



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr J G McGee

AND

Isos Housing Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 13 June 2016

Before: Employment Judge Shepherd

Appearances

For the Claimant: Mr M Cahill

For the Respondent: Ms V Webb

RESERVED JUDGMENT

The claims brought for outstanding annual leave pursuant to regulations 13 and 13A the Working Time Regulations 1998 are not well-founded and are dismissed.

REASONS

- 1 The claimant was represented by Mr Cahill and the respondent was represented by Ms Webb.
- 2 I heard evidence from John McGee, the claimant and Norman Liddle, Contract Services Manager.
- 3 I had sight of a bundle of documents consisting of 156 pages. I considered those documents to which I was referred by the parties' representatives.
- 4 The issues I had to determine had been set out following a telephone private preliminary hearing by Employment Judge Buchanan as follows:
 - 4.1 Was any overtime worked by the claimant sufficiently regular to amount to normal remuneration? Are there any other elements to the pay of the claimant which should be reflected in the calculation of holiday pay?
 - 4.2 If so, how should it be reflected in any calculation of holiday pay?
 - 4.3 Are the claims in time?
 - 4.4 Have there been periods of more than three months between any payments of holiday pay so as to render any underpayment irrecoverable?
 - 4.5 How are holidays taken to be apportioned between the holiday entitlement pursuant to regulation 13 and regulation 13A of the Working Time Regulations 1998?
 - 4.6 What amount (if any) is due to the claimant for unpaid holiday pay including sums which may have accrued since the filing of these proceedings?
- 5 It was confirmed by Ms Webb on behalf of the respondent that there was no issue in respect of jurisdiction. The claims brought by the claimant were in respect of holidays taken in 2015. There were no amounts claimed where there was a gap of more than three months between any payments of holiday pay. The calculations were agreed between the parties and it was agreed that if I were to find in favour of the claimant the amount in respect of regulation 13 would be £341.86 and, in respect of regulation 13A the amount would be £638.35.
- 6 The issues to be considered were in respect of standby payments and overtime for any actual call out completed.
- 7 Upon considering all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These findings are not

intended to cover all the findings made but they are a summary of the findings I made from which I drew my conclusions:

- 7.1 The claimant is employed by the respondent as a Lead Gas Heating Engineer. His terms and conditions of employment state that normal hours of work are 37 hours per week. In addition it is stated that "you are required to participate in the 'on call' rota which covers the out of hours emergency repair service". The claimant was usually "on call" one week in every five and this was the case during the material period of the claim.
- 7.2 The claimant receives a set payment for being on call. This is referred to as a standby payment on his monthly payslip. If the claimant is called out to a job whilst he is on call he receives overtime pay.
- 7.3 All the gas heating engineers are required to be on standby. When a Gas Heating Engineer is on standby he will carry out his normal 37 hours per week and will also undertake any additional call out work for which he is then paid overtime.
- 7.4 The standby time is set out in a rota and if the claimant or one of the other Engineers wished to take holiday on a week in which they are on call then it is the responsibility of the claimant or other Engineer to make sure that the shift is covered. It will usually be that the Engineer will swap his standby period with someone else in the same zone. However, if that is not possible the Engineers will swap with someone in a different zone.
- 7.5 Mr Little, the Contract Services Manager, said that this had always been carried out on a voluntary basis which enabled the Engineers to take their holiday when they wished. It is expected that the shift is always covered. In theory, if the claimant or another Engineer was unable to arrange cover for his on call time then they would obtain a contractor to provide the necessary cover. However, this this had never actually happened
- 7.6 As the standby is swapped with another colleague, it means that the claimant does not do any less standby by virtue of going on holiday or taking leave and he does not do any greater amount of standby by virtue of his colleagues going on holiday.
- 7.7 During 2015 the claimant was paid a standby payment in respect of weeks during which he was on standby. All of the relevant overtime worked by the claimant was when he was on standby. The claimant was on standby for eleven weeks and he was paid a standby payment in respect of those weeks and he was also paid overtime when he worked overtime hours.
- 7.8 The claimant is also paid a multi-skilled payment. This is a fixed payment which is paid monthly throughout the year. The claimant receives the same multi-skilled payment when he goes on holiday as when he does not go on holiday.

The law

8 I was referred to the following authorities:

Marleasing SA v La Comercial Internacional De Alimentacion SA [1992] 1CNLR 305;

Bamsey v Albon Engineering [2004] ICR 1083;

Robinson-Steele v RD Retail Services [2006] ICR 932;

British Airways v Williams [2012] ICR 847;

Lock v British Gas Trading [2014] ICR 813;

Bear Scotland v Fulton [2015] ICR 221;

Unites States of America v Nolan [2015] 3WLR 1105;

Whitehead & Others v EMH Housing and Regeneration Limited Leicester Employment Tribunal Case Number 2600493/2015 & Others.

9 I received helpful written and oral submissions from Mr Cahill and Ms Webb. I have not set out those submissions in full but I have considered all the submissions carefully and the relevant authorities where appropriate.

