Neutral Citation Number: [2022] EAT 169

Case Nos: EA-2022-000029-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 January 2023

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

L LLOYD **Appellant**

- and –

ELMHURST SCHOOL LIMITED **Respondent**

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Darryl Hutcheon (instructed by Unison Legal Services) for the **Appellant**
James Wynne (instructed by Cunningham Legal Ltd) for the **Respondent**

Hearing date 12 October 2022

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JUDGMENT

SUMMARY

NATIONAL MINIMUM WAGE

The claimant was employed as a part-time learning support assistant at the respondent school and was paid a salary in equal monthly instalments. She worked three days (or 21 hours) a week during term time and, according to clause (4) of her contract, was entitled to the usual school holidays as holidays with pay. She brought a claim for unlawful deduction from wages, contending that she had been paid at below the level of the national minimum wage. It was accepted that the claimant was engaged in "salaried hours work" for the purpose of the National Minimum Wage Regulations 2015. The tribunal dismissed her complaint, holding that her "basic hours" for the purpose of regulation 21(3) of the National Minimum Wage Regulations were based on 21 hours over 40 weeks, comprised of (i) the 36 weeks she worked in term time and (ii) her four weeks' leave due under the Working Time Regulations 1998.

The appeal was allowed. The claimant's "basic hours" for the purpose of regulation 21(3) were to be ascertained from her contract and could include hours which were not working hours. Where a worker is contractually entitled to receive his or her normal salary for a period of absence, such as contractual holidays, the periods of absence from work can count towards the "basic hours" of salaried hours work even if they are not absences from a period when a worker would otherwise be working. The tribunal had erred in focusing on the weeks the claimant in fact worked, to which it had added her statutory entitlement to paid annual leave, rather than ascertaining the claimant's basic hours from her contract alone.

Michael Ford KC, Deputy Judge of the High Court

Introduction

1. This appeal concerns the assessment of the "basic hours" of a worker who works "salaried hours work" for the purpose of the **National Minimum Wage Regulations 2015** ("NMWR"). It is mostly a question of statutory interpretation on which there is no direct authority.

2. The appeal is brought by Ms Linda Lloyd against a judgment of the employment tribunal (Employment Judge Burge, J Cook and S Gooden), written reasons for which were sent to the parties on 8 December 2021. The employment tribunal (the "Tribunal") dismissed her claim against the Respondent, Elmhurst School Limited, for failing to pay the national minimum wage ("NMW"). The Notice of Appeal was sealed on 11 March 2022 and permission to appeal was granted by Heather Williams J.

3. I shall refer to the parties as the claimant and respondent, as they were before the Tribunal.

4. Before me, the appellant was represented by Mr Hutcheon, who did not appear below, and the Respondent by Mr Wynne, who did appear in the Tribunal. I am very grateful to both counsel for their helpful and clear written and oral submissions.

The Tribunal decision

5. The issue before the Tribunal was whether the claimant was paid the NMW. The NMW operates as a mandatory contractual entitlement by virtue of section 17 of the **National Minimum Wage Act 1998** ("NMWA") . The claim was brought as an unlawful deductions claim under Part II of the **Employment Rights Act 1996** ("ERA").

6. The NMW is calculated in accordance with a formula in regulation 7 by which, in summary, the remuneration calculated as due for the relevant "pay reference period" is divided by the "hours of work" for that period determined in accordance with Part 5. It was common ground that the claimant was a "worker" within the meaning of the **NMWA** and was performing "salaried hours work" for the purpose of regulation 21 of the **NMWR**. The Tribunal recorded the three issues for the hearing at paragraph 3, though only one was in dispute. They were:

(1) What was the claimant's "pay reference period"? It was common ground that this was one month: see Tribunal reasons, paragraph 19(a).

(2) What was the claimant's total annual gross pay? There was no dispute that it was, at the time of the Tribunal judgment, £8,568 per annum: see paragraph 11.

(3) What was the time which should count during the pay reference period? It is this issue which gives rise to the appeal: the claimant contended that her "basic hours" in the year fell to be calculated over 52 weeks, whereas the respondent said that they were based on 40 weeks.

7. The facts were short and there was limited dispute about them. The Tribunal found the following facts:

> "5. The Respondent is a private school for boys in South Croydon. In September 2009 the Claimant was recruited as a Learning Support Assistant ("LSA", also known as a Teaching Assistant). There was no job advert, she heard about the job through a friend. She was interviewed by Charles South, CEO and Bursar. She would be working 2 days per week and would be paid £311.74 per month. Her main responsibilities were helping students on a one to one basis and in small groups. In evidence to the Tribunal the Claimant said that her understanding of her working arrangements when she was recruited was that she worked term time only.
>
> 6. The Claimant signed a contract with the Respondent. There was no clause in the contract that dealt with hours of work. However, clause 3(b) stated that:
>
> > "*during term time these duties must be personally attended to during such hours, including out of school hours, as the CEO and/or Head Teacher may reasonably direct. In addition the Teaching Assistant may be required to work for varying short period after the end and before the beginning of any term."*
>
> 7. Subject to this clause 3(b), in clause 4 the claimant was "entitled to the usual school holidays as holidays with pay". Not only did the contract not specify what rate of pay the school holidays would be paid at, there was no clause saying what her salary would be.

> 8. In 2010 the Claimant's days increased to 3 days (21 hours).
>
> 9. In October 2013 the Respondent became part of Bellevue Education International Limited.
>
> 10. The Claimant is a valued member of staff. Over the course of her employment she undertook training for forest school outside of school hours, and occasionally represented the school. She also undertook a course on mental health approximately two years ago which she received extra pay for. In cross examination the Claimant accepted that as a proportion of her working time these extra activities were "hardly noticeable". The Tribunal finds as a fact that none of these extra activities meant that she had to work during school holidays and that the Claimant worked term times only.
>
> 11. The Claimant received her pay monthly in equal installments over 12 months. The Claimant's gross pay is currently £8568 (0.6 equivalent of £14,280).
>
> 12. Mr Padfield gave evidence, that is accepted by the Tribunal, that the Claimant's pay was calculated on the basis of 40 weeks – she worked 36 weeks during term time while the school was open to students and that she was also entitled to 4 weeks' annual leave in accordance with her statutory entitlement."

