Hilary Term
[2010] UKSC 16
On appeal from: A2/2008/0632

JUDGMENT

British Airways plc (Respondents) *v* Williams (Appellant) and others

before

Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Clarke

JUDGMENT GIVEN ON

24 March 2010

Heard on 24 and 25 February 2010

Appellant	*Respondent*
Jane McNeill QC	Christopher Jeans QC
Michael Ford	Andrew Short
(Instructed by Thompsons Solicitors)	(Instructed by Baker and Mackenzie LLP)

LORD MANCE (delivering the judgment of the court)

The relevant law

1. This appeal concerns the concept of "paid annual leave" for crew members employed in civil aviation appearing in regulation 4 of The Civil Aviation (Working Time) Regulations 2004 (SI 2004 No. 756) ("the Aviation Regulations"). These Regulations were introduced under s.2(2) of the European Communities Act 1972 to comply with the United Kingdom's obligations under Council Directive 2000/79/EC of 27 November 2000 ("the Aviation Directive"), the purpose of which was in turn to implement the European Agreement on the organisation of working time of mobile staff in civil aviation dated 22 March 2000 ("the European Agreement") annexed to the Directive.

2. Clause 3 of the European Agreement reads:

> "1. Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
> 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

3. The Aviation Regulations provide:

> "4.-(1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in
> respect of a period of employment of less than one year.
> (2) Leave to which a crew member is entitled under this regulation-
>> (a) may be taken in instalments;
>> (b) may not be replaced by a payment in lieu, except where the crew member's employment is terminated."

4. The Aviation Regulations and Directive are part of a wider complex of legislation requiring paid annual leave. Council Directive 93/104/EC of 23 November 1993 ("the Working Time Directive") introduced a general requirement that Member States take measures 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" (article 7(1)). But it excepted various mobile sectors of activity, viz "air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training" (article 1(3)), and further stated that its provisions should not apply "where other Community instruments contain more specific requirements concerning certain occupations or occupational activities" (article 14).

5. The Working Time Directive was implemented domestically, with exceptions matching those of the Directive, by the Working Time Regulations 1998 (SI 1998 No. 1833) ("the Working Time Regulations"). These Regulations (as amended by the Working Time (Amendment) Regulations 2001 (SI 2001 No. 3256)) provide that a worker is "entitled to four weeks' annual leave in each leave year" (regulation 13) and "entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 at the rate of a week's pay in respect of each week of leave" (regulation 16(1)). Regulations 16(2) and (3) make ss.221 to 224 (and by implication also, it has been held, ss.234-235) of the Employment Rights Act 1996 applicable to the determination of the amount of a week's pay for the purposes of regulation 16. Ss.221 to 224 contain a detailed scheme (originally introduced in the context of redundancy pay) for ascertaining a week's pay in the cases of employments with and without "normal working hours". The scheme includes provisions governing the differing situations of remuneration varying (s.221(3)) and not varying (s.221(2)) with the amount of work done and of remuneration varying according to the times of day or days of the week in which work is required to be done (s.222); as well as provisions governing employments with no normal working hours (s.224). Where the remuneration varies according to the amount, time or hours of work, the computation of weekly pay falls to be derived from an examination of an average position over a defined period of twelve weeks preceding the relevant calculation date, itself defined (ss.221(3), 222 and 224). Under s.234, in the case of an employee who is entitled to overtime pay when employed for more than a fixed number of hours in a week, the employee's "normal working hours" are the number of hours so fixed - unless the contract also fixes a number of hours of overtime which the employer is bound to provide and the worker bound to work, in which case, the employee's "normal working hours" consist in the total number of fixed hours (so excluding any voluntary overtime): *Tarmac Roadstone Holdings Ltd. v Peacock* [1973] ICR 273 (CA); the same interpretation of s.234 has been applied to a claim under Regulation 16 of the Working Time Regulations: *Bamsey v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359; [2004] ICR 1083 (CA).