10 Article 7 of Directive 2003 states:

“Annual leave

(1) Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least 4 weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

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

11 The Working Time Regulations 1998 state:

“Section 13 – Entitlement to annual leave

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

“13A Entitlement to additional annual leave

- (1) Subject to regulation 26A in paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).
- (2) The period of additional leave to which a worker is entitled under paragraph (1) is –
 - (e) in any leave year beginning on or after 1 April 2009, 1.6 weeks”.

“16 Payments in respect of periods of leave

- (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 (and regulation 13A), at the rate of a week’s pay in respect of each week of leave.
- (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week’s pay for the purposes of this regulation ...”.

12 The case of **British Airways Plc v Williams [2011] IRLR 948** provides the following passage setting out the general principles:

“17 The wording of article 7 of Directive 2003/88 makes no specific reference to the remuneration to which a worker is entitled during his annual leave. The case law, however, points out that it follows from the very wording of article 7(1) a provision from which that Directive allows no derogation – that every worker is entitled to be paid annual leave of at least four weeks and that that right to paid annual leave must be regarded as a particularly important principle of community social law (see joint cases C-350/06 and C-520/06 **Shultz-Hoff & Stringer & Others [2009] ECR1-179, paragraphs 22 and 54** and the case law cited).

18 The right to such an annual period of paid leave is, moreover, expressly laid down in article 31(2) of the Charter of Fundamental Rights of the European Union, which article 6(1) EU recognises as having the same legal value as the treaties.

19 In that context, the court has already had occasion to state that the expression “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 (see joint cases C-131/04 and C-257/04 **Robinson-Steele & Others [2006] ECR1-2531, paragraph 50** and **Shultz-Hoff & Stringer & Others, paragraph 58**).

- 20 The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work (see **Robinson-Steele & Others, paragraph 58**, and **Shultz-Hoff & Stringer & Others, paragraph 60**). As the Advocate General states at point 90 of her opinion, it follows from the foregoing that remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker. It also follows that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law.
- 22 However, 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. Such is the case with regard to the remuneration of an airline pilot as a member of the flight crew of an airline, the remuneration being composed of a fixed annual sum and of variable supplementary payments which are linked to the time spent flying and to the time spent away from base.
- 23 In that regard, although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practice governed by the law of the member states, that structure cannot affect the worker's right, referred to in paragraph 19 of the present judgment, to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.
- 24 Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker's is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave.
- 25 By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out in his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave.

In that regard, it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case law cited above, according to which Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right (see **Robinson-Steele & Others**, paragraph 58 and **Shultz-Hoff & Stringer & Others**, paragraph 60).”

- 13 In **Bamsey v Albon Engineering & Manufacturing Plc** [2004] ICR 1083 it was held that where overtime was worked, only that which the contract of employment required the employer to provide and the employee to do counted as “normal working hours” for the purposes of calculating “a week’s pay”.
- 14 In **Bear Scotland Limited & Others v Fulton & Others** [2015] ICR 221 it was held that payments in respect of non guaranteed overtime must be taken into account when calculating the pay to which a worker was entitled during a period of paid annual leave. “in so far as the test seeks an intrinsic or direct link to tasks the worker is required to carry out (stressing those last four words) it would be perverse to hold that overtime in these cases was not. In my view, therefore article 7 requires and required non-guaranteed overtime to be paid during annual leave”.
- 15 In the case of **Patterson v Castlereagh Borough Council** [2015] IRLR 721, a Northern Ireland Court of Appeal case, it was held that, in principle, there is no reason why voluntary overtime should not be included as part of a determination of entitlement to paid annual leave and it will be a question of fact for each Tribunal to determine whether or not that voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the remuneration to trigger its inclusion in the calculation.
- 16 In the first instance case of **Whitehead & Others v EMH Housing and Regeneration Limited** Leicester Employment Tribunal Case No 2600493/2015 Employment Judge Camp referred to the key part of **Williams** is in particular, “for the duration of annual leave within the meaning of (the Directive) remuneration must be maintained ... In other words workers must receive their normal remuneration for that period of rest”. ... “The purpose of the requirement of payment for that leave is to put the worker during such leave, in a position which is, as regards remuneration, comparable to periods of work”. There was also reference to the principle that “A reduction in a worker’s remuneration in respect of his paid annual leave (is) liable to deter him from actually exercising his right to take that leave (and) is contrary to the objective pursued by article 7 of the Directive”.
- 17 It was submitted on behalf of the claimant that all the standby and overtime performed by the claimant is intrinsic to his contractual role as a Gas Heating Engineer and should be included for the purpose of calculating his holiday pay.