8. For completeness, I should set out the relevant provisions of clauses 3 - 5 of the claimant's contract:

> "3. (a) The Teaching Assistant shall carry out the professional duties which may reasonably be expected of him/her and such particular duties which may be assigned to him/her by the CEO and/or Head Teacher.
>
> (b) During term time these duties must be personally attended to during such hours, including out of school hours, as the CEO and/or Head Teacher may reasonably direct. In addition, the Teaching Assistant may be required to work for varying short periods after the end and before the beginning of any term.
>
> .....
>
> 4. Subject to clause 3(b) hereof, the Teaching Assistant shall be entitled to the usual school holidays as holidays with pay.
>
> 5. (a) The Teaching Assistant will receive a salary calculated in accordance with the Elmhurst Salary Scale currently in force. The school has the right to alter the salary from time to time and any such alteration will be effective from the date notified to the Teaching Assistant. A copy of the salary scale is available for reference on application to the Principal.
>
> (b) Part-time teachers will receive one tenth of the appropriate full time salary for each session worked, irrespective of it being a morning or afternoon session. Daily sessions being from 8.30-4.00. The salary shall be paid by monthly instalments in arrears on the last day of the month. This is in effect for two days a week."

9. As the Tribunal recorded at paragraph 8, in 2020 the claimant began working three days a week or 21 hours. Those weekly hours were based, I was told, on the above daily sessions,

amounting to three full daily sessions of seven hours a day (after breaks). This meant that, when the claimant was first engaged, she was paid a fixed annual salary based on two days a week and, once she moved to working three days a week, she was paid 0.6 of a full-time teacher's salary, payable in equal instalments at the end of each month.

10. The Tribunal went on to refer to a complaint raised by the claimant that she was not paid the NMW and a decision of HMRC that employees at the school were paid for a 40-week period (with one exception), with the consequence there was no under-payment of the NMW. It also referred to new employment contracts which the respondent asked staff to sign following the HMRC investigation which, I was told, no longer contained clause (4).

11. After referring to the relevant regulations of the NMWR, including regulation 21, the Tribunal summarised the competing arguments of the parties at paragraphs 25 to 27. In summary, the claimant contended that, as a result of clause (4) in her contract, her basic hours in the calculation year were 21 hours over 52 weeks because the paid school holidays counted for this purpose. The Tribunal referred to Mr Wynne's contrary argument for the respondent, addressing clause (4) of the contract, at paragraph 26:

> "Mr Wynne described the "holiday with pay" clause as "loose wording". It is an ambiguous clause. However, for NMW purposes it does not matter as the Tribunal needs to determine what the Claimant's basic hours are and it is clear that she is not working during the 12 weeks' leave."

His argument before the Tribunal was that the claimant's basic hours across the year were 21 per week during the 36 weeks of term time plus her four weeks' of statutory leave (it is accepted that this was wrong: it should have been 5.6 weeks' leave in accordance with regulations 13 and 13A of the **Working Time Regulations 1998** ("WTR") and the judgment of the Supreme Court in **Harpur Trust v Brazel** [2022] ICR 1380).

12. The Tribunal noted the different effect of these submissions at paragraph 28: if the claimant's basic hours were calculated over 52 weeks, the claimant was paid less than the NMW; if they were calculated over 40 weeks, as submitted by the respondent (or 41.6 weeks, as now submitted on appeal), she was paid over the NMW.

13. At paragraph 30 the judgment stated:

> "The Tribunal has found as a fact that the Claimant worked term time only. When the Claimant accepted her job it was on her and the School's understanding that she would work term times only. The contract did not explicitly set this out although this is consistent with clause 3(b) which states:
>
> *"during term time these duties must be personally attended to during such hours, including out of school hours, as the CEO and/or Head Teacher may reasonably direct. In addition the Teaching Assistant may be required to work for varying short period after the end and before the beginning of any term."*

14. After stating that hours of work outside term-time, such as forest school training, were "hardly noticeable", the Tribunal said this:

> " 32. The Tribunal ascertains that, in accordance with her contract, the Claimant's basic working hours are the hours that she works (plus her 4 week pro-rated holiday entitlement). The fact that she has the clause "the usual school holidays as holidays with pay" does not mean that these school hours are deemed to be working hours for the purposes of the NMW legislation. Moreover, this interpretation does not accord with the legislation and the caselaw. In the Regulations there are examples of time that do not count towards NMW calculations such as where a salaried hours worker sleeps at/near a place of work when on call, and is provided with suitable facilities for sleeping – only time when the worker is awake for the purposes of working will be treated as working time. In *Royal Mencap Society v Tomilson- Blake and another* [2021] ICR 758 the Supreme Court said that the Court of Appeal had failed to recognize that the NMW Regulations draw a basic distinction between working and being available for work. If the worker was only available for work, his or her activity was distinct from working and could not also fall within the meaning of time work or salaried hours work.
>
> 33. The same principle can be applied in this case – the fact that the contract entitles the Claimant to "holidays with pay", does not mean that this counts as a working activity. The Claimant is not working during those 12 weeks. The purpose of the National Minimum Wage legislation is to ensure that workers are paid a minimum amount for the work that they do. Basic hours need to be "ascertained in accordance with the contract". The Tribunal concludes that it is not correct that "the usual school holidays as holidays with pay" mean that the 12 weeks of school holiday should be paid at the same rate as when she is working/on statutory leave and should be included in her basic hours worked calculation for NMW purposes. "

15. On that basis, the Tribunal concluded at paragraph 34 that the "Respondent has shown that the Claimant's 'basic hours' as ascertained in accordance with her contract (and as understood by both parties when it was entered into) is 21 hours over 40 weeks". For good measure, at paragraph 36 it went on to address an argument for the claimant that fully-paid absences from work should not be discounted, saying that it did not arise because the additional 12 weeks' holiday did not form part of her "basic hours".