6. The exceptions from the Working Time Directive were in due course addressed. Council Directive 1999/63/EC of 21 June 1999 gave effect to a European Agreement dated 30 September 1998 entitling non-fishing seafarers to paid annual leave on the same basis as was in 2000 provided for mobile staff in

civil aviation (paragraph 2 above). This was in turn given domestic effect by The Merchant Shipping (Hours of Work) Regulations 2002 (SI 2002 No. 2125) ("the non-fishing Seafarers Regulations"), in language identical as regards paid annual leave to that of the Aviation Regulations (paragraph 3 above), with the substitution of the word "seafarer" for "crew member" (regulation 12).

7. Directive 2000/34/EC of 22 June 2000 extended the application of the Working Time Directive to all sectors of activity, excluding seafarers as defined in Council Directive 1999/63/EC, and gave Member States until 1 August 2003 to achieve this. However, it also replaced article 14 of the Working Time Directive with a provision that that Directive should "not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities". With effect from 2 August 2004, the Working Time Directive as extended and amended has been replaced by a consolidated Working Time Directive 2003/88/EC of 4 November 2003, but article 7 remains in identical terms to article 7 of the original Working Time Directive of 1993.

8. The Aviation Directive of 27 November 2000 was a specific Community instrument within article 14 of the Working Time Directive and was, as stated, implemented domestically in 2004 by the Aviation Regulations. The extension of the Working Time Directive in its original and consolidated form to other mobile workers was further implemented domestically by inter alia The Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 (SI 2003 No. 3049) made 23 December 2003 and The Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 (SI 2004 No. 1713) made 16 August 2004. In these two sets of Regulations, governing inland waterway workers and sea-fishermen, regulation 11(1) entitles such workers "to" (or, in the case of the latter, "to at least") "four weeks' annual leave and to be paid in respect of any such leave at the rate of a week's pay in respect of each week of leave". They go on to apply ss.221 to 224 for the purpose of determining the amount of a week's pay for the purposes of the right to four weeks' paid annual leave, and to define the relevant calculation date for the purposes of the twelve week period as "the first day of the period of leave in question". They also provide specifically for a worker to be able to complain of failure to pay any amount due under regulation 11(1).

9. In contrast, neither the non-fishing Seafarers Regulations of 2002 nor the Aviation Regulations made 13 April 2004 contain any detailed provisions which either define the nature or amount of the payment to be made during annual leave or apply ss.221 to 224 of the 1996 Act for that purpose. Nor do they provide specifically for the consequences of failure to pay for annual leave (though the Aviation Regulations entitle a worker to complain of a refusal "to permit him to exercise any right" to paid annual leave, while the non-fishing Seafarers Regulations make contravention by an employer of regulation 12, entitling

seafarers to paid annual leave of at least four weeks, a criminal offence). These domestic distinctions can only have been deliberate. It is common ground now that ss.221 to 224 cannot apply to aviation crew members. This appeal therefore turns on the meaning of the phrase "paid annual leave", which is all that the United Kingdom legislator has relevantly enacted. The phrase cannot of course be construed in a vacuum. The Aviation Directive is not directly applicable, certainly not against British Airways which is not an emanation of the state. But it is our duty, as far as possible, to construe the phrase in the domestic Regulations consistently with any requirement inherent in the identical phrase used in clause 3(1) of the European Agreement to which Member States are required to give effect by the Aviation Directive: see e.g. *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, paragraph 8; *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397-404/01) [2004] ECR I-8835, paragraphs 111-113 and, most recently, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, (Case C-555/07) (judgment of 19 January 2010) paragraphs 44-48.

10. Strictly, the European Agreement is an agreement between private associations representing airlines on the one hand and aviation workers on the other. As such, its meaning might be capable of being influenced by the circumstances in which it was negotiated, any travaux préparatoires and even statements made during its negotiation. But no evidence of that nature was put before the Employment Tribunal which considered the present case, and all that the Tribunal records (paragraph 37) is that the issue of holiday pay "was not high on the agenda" of those representing the interests of aviation workers when the Agreement was reached. The reality is that clause 3 of the European Agreement adopted identical wording to article 7 of the Working Time Directive. The natural inference is that it was intended to have the same effect in law and there is nothing to suggest the contrary.

