime which the Respondents have the opportunity to work on any day of the year and leave which the Respondents may take at any point throughout the year.

[126] The Appellants also referred to the pragmatic settlement in England and Wales which adopted the calculation for payment as being 20/365 of total payments paid during a 12 month rolling reference period prior to the commencement of the holiday.

(v) Discussion

[127] The objective which should be achieved is clear having been repeated by the CJEU in *Hein v Albert Holzkamm GmbH* (C-385/17), [2018] 12 WLUK 184. A worker should receive normal pay as holiday pay. The issue in this part of the appeal is a point of detail as to how that objective is to be achieved.

[128] As we have indicated the objective was repeated by the CJEU in *Hein v Albert Holzkamm GmbH*. The Court observed that it "has already stated that the term 'paid annual leave' in Article 7(1) of Directive 2003/88 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" (emphasis added).

[129] In broad outline the CJEU in *Hein v Albert Holzkamm GmbH* also gave an indication as to how that objective was to be achieved. The Court said at paragraph [27] that "entitlement to paid annual leave must, in principle, be calculated by reference to the periods of actual work completed under the employment contract."

[130] Turning to the Directives the periods of annual leave are defined by reference to "weeks" in that both Directives provide an entitlement to "paid annual leave of at least *four weeks*." "Weeks" are also the time period in Regulation 13(1) of the WTR (NI) 1998. So if the applicable reference period is 12 months a divisor of the 4 weeks annual leave would be 52 (4/52). On that basis if a worker earned various amounts of overtime during the 12 month reference period but those payments all added up to £5,200 (£100 per week) then he should receive £400 in respect of his overtime payments during his four week annual leave. Applying the fraction 4/52 to £5,200 produces £400. The fraction of 4/52 converts into the decimal 0.07692308 which multiplied by 100 produces 7.692308%. The same figure of £400 is achieved by applying that percentage which is equivalent to the fraction 4/52.

[131] If one converts four weeks leave to 20 working days leave and if the appropriate reference period is still 12 months then the issue posed in this part of the appeal is should the fraction be 20/365. If that fraction is applied in the example set out in the preceding paragraph then rather than receiving £400 the worker would receive approximately £285. That cannot be correct and the reason why it is not

correct is that the fraction 20/365 does not apply like for like figures. Rather one is using both working and non-working days as the divisor and applying that divisor to 20 working days. However if there are 260 working days in a 12 month period (5 x 52 = 260) and one applied the fraction 20/260 to £5,200 then the correct figure of £400 would be achieved. The same figure of £400 is achieved by applying the percentage which is equivalent to 20/260, namely 7.692308%. It can be seen that the fraction 20/260 is the same equivalent to the fraction 4/52.

[132] What then happens if the worker works for say 6 days a week? Does the divisor of 20 working days increase from 260 to 312 (6 x 52 = 312) so that the fraction is 20/312. Assume that the worker earns exactly the same amount in overtime over the year that is £5,200 but takes 6 days every week rather than 5 days every week to achieve that figure. Why then should he not receive £400 during his four *weeks* annual leave? Applying the fraction 20/312 would produce £333.33 rather than £400. This cannot be correct for the reason that one is seeking to achieve a figure for a *week*'s *leave.* It also cannot be correct as the number of working days in the four week period increases from 20 to 24. The fraction should be 24/312. That fraction produces £400 and it is equivalent to the fractions 4/52 and 20/260. Also it is equivalent to 7.692308%.

[133] As we have indicated we consider that it is wrong in principle to use the divisor 365 as a divisor to 20 working days. The answer to the issue as defined by the parties is that it is not a lawful approach to divide the number of working days in the four weeks' leave period (20) by the number of calendar days in the reference period.

[134] We consider that the maintenance of remuneration and what is normal remuneration is a question of fact just as the reference period is a question of fact. We have given various illustrations but emphasise that apart from the point of principle which we have decided the outworkings are best addressed in evidence in individual cases.

(vi) Conclusion

[135] We allow the Respondents' appeal against the Tribunal's finding that the appropriate divisor is 365.

Part F

The sixth remaining issue on the appeal being the identification of the appropriate reference period.

(i) The question posed by the parties

[136] The question posed by the parties is having regard to the fact that the parties agree that the appropriate reference period for the assessment of normal pay is a question of fact in each case, is the court in possession of sufficient information to give the parties any assistance as to what is likely to be the appropriate period in the case of a claimant whose case contains no features particular to that person (for example, maternity absence, illness, reserve duty etc.)?