- 18 It was submitted on behalf of the respondent that the cases cited are cases where the worker was provided with a financial disincentive from taking leave. It was submitted that this case can clearly be distinguished on this basis.
- 19 Also, further, in all the cases cited above, and no doubt relied upon by the claimant, there is not a “settled pattern of work” and there is uncertainty as to the sums the claimant would have received, had they been working. It is in that context that an averaging process makes sense. There is no need for any averaging process in the present case, and it, in fact results in the logical outcome that the claimant would receive more pay by taking holiday, than by going to work. Ms Webb referred to the issues identified at the preliminary hearing, case management summary, It was indicated that the standby and overtime worked by the claimant was regular, being part of a settled pattern of work, but was not part of “normal remuneration” in relation to the period of time for which the claimant was on leave and is not required to be reflected in the calculation of holiday pay.
- 20 Mr Cahill on behalf of the claimant submitted that all the payments were paid regularly, came to be expected by the claimant and had formed part of the normal remuneration. Including them in the claimant’s holiday pay would put him in position comparable to the one he is in when he is working.
- 21 Ms Webb, on behalf of the respondent, summarised the respondent’s position as, “During the relevant period (and as a matter of general practice), the claimant did not take leave during the period when he was rostered to perform standby. The claimant like other Engineers could and did swap his standby with another colleague. Thus the claimant did not miss out on the opportunity to earn his regular standby and overtime payments by taking leave, he was paid the same amount of pay in respect of his holiday as he would have done had he been at work and thereby he suffered no reduction in standby or overtime payments by taking leave”.
- 22 With regard to how the holidays are to be apportioned between entitlement pursuant to regulation 13 and regulation 13A of the Working Time Regulations, the claimant claims that the leave days in question were taken pursuant to regulation 13. It was submitted by Mr Cahill on behalf of the claimant that the most sensible and logical way of dealing with the holiday would be for the section 13 holiday to come first followed by section 13A holiday, followed by any contractual leave and this is the basis on which the schedule of loss had been prepared. It was also submitted that the Court of Appeal decision in **Bamsey v Albon Engineering & Manufacturing Plc** confirmed that standby payments should be included in the calculation of holiday pay for section 13A holiday. Ms Webb on behalf of the respondent does not accept that proposition and submits that only where there are fixed guaranteed hours under the contract will be treated as normal working hours pursuant to section 234 of the Employment Rights Act 1996. It was submitted that the respondent’s approach does not violate this principle. Also, in relation to standby payments there was no entitlement to such payments in respect of the periods of the holiday under consideration given that the claimant was not rostered for such holiday.

23 I was referred to the Advocate General's opinion in the case of **British Airways Plc v Williams** and this is not covered in the judgment but is of persuasive value. It states at paragraph 86:-

“86 The foregoing interpretation of the court's case to the effect that the worker's entitlement is not to extend beyond his “normal remuneration”, leads, on the one hand, to a requirement to level out and calculate average earnings. This in turn means that the basic pay and any supplements are not to be automatically aggregated where the latter are not usually paid. In this regard, the Danish government's submission that those supplements must be included in the calculation of an average sum only where they are systematic components of pay must be expressly endorsed.

87 That interpretation also implies, in essence, that a worker who takes leave must not be treated any differently, from a financial point of view, from when he is working. In the light of the regulatory purpose of the right to paid annual leave, that requirement is targeted primarily at financial disadvantages for the worker. However, this does not mean that worker who takes annual leave should be placed in a better financial position than other workers. After all, the granting of “normal remuneration” means that the usual restrictions should in principle also be applied”.

24 In considering this case, on its individual facts, I am satisfied that on the dates in question, the claimant has received holiday pay on the basis of his normal pay and the multi skilled payment. The claim is in respect of standby pay and overtime payments. The claimant received 11 weeks standby payment and overtime throughout the year. He did not lose any entitlement to standby payment or the relevant overtime pay as he arranged his holidays and swapped with colleagues which meant that he still received those payments.

25 If the holiday payments had included a proportion of the standby and overtime payments it would mean that the claimant would, in effect, receive more pay as a result of taking holidays. This would mean that he would be placed in a better financial situation when he received holiday payments on that basis. I do not accept that is the purpose of the Working Time Regulations albeit pursuant to regulation 13 or regulation 13A.

26 The way in which the payments for annual leave were made placed the claimant in a financial position comparable to the one he is in when he is working. I am not satisfied that there is any breach of the principle in article 7 of the Working Time Directive. There is no disincentive to the claimant and on these individual facts the case is distinguishable from a case where overtime and standby pay forms part of the normal remuneration of the claimant and, when holiday is taken it means that the worker does not have the opportunity to earn those sums. In this case, the claimant and his colleagues did not lose any payment as a result of taking holidays. They still received the same standby pay and overtime payments when appropriate.

- 27 In the circumstances the claims brought for outstanding annual leave under regulations 13 and 13A pursuant to the Working Time Regulations 1998 are not well-founded and are dismissed.

EMPLOYMENT JUDGE Shepherd

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

.....22 June 2016.....

JUDGMENT SENT TO THE PARTIES ON

.....23 June 2016.....

AND ENTERED IN THE REGISTER

.....

FOR THE TRIBUNAL