The facts

11. The factual context in which the phrase "paid annual leave" has presently to be understood and applied is as follows. The appellants are pilots employed by British Airways plc. In practice the terms of their employment were and are negotiated with British Airways by the pilots' union, British Air Line Pilots Association ("BALPA"). These terms are currently found in a Memorandum of Agreement ("MOA") dated 1 April 2005. The Court understands that, for present purposes, the terms of this MOA mirror those applicable under previous similar agreements going back to before 2000. Under the MOA (and consistently with the Aviation Directive and Regulations) British Airways pilots are required to take 30 days' annual leave and are entitled to take a further two weeks' leave, save for pilots with a Gatwick base who are obliged to take 35 days' holiday and are entitled to a further seven days of leave.

12. Under the MOA, read with collectively agreed “bidline” rules, pilots’ remuneration includes three components relevant to this case. The first consists of a fixed annual sum. The second and third consist of supplementary payments varying according to time spent flying (the “Flying Pay Supplement” or “FPS”, paid at £10.00 per planned flying hour) and time spent away from base (the “Time Away from Base Allowance” or “TAFB”, paid at £2.73 per hour). The whole of the FPS is remuneration and taxable. 82% at the relevant time of the TAFB is treated as having been paid on account of expenses, so that only 18% is treated as remuneration and taxable.

13. There are limits to the FPS and TAFB which a pilot or other crew member can earn. Regulation 9 of the Aviation Regulations requires every employer to ensure that:

> “in any month
> (a) no person employed by him shall act as a crew member during the course of his working time, if during the period of 12 months expiring at the end of month before the month in question the aggregate block flying time of that person exceeds 900 hours; and
> (b) no crew member employed by him shall have a total annual working time of more than 2,000 hours during the period of 12 months expiring at the end of the month before the month in question”.

14. The amount of time a pilot spends flying will depend upon his or her route and roster. It could typically be about 15 days a month. The Court has been given a schedule of payments made to the first appellant, Ms Williams. This indicates that, in the calendar year 2006, she took 25 working days leave in periods of between one and eight days in five different months, and received total fixed pay of £96,452.36, total FPS of £8,510 and total taxable TAFB of £1,038.49. Total FPS of £8,510 is indicative (at £10 an hour) of 851 flying hours. If that is so, then, had Ms Williams continued to fly at this rate during leave periods, it appears that she would or might have exceeded the maximum permitted annual number of 900 flying hours. Total taxable TAFB of £1,038.49 gives total TAFB of £5,769.39 (£1,038.49 x 100 ÷ 18: see paragraph 12 above), indicative of 2,113 hours away from base. Again, had Ms Williams continued to fly during leave periods, it appears that she would or might have exceeded the maximum total annual working time of 2,000 hours. However, whether this be so or not in her case in relation to FPS or TAFB, a crew member could clearly be in this position in practice, i.e. in a position where during the 12 month period prior to taking any particular leave, he or she had already completed all or almost all of his or her permitted annual flying or working time.

The issue and submissions

15. It is common ground that, upon a true construction of the MOA and so as a matter of contract, the payment to be made in respect of annual leave is based on the first component of remuneration only, that is the fixed annual sum. The question is whether this was and is permissible under the Aviation Regulations, interpreted in the light of the Aviation Directive. This question was first raised in 2005 following the introduction of the Aviation Regulations on 13 April 2004. The Court understands that it has been raised not merely by British Airways pilots, but also by other airlines' pilots and other aviation crew under contractual arrangements not before the Court. Before the Employment Tribunal and Employment Appeal Tribunal, the appellants argued, successfully, that they were entitled under European and domestic law to payment at a weekly rate based on all three components of remuneration (which both Tribunals said should be calculated by analogy with ss.221-4, despite the inapplicability of these sections). The Court of Appeal accepted British Airways' contrary case under both European and domestic law.

16. British Airways' case operates at various levels:

(i) British Airways' first submission is that (a) the United Kingdom legislator must be taken (when deciding not to enact any detailed provisions to define the nature or amount of the payment to be made during annual leave or to apply ss.221 to 224 of the 1996 Act: see paragraph 9 above) to have intended that the amount of any payment to be made to aviation workers (and non-fishing seafarers) in respect of their annual leave should be determined by collective or individual contractual agreement between the relevant parties; and (b) the domestic legislative intention being in this respect clear, it must prevail, whatever the effect may be of the Aviation Directive.