The Legal Framework

16. The background to the introduction of the NMWA is set out in the judgment of Lady Arden in **Royal Mencap v Tomlinson-Blake** [2021] ICR 497 at paragraphs 6-7. By section 1(1) of the NMWA, a qualifying worker "shall be remunerated by his employer in respect of work in any pay reference period at a rate which is not less than the [NMW]". The rate is an hourly rate, as prescribed from time to time in regulations: sections 1(3), 2.

17. According to section 2(3):

> "The regulations may make provision with respect to -
> (a) the circumstances in which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated.
> (b) the treatment of periods of paid or unpaid absences from, or lack of, work and of remuneration in respect of such periods."

Provision may be made for a matter in subsection (3)(a) to be determined by reference to the terms of an agreement: section 2(4).

18. The detailed means of calculating a worker's entitlement to the NMW is set out in the **NMWR**, which replaced the **National Minimum Wage Regulations 1999** from 5 April 2015. The hourly rate of the NMW is set out in regulations 4 and 4A; it is currently £9.50 for adults aged 23 or over (referred to as "the national living wage rate"). In broad terms, to

see if a worker has been paid the NMW it is necessary to divide the remuneration received in a pay reference period by the number of qualifying hours in that period.

19. Regulation 7 provides the framework for undertaking this calculation. It states:

> "A worker is to be treated as remunerated by the employer at the hourly rate determined by the formula RH, where-
> "R" is the remuneration in the pay reference period determined in accordance with Part 4;
> "H" is the hours of work in the pay reference period determined in accordance with Part 5."

20. In order to calculate "R", Part 4 takes into account (in general terms) all payments from the employer to the worker as respects the pay reference period, determined in accordance with Chapter 1 but less reductions determined in accordance with Chapter 2: see regulation 8.

21. It is the determination of "H" under Part 5 which is in issue in this appeal. By regulation 17, for the purpose of the calculation of the hours of work in regulation 7, "the hours worked or treated as worked by the worker in the pay reference period are determined" as regards salaried hours work in accordance with Chapter 2. Chapter 2 has the title "Salaried Hours Work" and includes regulations 21-29.

22. Regulation 3 originally defined "basic hours" as having "the meaning given in regulation 21(5)". It is accepted that this was an error - regulation 21(5) is not about basic hours at all but is about payment in instalments - and the mistake was belatedly corrected by regulation 3 of the National Minimum Wage (Amendment) (No.2) Regulations 2020 (the "**2020 Amendment Regulations**"). Regulation 3 therefore now states that "'basic hours' has the meaning given in regulation 21(3)".

23. Regulation 21 was amended by the **2020 Amendment Regulations** with effect from 6 April 2020 but in ways which, it is agreed, are not material to this appeal. At the time the claim form was presented to the tribunal on 25 November 2019, regulation 21 stated as follows:

> "21.— The meaning of salaried hours work
>
> (1) "Salaried hours work" is work which is done under a worker's contract and which meets the conditions in paragraphs (2) to (5) of this regulation.
>
> (2) The first condition is that the worker is entitled under their contract to be paid an annual salary or an annual salary and performance bonus.
>
> (3) The second condition is that the worker is entitled under their contract to be paid that salary or salary and performance bonus in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract ("the basic hours").
>
> (4) The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than an annual salary or an annual salary and performance bonus.
>
> (5) The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month—
>
> (a) in equal weekly or monthly instalments, or
>
> (b) in monthly instalments that vary but have the result that the worker is entitled to be paid an equal amount in each quarter.
>
> (6) Circumstances where it may not be practicable to pay a worker by equal instalments, or by an equal amount in each quarter, include where—
>
> (a) a performance bonus is awarded;
>
> (b) the annual salary is varied;
>
> (c) a payment is made in respect of hours in addition to basic hours; or
>
> (d) the employment starts or terminates during a week or month with the result that the worker is paid a proportionate amount of their annual salary for that week or month.
>
> (7) Work may be salaried hours work whether or not—
>
> (a) all the basic hours are working hours;
>
> (b) the worker works hours in excess of the basic hours (whether the worker is entitled to be paid for those additional hours or not);
>
> (c) the annual salary may be reduced due to an absence from work.
>
> (8) A "performance bonus*"* is a payment paid to a worker on merit attributable to the quality or amount of work done in the course of more than one pay reference period."

24. By regulation 22(3),"where the pay reference period is a month, the hours of salaried work in that period are the basic hours divided by 12". According to regulation 22(5) "the basic hours are to be ascertained in accordance with the worker's contract on the first day of the pay reference period in question unless paragraphs (6) or (7) apply" (Paragraphs (6) and (7)

apply where, for example, a worker works additional hours in a calculation year or where the contract is terminated during the calculation year).

25. Regulation 23 deals with absences from work. It states:

> "23.— Absences from work to be reduced from the salaried hours work in a pay reference period
>
> (1) The hours a worker is absent from work are to be subtracted from the hours of salaried hours work in a pay reference period if all of the following conditions are met—
>
> (a) the employer is entitled under the worker's contract to reduce the annual salary due to the absence;
>
> (b) the employer pays the worker less than the normal proportion of annual salary in the pay reference period as a result of the absence.
>
> (2) The hours during which a worker takes industrial action are to be subtracted from the hours of salaried hours work in a pay reference period if an annual salary was payable for those hours, or would have been payable but for the industrial action."

While regulation 23 did not figure in the Tribunal's reasons in relation to the claimant, it is said to be relevant because, Mr Hutcheon submits, it presupposes that absences from work would count unless excluded by that regulation.

26. Regulations 24-28 apply for calculating the hours of salaried hours work where a worker works additional hours in excess of the basic hours in a calculation year: see regulation 22(6). To see if this regulation is triggered, a tribunal or court performs a calculation of adding up all the hours listed in regulation 26(1)(a)-(d). The first two items on the list are:

> "(a) hours worked which form part of the basic hours in the calculation year;
> (b) hours when the worker was absent from work which form part of the basic hours in the calculation year."

Hours "treated as worked" by regulation 27 also form part of the calculation in regulation 26, subject to conditions: see regulation 26(1)(d). Such hours include hours spent training "when the worker would otherwise be working", hours when a worker is available near a place of work and hours spent travelling for the purpose of working "when the worker

would otherwise be working" (see regulations 27(1)(a)-(c)).

27. Finally, my attention was also drawn to some of the provisions governing the calculation of hours of work for those performing "time work". This is work, other than salaried hours work, as defined in regulation 30. It includes work paid by reference to the "time worked by the worker" (regulation 30(a)); an example would be zero hours working. The hours worked or treated as worked for those engaged in time work is determined in accordance with Chapter 3. For this type of work, the hours in each pay reference period are "the total number of hours of time work worked by the worker or treated under this Chapter as hours of time work in that period" (regulation 31). The Chapter goes on to treat time when a worker is required to be available at or near the workplace (regulation 32), time spent training (regulation 33) and some hours spent travelling (regulation 34) as hours of time work (regulation 35). But, save for these provisions, regulation 35(a) specifically excludes the "hours a worker is absent from work" as being treated as hours which count towards time work.

28. The government has published some guidance on the NMW, though none of it is statutory guidance. In the appeal I was shown extracts from the guidance document, **Calculating the National Minimum Wage** (6 April 2020) which stated (and continues to state):

> "Absences from work. If you pay a worker their normal salary while they are absent from work and this forms part of their employment contract, the time of the absence counts towards the workers' time worked for the minimum wage purposes. For example, during rest breaks, lunch breaks, holidays, sickness absence or maternity/paternity/adoption leave."

I was also shown extracts from HMRC's internal but published guidance. For example, the HMRC document **NMWM08070 - Working time: salaried hours work: considering adjustments for absences** states that "absences from work are included within basic hours where the worker is contractually entitled to receive their normal salary", referring to

holidays and sickness as some of the common examples of such absences.

Submissions: Summary

29. For the claimant, Mr Hutcheon submitted in outline that the determination of the "basic hours" for salaried work is a question of contractual interpretation, demonstrated by the wording of regulation 21(3) and the reference to "entitled under their contract to be paid" in that regulation. It was not a question based on the work in fact done, in contrast to the statutory rules on time work. That was not the exercise which the Tribunal undertook, he submitted: instead of interpreting the basic hours which gave rise to the claimant's entitlement to pay, the Tribunal wrongly focused on the hours when the claimant in fact worked. It was implicit in **NMWR** that fully paid contractual absences counted for the purpose of the basic hours, unless a subtraction was permitted under regulation 23. Had the Tribunal applied the correct test, only one conclusion was possible: that the claimant's basic hours were 52 weeks x 21 hours each year.

30. For the respondent, Mr Wynne submitted that the real issue here was whether the claimant worked on a 52-week contract or on a term-time only contract. Paid absences could count for the purpose of the "basic hours" but only if they were absences *from* work: that is, leave from days a worker would otherwise be working. Here, on the Tribunal's findings the claimant was only required to work during term time. Accordingly, the Tribunal was entitled, and bound, to conclude that her basic hours "ascertained in accordance with [her] contract" were term-time only, and the school holidays were not holidays from periods she was expected to work. While he accepted that the claimant had a permanent contract, the respondent calculated her pay on the basis of 40 weeks only - the 36 weeks of term time she worked, plus her statutory entitlement to four weeks' annual leave (it was accepted this should have been 5.6 weeks' annual leave but nothing turned on that). Accordingly, she was

only paid for 40 weeks each year, and so her annual basic hours were 40 x 21 hours each year (or 41.6 x 21 hours on the basis of 5.6 weeks' leave). The result was that the Tribunal decision was correct, even if it referred to some unrelated legislative provisions in reaching its decision.

Analysis: the Construction of "Basic Hours" in NMWR

31. The judgment of Lady Arden in **Royal Mencap** gives some general guidance on the approach to construing **NMWR**. At paragraph 35 she said:

> "These appeals raise questions of statutory interpretation, and, in my judgment, I should not approach them with any preconception as to what should entitle a worker to a wage. It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work. Nor does the legislation proceed on the assumption that the worker must be paid a living wage."

I take that as a strong cautionary note against using any presumed purpose of the legislation as the primary or a reliable guide to construction and, in particular, against assuming that any forms of activity or time should (or should not) generate an entitlement to the NMW. Rather, the focus should be on the detailed provisions which provide how the NMW is to be calculated for each type of work.

32. Underlining that approach are two further matters raised by Lady Arden in **Royal Mencap**. First, she said that objectives of the **NMWA** are "no doubt complex" and cannot be reduced to any single one (paragraph 36). Second, when it came to examining the question in **Royal Mencap** itself, which concerned whether hours spent on "sleep-in" shifts counted for the purpose of the NMW, Lady Arden focused very closely on the wording of the relevant regulations rather than seeking to derive their meaning from any presumed legislative purpose. After noting that regulation 17 referred to "hours worked or *treated* as worked" (paragraph 38; her emphasis), she said this at paragraph 39:

> "The use of the word "treated" in regulation 17 of [NMWR] is a signal that a counterfactual situation may arise. It underscores that the rules enacted by the regulations may not accord with reality and that there may be occasions when hours are not treated as hours worked for the purpose of the regulations even though a different number of hours might have been determined to be worked in the absence of that provision."

In addition, one provision must not be read in isolation because the rules must be read together to produce a "harmonious whole" (paragraph 43).

33. The **NMWR** are complicated and intricate and the legal question faced by the Tribunal was far from straightforward. In principle, its task was to determine the claimant's basic hours in each pay reference period under regulation 22. There was no suggestion here that the claimant worked additional hours in any pay reference period (see regulation 22(6)) and nor was regulation 22(7) applicable, so regulation 22(5) applied, by which the "basic hours are to be ascertained in accordance with the worker's contract on the first day of the pay reference period". The contract here was the same throughout the claimant's employment, save for the variation to the hours in 2010. Because "basic hours" are defined in regulation 3, incorporating in turn regulation 21(3), it was in accordance with the claimant's contract that her yearly basic hours were to be ascertained. Those annual basic hours, as ascertained from her contract, would then fall to be divided by 12 to give the hours of salaried work for each one-month pay reference period: see regulation 22(3). So far, so simple.

34. Before examining the arguments and grounds of appeal in detail, I should clarify what was and what was not in dispute:

(1) It was not in dispute in this appeal, and nor was it in dispute before the Tribunal, that the claimant was a permanent employee, who was employed throughout the school year and who was engaged in "salaried hours work" for the purpose of the **NMWR**. This meant she met the four conditions in regulation 21, including the second condition in regulation 21(3) that she was entitled to be paid in respect of a number of hours in a year and that those hours necessarily could be ascertained from her

contract.

(2) Second, it was common ground that the term "basic hours" should be determined at all material times in accordance with regulation 21(3), as regulation 3 now states following the amendment made by **2020 Amendment Regulations**. Both counsel agreed, and I accept, that the original reference in regulation 3 to regulation 21(5) was a drafting mistake. A rectifying construction should therefore be given to the original definition of "basic hours" in regulation 3, so that it is to be read as stating the same prior to its amendment by the **2020 Amendment Regulations** as it now states.

(3) Third, both counsel agreed that the ascertainment of the claimant's "basic hours" depended on the meaning of her contract: the statutory question was not answered by looking at the hours which she in fact worked. That, in my view, is a necessary consequence of the wording of regulation 21(3) which looks at the hours in a year for which the worker is "entitled under their contract" to be paid their salary, with the hours to be "specified or ascertained in accordance with their contract". Reinforcing that interpretation is regulation 22(5), which uses similar wording. The claimant's contract was the exclusive means of ascertaining her basic hours in each and every pay reference period.

(4) Fourth, the findings of HMRC following its investigation in 2017-2018, to which the Tribunal referred at paragraph 13, were not binding on the legal question before the Tribunal as to the correct interpretation of **NMWR**.

35. A fifth matter was also not in dispute. For the respondent, Mr Wynne accepted that some periods of fully paid absence count towards the "basic hours" of salaried hours work. He accepted that if a worker is entitled to be paid contractual salary while absent from work on holiday, ordinarily those periods of holiday will count towards the worker's "basic hours".

36. Take the example, considered in oral argument, of a full-time worker whose contract said he or she was entitled to a salary of £400 a week for a 40-hour week and to seven weeks' holiday at full pay each year. If the worker were not paid for any week of the seven weeks' holiday, he or she could bring a claim in contract for salary due in respect of that holiday. Mr Wynne accepted that, in those circumstances, the annual basic hours would be based on a multiplier of 52: the "basic hours" for the purpose of regulation 21(3) would comprise the entitlement under the contract to be paid salary *both* in respect of the weekly working hours *and* in respect of the notional hours of work comprising the seven weeks' holiday. The total basic hours in the year would therefore be 52 x 40 = 2,080.

37. I consider Mr Wynne was right to make this acceptance. That basic hours can include non-working hours is presupposed by regulation 21(7)(a), by which a worker may be engaged in salaried hours work whether or not "all the basic hours are working hours". It is also presupposed by regulation 26 where, to see if a worker has worked more than the basic hours in a year, a tribunal includes in the total both hours worked and "hours when the worker was absent from work which form part of the basic hours in the calculation year" (regulation 26(1)(b)). Finally, such an interpretation is also supported by regulation 23(1), which provides for the subtraction from hours of salaried work in a pay reference period of hours where (i) the employer is entitled under the contract to reduce the annual salary due to absence and (ii) the worker is paid less as a result. An obvious example is if a worker is paid half pay during sickness absence: the hours of sickness absence from work would then not count in the calculation. But the implication of regulation 23 is that, but for that regulation, absences such as sickness at full pay would count towards the basic hours in the pay reference period.

38. The principal point of dispute on statutory interpretation was *which* non-working hours of absence or holiday - to put the matter neutrally - count towards basic hours. Mr Hutcheon

argued that, while it depends on the individual contract, in principle it includes all the hours which are paid as contractual holiday (so long as the employer is not entitled under the contract to reduce the annual salary during those periods, when regulation 23 would apply). By contrast, Mr Wynne argued that the only periods of absence which counted towards basic hours were those which were absences *from days when the worker would otherwise be working*. The counterfactual question he proposed was that if the worker were not on leave, would he or she be under an obligation to work? If the worker was under no such obligation, the absence would not count towards basic hours; if the worker did owe such an obligation, the notional hours worked in the period of absence would count.

39. Although the area of disagreement is narrow, the resolution of this point is central to the grounds of appeal which follow and so I deal with it first in this judgment. While I have not found the point straightforward, I prefer the arguments of Mr Hutcheon for the claimant. My reasons are as follows.

40. First, I do not consider that any assistance is gained from any purpose of **NMWA**. Mr Wynne floated a light suggestion that the purpose of the **NMWA** was to pay workers for the work they do. But, in accordance with the judgment of Lady Arden in **Royal Mencap**, the objectives of the legislation are complex and the detailed rules may "treat" hours as worked in a way which does not accord with reality, as regulation 17 recognises. In the context of the detailed code such as **NMWR**, any presumed purpose of the **NMWA** or the regulations themselves is a poor guide to what hours are to be treated as basic hours. That is especially so in relation to the provisions dealing with salaried hours work, where the regulations expressly contemplate that "basic hours" are not restricted to working hours (see, for example, regulation 21(7)).

41. Second, once it is accepted that paid absences can count towards the basic hours, there is little support in the wording of regulation 21(3) for an approach that distinguishes absences

depending on whether or not they are absences from what would otherwise be work. Regulation 21(3) simply looks to whether there is entitlement to be paid in respect of a number of hours in a year ascertainable from the contract. It does not focus on the quality of those hours - for example, whether they are hours of work or hours attributable to a particular type of absence. Once more, this interpretation is reinforced by regulation 21(7), making clear that non-working hours, which are also not further specified by type, can count towards basic hours. Nothing in regulation 21(3) suggests that the basic hours ascertained from the contract exclude the holiday if it must take place, say, during periods of an annual factory shut down.

42. Third, Mr Wynne sought to counter the claimant's reliance on regulation 23, which provides for the subtraction from basic hours of certain forms of absence "from work", and on similar statements in the non-statutory guidance. It is only where a worker would otherwise be expected to be working, he argued, that the worker is absent "from work" and regulation 23 is engaged.

43. I do not consider those words will bear the weight he seeks to place on them. For it is notable that in some cases the legislation does expressly focus on the counter-factual question. For example, regulation 27 applies for the purpose of whether a worker is treated as working more than basic hours in the calculation year. Time spent training and travelling for work count for this purpose but only if it is time "when the worker would otherwise be working": see regulation 27(1)(a)(c). A similar counterfactual is posed in other regulations (see, e.g., regulation 19). In that legislative context, if "basic hours" for the purpose of regulations 21(3) only included hours attributable to absences from what would otherwise be work, I consider this would have been spelt out, just as Mr Hutcheon submitted. By the same token, and so that the regulations work in harmony (per Lady Arden in **Royal Mencap**), I consider the absences at reduced pay which potentially fall to be subtracted

under regulation 23, such as sickness absences, are not restricted to absences from what would otherwise be an obligation to work.

44. Fourth, in practical terms it may often be difficult to answer the counterfactual question, of whether a period of paid leave would otherwise be a period of work. A workplace may have an annual shutdown or a period during the year when it is not operating at full capacity. If a worker is required to take his or her annual leave at those times or does in fact take leave then, is that leave from a period when he would otherwise be obliged to work? The problem of uncertainty is not confined to holiday: on the logic of the respondent's argument, where a worker goes on sick leave and is paid a reduced rate, the hours are only subtracted under regulation 23 if the worker would otherwise be working during that period of sickness.

45. For instance, in **Russell v Transocean Resources Ltd** [2012] ICR 185, referred to in oral argument, offshore workers worked two or three weeks offshore followed by two or three weeks onshore. While onshore, they were mostly free from work-related duties but owed obligations to attend some events, such as training courses, appraisals and medical assessments: see Lord Hope at paragraph 8. If a worker took annual leave during the field breaks onshore, as the Supreme Court held they could be required to do for the purpose of the **Working Time Regulations 1998** ("WTR"), it might not be easy to say whether this would amount to leave from what would otherwise be work. Similar problems may arise in respect of workers who are subject to a maximum number of hours of work in a week, month or year, where it may be hard to answer the counterfactual question when they are absent on holiday or owing to sickness.[1]

46. For all these reasons, I consider that in principle the periods of absence which count towards

[1] It is true, of course, that these problems of uncertainty will also arise where the legislation expressly requires a tribunal to address whether the worker would otherwise be working, such as in relation to training and travelling time in regulation 27(1). But here the counterfactual question is an unavoidable consequence of the legislation. Moreover, it is notable that in at least one regulation the legislation has made some attempt to address the problem of uncertainty arising from such a counter-factual question: see regulation 19(2).

basic hours under regulation 21(3) are not restricted to absences from a period which would otherwise be work. If that were the intention of the legislation, it would say so. To return to the earlier example of a worker whose contract provides for a 40-hour week and seven weeks' annual leave: the worker's total annual basic hours would be 52 x 40, regardless of whether under the contract the seven weeks' leave could be taken at any time of the year or had to be taken during a fallow period, such as a factory shut down, during which there might strictly be no obligation to work.

The Grounds of Appeal

47. It is on the legal premise set out above that I consider the individual grounds of appeal.

48. **Ground 1**. The first ground of appeal is that the Tribunal erred in the approach it took at paragraph 26 when it said that clause 4 in the contract, dealing with paid holidays, "for NMW purposes does not matter". It is argued that the Tribunal (i) was required under regulation 21(3) to identify the number of hours a year for which the claimant was entitled to be paid salary "ascertained in accordance with [her] contract" and (ii) therefore to decide in respect of how much holiday the claimant was entitled to be paid her salary. Instead of asking that question, and addressing the effect of clause 4 of the contract, it is submitted that the Tribunal erred by looking at what work the claimant in fact did and/or how the respondent calculated her pay.

49. It was common ground that the claimant was engaged in "salaried hours work" so that her basic hours fell to be ascertained from her contract. On the premise that fully paid absences can count towards "basic hours" even if they are not absences from a period in respect of which a worker owed an obligation to work – see above - the proper meaning of clause 4 of the contract was critical to the Tribunal's task. In particular, that clause was central to the dispute whether the basic hours "ascertained in accordance with the contract" were 21 hours

over 52 weeks of the year, as the claimant submitted, or 21 hours over 40 (or 41.6 weeks) as the respondent argued.

50. Instead of examining the contract, it seems the Tribunal addressed a different question, and examined the periods during which the claimant was *in fact* working. This emerges not only from paragraph 26 itself, where the reason the Tribunal gave to support its view that the contract did not matter was that "it is clear that [the claimant] is not working during the 12 weeks' leave", but also from the analysis it undertook at paragraphs 30-33.

51. The first reason the Tribunal gave to support its conclusion was that it was the claimant's understanding when she accepted the job that she "would work term times only" and that duties she took outside term time were "hardly noticeable" (paragraph 31). That may be factually accurate; but it is not clear it is relevant to the interpretation of the contract. Next, at paragraph 32, in asking itself what were the claimant's basic hours ascertained in accordance with her contract, the Tribunal said that "the claimant's basic working hours are the hours she works plus her 4 week pro-rated holiday entitlement" (my emphasis). But regulation 21(3) does not refer to basic *working* hours at all, but simply to "basic hours", which expressly can include non-working hours. While that might be seen as an over-pernickety reading of the decision if it were an isolated comment, it is consistent with the Tribunal's subsequent analysis. For in the next sentence the Tribunal decided that clause 4 of the contract did "not mean that these school hours are deemed to be *working* hours for the purpose of the NMW legislation" (my emphasis).

52. Consistent with the same approach, in paragraph 33 the Tribunal said (once more my emphasis):

> "(…) the fact that the contract entitles the Claimant to "holidays with pay" does not mean that this counts as a *working activity*. The Claimant was not working during those 12 weeks. The purpose of the National Minimum Wage legislation is to ensure that workers are paid a minimum amount for the work that they do."

The analysis in these paragraphs shows, in my judgement, that throughout its reasons the Tribunal examined the hours the claimant in fact worked, and assumed only those hours counted as basic hours, rather than construing the meaning of her contract and the meaning and effect of clause 4 in particular.

53. In that light, I do not accept that the effect of the Tribunal's reasons was to decide that, as a matter of contractual interpretation, the claimant was engaged on a term-time only contract, as Mr Wynne submitted. That is not what the contract said and it is inconsistent with clause 3(b) as well as clause 4. That she and the school understood she would only work term times (paragraph 30) did not resolve what were her basic hours ascertained from her contract, to which clause 4 was of central relevance. But rather than seeking to interpret the meaning of clause 4 as a matter of contract, the Tribunal discounted it on the basis that the claimant was not working during the school holidays: see paragraphs 32 and 33 of its reasons.

54. There is a further problem with the Tribunal's analysis. The respondent submitted, and the Tribunal accepted, that the basic hours included paid statutory holiday due under **WTR**: see paragraph 32. It is hard to see, however, how this fits with the wording of regulation 21(3), the terms of the claimant's contract, or with the Tribunal's focus on the hours the claimant in fact worked. A worker's paid holiday entitlement under **WTR** does not operate by means of a statutorily implied term in the contract (compare **Barber v RJ Mining** [1999] ICR 679). Accordingly, the claimant's statutory entitlement under **WTR** provided no clue as to the amount of hours for which she was entitled to be paid "under [her] contract" as ascertained in accordance with her contract for the purpose of regulation 21(3).[2] On the Tribunal's analysis, she was not engaged in working activity during those four weeks of

[2] Of course, the position may be different if a worker's contract expressly adopted the rules in WTR. It might say, for example, that "you are contractually entitled to 5.6 weeks' holiday at full pay in accordance with WTR". But the source of the right to payment for those weeks would then be contractual, as well as statutory.

statutory leave (or strictly 5.6 weeks) and so the hours attributable to those weeks should not have been included in her basic hours at all. Alternatively, if those weeks of statutory holiday counted towards her basic hours even though she was not working then (and nor was she expected to work them), no sufficient explanation is given why the same should not have applied to the claimant's contractual paid holiday under clause 4 of her contract.

55. In support of the Tribunal's inclusion of leave due under **WTR**, Mr Wynne submitted that the claimant had a right to be paid for that leave and it formed part of the basis upon which the respondent said it paid the claimant: see Tribunal paragraph 12, referring to the evidence of Mr Padfield, the respondent's head teacher. But that does not overcome the problem that the claimant's contract made no reference to **WTR** leave at all in clause 4. Any subjective intention of the respondent as to what the claimant was being paid for could not resolve the proper interpretation of what were the basic hours ascertainable from her contract; and nothing in the wording of her contract suggested the ascertainable hours for which she was entitled to be paid each year included leave due under **WTR**.

56. Mr Wynne also argued that to include the claimant's notional hours for school holidays would produce the perverse or absurd result that the claimant had the right to be paid the NMW in respect of a period which neither party expected her to work. I suspect that the source of his objection is the length of the period of the claimant's paid leave each year, not its quality, and the point would not have much force if the claimant were only entitled to, say, 5.6 weeks' contractual leave to be taken outside term time. A similar consequence would arise in respect of any worker who had a long period of contractual leave, even if it were from a period which would otherwise be a working period. Bearing in mind that it is important not to approach **NMWR** with pre-conceptions about what periods count towards basic hours (per Lady Arden in **Mencap** at paragraph 35), I do not consider consequentialist arguments, drawing on atypical working arrangements, resolve the question of statutory

construction.

57. For these reasons, in my judgment ground (1) of the appeal succeeds. The Tribunal erred in examining the hours the claimant in fact worked, to which it added her statutory entitlement to paid annual leave under **WTR**. In both respects it departed from ascertaining the number of hours in the year for which the claimant was entitled to salary in accordance with her contract, as to which the meaning of clause 4 was of central importance.

58. **Ground (2)**. Ground (2) confronts squarely the issue of statutory interpretation which I addressed earlier in this judgment, though it overlaps with ground (1). It is that, properly interpreted, "basic hours" for the purpose of **NMWR** include the notional hours attributable to periods of contractual holiday (at least if it is at full pay). It is said that the Tribunal failed to have regard to the provisions of **NMWR** which recognise that non-working hours can count towards basic hours, such as regulation 21(7) and regulation 23. This, it is said, is shown by paragraph 33 of the Tribunal's reasons, where it said that "the fact the contract entitles the Claimant to 'holidays with pay' does not mean this counts as a working activity".

59. This ground of appeal is largely resolved by what I consider to be the correct construction of regulation 21(3) of the **NMWR**. It engages with Mr Wynne's fundamental submission that the only holidays or absences which can count towards basic hours are those from days from which a worker would otherwise be working. As further support for that argument, he relies on clause 3(b) of the contract as showing that the claimant's working hours did not, in practice, involve school holidays.

60. It is not clear to me that clause 3(b) has the effect for which Mr Wynne contends – on its face it contemplates that the claimant could be required to do work outside term time - though I accept the Tribunal found that the claimant's and school's understanding when she

was recruited was that she would only work term time (Tribunal judgment, paragraphs 5, 30). But, at the risk of repetition, addressing what constitutes "basic hours" for the purpose of salaried hours work does not depend on the hours which a worker works and it can, depending on the terms of the contract, include periods of absence for which contractual salary is due. The Tribunal's analysis was inconsistent with answering that statutory question because it examined whether the claimant was engaged in "working activity" outside term time, rather than asking whether those periods of contractual holiday could form part of her basic hours. Moreover, the same problem of inconsistency of including WTR leave but excluding contractual leave, when neither was leave from what would otherwise be a period of work, arises in respect of this ground too.

61. **Ground (3)**. The third ground of appeal is that the Tribunal erred in paragraph 33 of its reasons in placing reliance on the decision of **Royal Mencap** and on regulation 27(2) of the **NMWR**. Neither, it is contended, was relevant to the correct interpretation of "*basic hours*" in regulation 21(3).

62. I can deal with this ground of appeal shortly because, for the respondent, Mr Wynne conceded that the detailed regulations considered by the Supreme Court in **Royal Mencap** did not assist the Tribunal in addressing regulation 21(3). I agree. In **Royal Mencap** the Supreme Court considered the calculation of "sleep-in" shifts for the purpose of the predecessor regulations to **NMWR**, the **National Minimum Wage Regulations 1999**, including the effect of the detailed provisions applying to those doing salaried hours work (see Lady Arden at paragraph 22). The issue of whether a worker is "available at or near a place of work" for the purpose of doing work within the meaning of those provisions or, now, regulation 27(1)(b) **NMWR** does not illuminate the very different question of what counts as "basic hours" within the meaning of regulation 21(3).

63. I do not accept, however, that the Tribunal's error was immaterial to the result it reached. I consider the Tribunal's reliance on **Royal Mencap** reflects the general approach it took to "basic hours", of examining the hours when the claimant was in fact engaged in working or working activity. That reading of the Tribunal's reasons fits with the opening two sentences of paragraph 32, where it said that the paid holidays clause did not mean those periods were "deemed to be working hours". It also chimes with the final sentence, that being available for work "was distinct from working and could not also fall within the meaning of time work or salaried hours work". But determining whether a worker is "working" is not the question to be addressed in considering "basic hours" within the meaning of regulation 21(3), which expressly can include non-working hours (regulation 21(7)). In other words, I consider the reasoning in this paragraph displays the same errors as I have identified in relation to ground (1) of the appeal.

64. **Ground (4)**. This ground is that the Tribunal wrongly interpreted the amount of leave to which the claimant was entitled under **WTR**. Her correct leave entitlement was 5.6 weeks' leave, not four weeks, following the Supreme Court ruling in **Brazel**. However, both parties agree that this makes no difference to the ultimate outcome because the claimant's level of pay would still not be below the NMW even if the Tribunal had applied a divisor of 41.6 weeks rather than 40 weeks. This error, therefore, was immaterial and does not affect the lawfulness of the Tribunal's judgment. I therefore dismiss this ground of appeal.

Disposal

65. It follows that the appeal is allowed on grounds (1), (2) and (3) but dismissed on ground (4).

66. The question arises as to disposal. Mr Hutcheon submitted that clause 4 of the claimant's contract was unambiguous and clear, to the effect that the claimant was entitled to be paid her full salary in respect of school holidays. It did not say, for example, that she was entitled

to 5.6 weeks' leave to be taken during school holidays and nor that she was engaged on a term-time only contract. In those circumstances, he argued that if I allowed the appeal, I can properly substitute a finding that the claimant's annual basic hours, ascertained in accordance with her contract, were 1,092 a year (52 x 21 hours a week).

67. Where the EAT allows an appeal, it can substitute a different decision for the result of the tribunal provided that the EAT can conclude what the result would have been based on findings of fact made by the Tribunal, supplemented by undisputed facts: see **Jafri v Lincoln College** [2014] ICR 920 per Laws LJ at paragraph 21. Although at first I was tempted by Mr Hutcheon's submission, ultimately I have decided that the matter should be remitted to an employment tribunal. While it appears there is nothing in the background to the making of the contract to detract from the unambiguous meaning and effect of clause 4 of the contract, I do not know all the evidence which was before the tribunal. Nor do I consider that I can resolve all the issues relevant to determining the claimant's basic hours. I do not know, for example, exactly when the claimant moved from a two-day contract to a three-day contract in 2010, how far back the claim is said to go, or whether at any stage the claimant received reduced pay for e.g. sickness under regulation 23 which would fall to be deducted from her hours of salaried work in a particular pay reference period.

68. In those circumstances, I have decided that the matter should be remitted to the employment tribunal for the determination, in the light of my judgment, of all the issues relevant to the claimant's claim for unlawful deduction from wages.

69. After I produced a copy of this judgment in draft, the parties made submissions on whether remission to be to the same or a differently-constituted tribunal. Mr Hutcheon submitted it should go to a different tribunal, whereas Mr Wynne contended it should be to the same one. I have considered the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763.

While I accept that the Tribunal can be expected to approach the matter with professionalism and the legal question it had to address was far from familiar or straightforward, the original hearing took only two days, so little time and cost will be saved by remission to the same tribunal (and it may take longer to organise a hearing before the same Tribunal). Given the time that has passed, there is a real risk that the tribunal may have forgotten about the evidence. Finally, the effect of my judgment is that the ET approached the legal question in the wrong way. In those circumstances, I consider that remission should be to a different employment tribunal