(ii) The Tribunal's findings

[137] The Tribunals' findings at paragraph [232] stated that "the simple fact is that the reference period must be long enough to be representative of a claimant's working pattern." The Tribunal went on to state that "this must be done by reference to each individual claimant" and that "a reference period cannot be fixed by a tribunal in a general or arbitrary manner." The Tribunal stated that "what may be a representative reference period for one individual claimant with his or her own pattern of employment may well not be a representative reference period for another claimant with a different pattern of employment." The Tribunal stated that this meant "it will require individual analysis and decision-making on a case by case basis."

[138] The Tribunal then went on in paragraph [236] to give a non-binding indication that a pragmatic solution would be to apply a 12 month reference period. The Tribunal observed that there are significant administrative reasons for adopting a straightforward the 12 month reference period and that this was what was proposed in Northern Ireland by the (Appellants) for the period going forward. The Tribunal further observed that "there is much to be said for administrative convenience."

(iii) The agreement of the parties

[139] Both the Appellants and the Respondents agreed that the Tribunal's findings which we have set out in paragraph [137] are correct so that the question of the appropriate reference period would require individual analysis on a case-by-case basis.

[140] The Appellants stated that they had submitted to the Tribunal that the appropriate reference period for determining "normal pay" depends on the

circumstances. Their submission was that there may be different reference periods for different claimants, and even different reference periods for individual claimants at different stages in their careers. The Appellants submitted in this court that the Tribunal should have adopted that approach.

[141] The Respondents stated that a 12 month reference period has the advantage of considering the pattern over the entirety of the year thus avoiding distortions caused by highs or lows of overtime. It was suggested that this was of particular importance given that overtime accounts for a significant proportion of police officers' pay and it can fluctuate depending on the time of the year, the posting of the officer, or the circumstances of the particular officer. Furthermore that workers and employers are interested in pay over a full year so that for instance when advertising vacancies, the Appellants do not state pay as being per 3 months or 6 months. It was also suggested that shorter reference periods could run into questions of "gaming the system" by, for example, the employer ensuring that individuals do not do overtime in a shorter three months reference period before they take annual leave, or by individuals swapping overtime between themselves to ensure that immediately before taking annual leave their overtime massively increases. On this basis it was suggested that taking 12 months as the reference period avoids the risk of individuals being under-compensated or of obtaining a windfall. There was no suggestion that this "gaming" had actually occurred but it was suggested as being an appropriate factor to take into account in supporting the pragmatic approach of generally adopting a 12 month reference period.

[142] As the question posed indicates the parties enquire as to whether this court can give any assistance as to what is likely to be the appropriate period absent special features.

(iv) Conclusion

[143] The parties are agreed that the reference period is fact sensitive in each case.

[144] In relation to past losses, provided a claimant took the whole or part of his four weeks' annual leave in the previous 12 months then taking a 12 month reference period will be to the detriment of that claimant as the reference period will include holiday pay from which there have been unlawful deductions (unless normal pay and basic pay are the same). As a result the total 12 month figure will be too low so that applying the fraction 4/52 would be inappropriate. The solution in relation to past losses may well be to exclude the 4 weeks' holiday pay from the annual total and then to apply a different fraction to that smaller total. In that way the divisor of 52 is reduced to 48 and the fraction to be applied to the reduced annual total is 4/48. Another formula that could be employed is 4 over 52 (- the number of the four weeks' annual leave taken) x the total pay for the 12 months (- the amount of holiday pay actually received). However going forward once a claimant receives normal pay for the 4 week holiday period then taking the holiday period into account in the reference period should have no adverse impact on the calculation of normal pay.

We emphasise that this is a question of fact in an individual case and that we are not in possession of sufficient information to determine whether these facts do or do not apply.

[145] We do not consider that it is appropriate to add anything further.

[146] We also encourage the parties to agree a pragmatic, administration-friendly method for calculating and paying "normal pay" based on averages taken over a rolling 12 month period immediately preceding the period of leave. There is no obligation on them to do so.

Overall conclusions

[147] We have already set out our conclusions in relation to the remaining issues as identified by the parties.

[148] In summary:

(i) we dismiss the Appellants' appeal in relation to the issues in Parts B, C, and D;

(ii) we dismiss the Respondents' cross appeal in relation to the issues in Part A;

(iii) we allow the Respondents' cross appeal in relation to the issues in Part E; and

(iv) in relation to Part F we raise one factual issue for consideration but thereafter do not consider that it is appropriate to add anything further.

[149] The lead cases should now continue before the Tribunal to a final determination.