(ii) Second, however, if and to the extent that, contrary to the first submission, the meaning of the Aviation Regulations can be derived from the Aviation Directive, British Airways submits that the Aviation Directive is to the same effect.

(iii) (a) Third, British Airways qualifies its first two submissions only to the extent that it accepts that the payment for annual leave could not, under domestic or European law, be so low as to prevent or inhibit the taking of leave. Pay during weeks of annual leave at the rate of £96,452 per annum or £1,854.85 per week could hardly be said to fall within this qualification. Accordingly, British Airways contends that the contractual arrangements between them and their pilots are legitimate.

(b) The appellants' contrary submission of law is that the Aviation Directive requires the payment in respect of annual leave of "normal

remuneration" in order to ensure that the worker is on leave in a position which is "comparable" to that when he or she is at work.

(c) There is however disagreement about what this would mean in circumstances such as the present. In particular, on that basis of what "periods" is "normality" or any comparison to be established? And on the basis of what hypotheses? The latter question is relevant where, as may well be the case here, the worker was subject to annual limits which would have precluded him or her from undertaking particular work and receiving particular payments additional to his or her basic salary.

(iv) Fourth, British Airways submits (in response to this submission by the appellants) that, if the phrase "paid annual leave" involves payment of "normal" or "comparable" remuneration, then, in the present case, payment in respect of annual leave based on the fixed annual remuneration to which pilots are entitled satisfies this requirement.

17. The Court is not presently persuaded by British Airways' first submission. Of course, whether domestic legislation is capable of being interpreted consistently with the meaning of the Directive will or may depend upon what that meaning is. But, bearing in mind the possible meanings which appear, the Court's present view is that it is likely to be possible to construe the Regulations so as to comply with whatever meaning the Directive may have, even if the domestic position would otherwise be that for which British Airways contends by its submission at (i)(a) above. This is so, even though the determination of the relevant weekly rate will pose difficulties for the employment tribunals who will have to engage with this exercise, in circumstances where there is no detailed scheme and ss.221 to 224 of the 1996 Act do not apply.

18. British Airways' second and third submissions raise questions regarding (a) the meaning of the phrase "paid annual leave" in the Aviation Directive and (b) the extent of the freedom for national legislation and/or practice to lay down "conditions for entitlement to, and granting of, such leave" [i.e. paid annual leave]. The determination of these questions is in the Supreme Court's view necessary for the resolution of this appeal. There are statements in the Court of Justice's recent case-law (discussed below) which, on their face, are adverse to British Airways' second and third submissions (paragraph 16(ii) and (iii)(a) above) and favour the appellants' case that the Aviation Directive requires payment of "normal" or "comparable" remuneration (paragraph 16(iii)(b) above). But these statements were made in very different contexts to the present, and, further, do not specifically address the point identified in paragraph 16(iii)(c) above. The position in a case such as the present is not in the Supreme Court's view *acte clair* and the Supreme Court therefore makes this reference.

Analysis

19. In case it may assist the Court of Justice, the Supreme Court adds these observations. British Airways submits that the concept of paid annual leave is to be understood in the context in which the Working Time and Aviation Directives were enacted, namely the promotion of the health and safety of workers. That context appears from *United Kingdom v Council of the European Union* (Case C-84/94) [1996] ECR I-5755; [1997] ICR 443. The Court of Justice there upheld (save in one presently immaterial respect relating to Sunday working) the validity of the adoption of the Working Time Directive under article 118a of the European Community Treaty. Article 118a entitled the Council, by qualified majority voting, to "adopt by means of Directives, minimum requirements for gradual implementation" to encourage "improvements, especially in the working environment, as regards the health and safety of workers". (Subsequent to the Treaty of Nice, the relevant article became article 137, entitling the Community to support and complement the activities of Member States in the fields of, inter alia, "improvement in particular of the working environment to protect workers' health and safety". It is, since the Treaty of Lisbon, article 153 in similar terms.) In *R(BECTU) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ECR I-4881; [2001] ICR 1152, the Court of Justice again stressed the importance of "the general principles of protection of the health and safety of workers" and the aim of "ensuring effective protection of … health and safety" (paragraphs 40 and 44), when holding impermissible a provision of the then Working Time Regulations, according to which no entitlement to paid annual leave arose until an employee had been continuously employed for 13 weeks. The entitlement to paid annual leave was "a particularly important principle of Community social law from which there can be no derogations" (paragraph 43) and the Directive did not allow Member States either to make subject to any preconditions or to "exclude the very existence of" a right granted to all workers (paragraphs 53 and 55). Recital (11) to the Aviation Directive of 27 November 2000 confirms (unsurprisingly) that its objectives are precisely the same as those of the Working Time Directive, viz. "to protect workers' health and safety".

20. British Airways submits that paid annual leave therefore requires payment at a level which ensures that annual leave can be taken and enjoyed, that is payment which does not frustrate or undermine the purpose of the relevant Working Time or Aviation Directive. The Supreme Court would agree that the present arrangements with pilots employed by British Airways could not be regarded as posing any such risk to their health or safety. There is no suggestion that they do or could prevent or deter pilots or crew members from taking annual leave (even to the limited extent that they are free not to do so). On the contrary, the Employment Tribunal referred (paragraph 38) to a consensus that British Airways pilots not based at Gatwick do in practice take the extra two weeks' voluntary leave to which they are entitled.

21. British Airways also points out that, in *United Kingdom v Council*, the Court of Justice referred to Member States' freedom to lay down detailed implementing provisions in general terms, when it said in paragraph 47 that:

> "Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States."

22. Recital (12) to the Aviation Directive also indicates that Member States are to be free to define any terms used in the annexed European Agreement in accordance with national law and practice, providing that the definitions are consistent with the Agreement. In British Airways' submission, the freedom to enact detailed implementing provisions and the freedom to leave matters to national practice allow Member States either to introduce detailed provisions along the lines of ss.221 to 224 of the 1996 Act or to leave it to contracting parties to agree on terms as regards pay, so long as these do not frustrate or undermine the taking and enjoyment of annual leave.

23. The appellants, in relation to this latter point, rely upon further statements in *BECTU* as indicating a narrow view of Member States' discretion under clause 3 of the Aviation Directive. In his opinion in that case, Advocate General Tizzano said at paragraph 34:

> "It is not of course my intention to deny that the expression in question means that reference must be made to national legislation and therefore that the Member States enjoy some latitude in defining the arrangements for enjoyment of the right to leave. In particular, as the Commission also points out, the reference is intended to allow the Member States to provide a legislative framework governing the organisational and procedural aspects of the taking of leave, such as planning holiday periods, the possibility that a worker may have to give advance notice to the employer of the period in which he intends to take leave, the requirement of a minimum period of employment before leave can be taken, the criteria for proportional calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth. But these are precisely measures intended to determine the 'conditions for entitlement to, and granting of, leave and as such are allowed by the

> Directive. What, on the other hand, does not seem to be allowed by the Directive is for national legislation and/or practice to operate with absolutely (or almost) no restrictions and to go so far as to prevent that right from even arising in certain cases."

24. The Court of Justice referred to this passage in its judgment (paragraph 53):

> "The expression 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice' must therefore be construed as referring only to the arrangements for paid annual leave adopted in the various Member States. As the Advocate General observed in paragraph 34 of his Opinion, although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever."

25. British Airways point out that both these passages were specifically directed to explaining why the Directive did not permit Member States to remove entirely any right to paid annual leave in particular circumstances. They were not concerned with the permissibility of defining "paid annual leave" or of leaving it to parties to define, in a way which does not undermine its taking or its enjoyment.

26. The appellants submit, however, that the Court of Justice's later case-law contains statements establishing that "paid annual leave" must now be regarded as having achieved a closely defined autonomous European meaning: any payment in respect of annual leave must correspond with the employees' "normal" remuneration in order to ensure that the worker is, when on leave, in a position which is "comparable" to that when he or she is at work. They rely on statements to this effect in the Court of Justice's judgments in *Robinson-Steele v RD Retail Services Ltd.* (Cases C-131 and 257/04) [2006] ECR I-2531; [2006] ICR 932, paragraphs 50 and 57 to 59 and in *Stringer v Revenue and Customs Commissioner* (Case C-520/06) [*R (D) v Secretary of State for the Home Department* [2005] EWHC 728 (Admin) 2009] ECR I-179; [2009] ICR 932, paragraphs 57 to 62. In *Robinson-Steele*, the Court of Justice repeated that Member States "must ensure that the detailed national implementing rules take account of the limits flowing from the Directive itself" (paragraph 57) and went on:

> "58 The Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work.
>
> 59 Accordingly, without prejudice to more favourable provisions under article 15 of the Directive, the point at which the payment for annual leave is made must be fixed in such a way that, during that leave, the worker is, as regards remuneration, put in a position comparable to periods of work."

27. This was, however, again said in a very different context from the present. Part payments, ostensibly for holiday pay, were staggered over the corresponding annual period of work and paid together with remuneration for work done, leaving nothing specifically payable in respect of the weeks of leave. Further, the Court allowed such staggered payments, where transparently and comprehensibly attributable to annual leave, to be set off against the claim for holiday pay. An earlier statement (in paragraph 50) that "workers must receive their normal remuneration for that period of rest" was also said in a very different context. There had been agreement to attribute to holiday pay part of a sum which had previously been being paid as remuneration for work; the remuneration paid for work done was in other words being effectively reduced, by an amount attributed to the (staggered) holiday pay.

28. In *Stringer*, paragraphs 57 to 62, the Court of Justice cited *Robinson-Steele* as authority that "the expression 'paid annual leave' means that, for the duration of annual leave …, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest" (paragraphs 58 and 61), and explained this on the basis that the purpose was "to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work" (paragraph 60). Two points however arise. First, once again, the context was quite different from the present. The issue in *Stringer* was whether employees absent on sick leave throughout an entire leave year were entitled to take their leave after the end of that year or, (since their employment had in fact terminated) to receive payment in lieu. In that context, the Court repeated the statements in *BECTU* (paragraphs 53 and 55: see paragraph 19 above) that Member States are not entitled to exclude, or make subject to any preconditions, the very existence of a right deriving from the Directive.

29. Second, the Court of Justice's use of the word "comparable" in *Stringer* is itself to be compared with the Advocate General's suggestion (in paragraphs 90-91 of her opinion) that a worker should receive an allowance in lieu "equivalent" to that of his normal pay. The choice of the wording "comparable" to periods of work

to explain the concept of normal remuneration was no doubt deliberate. On one view, it indicates that the Court of Justice had in mind a relationship between pay while working and pay in respect of annual leave which was or could be more general and looser than the "equivalence" which the Advocate General would have favoured. In a sense, of course, even very different things are usually capable of a comparison, which will highlight the differences. The Court of Justice cannot have meant comparison in this sense. Nonetheless, it may have meant "comparable" in the sense of roughly similar (although this still leaves for consideration whether the right comparison was with pay which the worker could have earned if he or she had been working instead of on leave, or was earning during some other and. if so what, period) – or it may, perhaps, have meant sufficiently similar to achieve the aim of the Directive, that is ensuring that employees could and would take and enjoy a restful - or at all events restorative - annual leave.

The questions referred

30. In these circumstances, the Supreme Court refers to the Court of Justice these questions:

(i) Under (a) articles 7 of Council Directives 93/104/EC and 2003/88/EC and (b) clause 3 of the European Agreement annexed to the Council Directive 2000/79/EC: (1) to what, if any, extent does European law define or lay down any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (2) to what, if any, extent may Member States determine how such payments are to be calculated?

(ii) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?

(iii) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's "normal" pay?

Further, in the event of an affirmative answer to question (iii)(a) or (b):

(iv) Is the relevant measure or comparison (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?

(v) How should “normal” or “comparable” pay be assessed in circumstances where (a) a worker’s remuneration while working is supplemented if and to the extent that he or she engages in a particular activity; (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave?