BRIEFING 16: CALCULATION OF HOLIDAY PAY: WHERE ARE WE NOW?

How to work out holiday payments.

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(CLICK ON CASES FOR HYPERLINK TO JUDGMENTS).

1. In Dudley Metropolitan Borough Council v Mr G Willetts and others [UKEA/0334/16/J0J] the Employment Appeal Tribunal, Simler P (sitting alone) held that voluntary overtime may be a component in the calculation of holiday pay for the four week holiday pay entitlement set out in Regulation 13 of the Working Time Regulations 1998. The result does not come as a surprise, as a matter of principle, since it has been clear for some years that, in accordance with European jurisprudence, the tendency has been to widen the components of calculation, since “holiday pay must, in principle, be determined in such a way as to corresponded to the worker’s normal remuneration” (Trstenjak AG in British Airways plc v Williams: C-155/10 [2011] IRLR 948, [2012] ICR 847). The issue of what does amount to normal remuneration in the context of what may be claimed under the WTR, taking into account principles of European law have been hard fought but we now have clear guidance from the Courts on many of the issues of principle.

2. This briefing note will provide a synopsis of where we now appear to be, what further outstanding issues may exist and how employers may go about calculating employees’ holiday pay where remuneration involves a number of different components. Whilst the authorities have set out the principles, how they are to be applied in practice is rather trickier.
The current position: a summary

3. Taking into account the authorities, which are considered in more detail below, the following propositions are an attempt to set out the principles in easily digestible form:

1. It is necessary to distinguish between the four weeks (20 days) holiday entitlement under Regulation 13 and the 1.6 weeks (8 days) entitlement under Regulation 13A. The former is subject to European principles, the latter is a UK derived provision and does not have to be subjected to European constraints.

2. A claim for unlawful deductions will be subject to the Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322 with effect from 8th January 2015.

3. Basic salary will be included in the computation of holiday pay. Indeed, where there is only a basic salary the position will be quite clear.

4. Mutual Obligation. Where there is a mutual obligation under the contract of employment, these elements which are remunerated will be taken into account in calculating holiday pay. This covers obligations that the worker is obliged to comply with where the employer is obliged to compensate the worker. This will include payments for compulsory overtime, attendance allowances, call out allowances, allowances for inclement weather, standby allowances and travel allowances where the employer is obliged under the contract to provide these elements and the employee is obligated under the contract to undertake the work or accept the obligations that give rise to the payments.

5. Non guaranteed overtime: Payments for obligations or work where there is no legal obligation on the part of the employer to offer that element, but if offered, it must be accepted by the employee will be included. This will include the payments referred to under mutual obligation save that it will only be if and when employer offers them that the employee becomes obligated to accept.

6. Voluntary overtime: Where there is no obligation on the part of the employer to offer these elements and no obligation on the part of the employee to accept, the elements will nevertheless be taken into account in calculating holiday pay if they are accepted and undertaken by the employee. Thus if the worker accepts and undertakes voluntary overtime, or agrees to be on standby or on call, the worker may be paid attendance allowances, call outs, allowances for inclement weather, standby allowances and travel allowances. Payments for purely voluntary work, accepted and carried out, may be included, as a matter of principle.

7. However, the key to whether the payments come into the holiday pay calculation as a matter of fact will depend upon (i) whether they are required of the worker under his contract of employment which is intrinsically linked to the performance of the required tasks or (ii) where the pattern of work, even if voluntary, and thus payment extends for a sufficient period of time on a regular and/or recurring basis to justify the description “normal”.

8. Where the worker is paid by commission then that may be included, as a matter of principle, in the calculation of holiday pay.

9. It will be necessary to work out what is “normal” by consideration of payments made during a reference period. For the purposes of the ERA 1996 the reference period is 12 weeks but a longer reference period may be needed if the holiday pay calculation is not to be made artificially low or high.

10. Rolled up holiday pay, whilst stated in the European cases to be impermissible may, ironically, be the easiest way to calculate and ensure that workers are paid the holiday pay to which they should be entitled.
The case law

4. The convoluted journey by which we have got to the principles summarised above is partly due to the difficulties of interpretation of the WTR and the ERA and partly due to the way that the European cases have approached this area. In this section, I trace through the case law to see how we have got to the current position. In the next section I will consider some practical approaches to calculating holiday pay.

(a) The WTR & the ERA 1996

5. The relevant parts of the WTR 19998 and the ERA 1996 provide as follows:

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 and 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 1st April 2009, 1.6 weeks.
(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

16 Payment 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, subject to the modifications set out in paragraph (3).
(3) The provisions referred to in paragraph (2) shall apply—
(a) as if references to the employee were references to the worker;
(b) as if references to the employee's contract of employment were references to the worker's contract;
(c) as if the calculation date were the first day of the period of leave in question; and
(d) as if the references to sections 227 and 228 did not apply.
(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ('contractual remuneration') [and paragraph (1) does not confer a right under that contract].
(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

221 General
(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.
(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount
of work done in the period, the amount of a week's pay is the amount which is payable by
the employer under the contract of employment in force on the calculation date if the
employee works throughout his normal working hours in a week.

(3) Subject to section 222, if the employee's remuneration for employment in normal
working hours (whether by the hour or week or other period) does vary with the amount of
work done in the period, the amount of a week's pay is the amount of remuneration for the
number of normal working hours in a week calculated at the average hourly rate of
remuneration payable by the employer to the employee in respect of the period of twelve
weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(4) In this section references to remuneration varying with the amount of work done
includes remuneration which may include any commission or similar payment which varies in
amount.

(5) This section is subject to sections 227 and 228.

1.1.2

222 Remuneration varying according to time of work

(1) This section applies if the employee is required under the contract of employment in
force on the calculation date to work during normal working hours on days of the week, or at
times of the day, which differ from week to week or over a longer period so that the
remuneration payable for, or apportionable to, any week varies according to the incidence of
those days or times.

(2) The amount of a week's pay is the amount of remuneration for the average number of
weekly normal working hours at the average hourly rate of remuneration.

(3) For the purposes of subsection (2)—

(a) the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and

(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.

(4) In subsection (3) 'the relevant period of twelve weeks' means the period of twelve
weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(5) This section is subject to sections 227 and 228.

223 Supplementary

(1) For the purposes of sections 221 and 222, in arriving at the average hourly rate of
remuneration, only—

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours, shall be brought in.

(2) If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration
within subsection (1)(b) was payable by the employer to the employee, account shall be
taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of
which account is taken.

(3) Where—
(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and
(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime), account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

**224 Employments with no normal working hours**

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

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and
(b) otherwise, with the last complete week before the calculation date.

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

(4) This section is subject to sections 227 and 228.

**228 New employments and other special cases**

(1) In any case in which the employee has not been employed for a sufficient period to enable a calculation to be made under the preceding provisions of this Chapter, the amount of a week's pay is the amount which fairly represents a week's pay.

(2) In determining that amount the employment tribunal—

(a) shall apply as nearly as may be such of the preceding provisions of this Chapter as it considers appropriate, and
(b) may have regard to such of the considerations specified in subsection (3) as it thinks fit.

(3) The considerations referred to in subsection (2)(b) are—

(a) any remuneration received by the employee in respect of the employment in question,
(b) the amount offered to the employee as remuneration in respect of the employment in question,
(c) the remuneration received by other persons engaged in relevant comparable employment with the same employer, and
(d) the remuneration received by other persons engaged in relevant comparable employment with other employers.

**234 Normal working hours**

(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case—

(a) the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and
that number or minimum number of hours exceeds the number of hours without overtime,
the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

Although regulation 16 does not in terms also apply s 234, which provides a partial definition of what are 'normal working hours' for the purposes of sections 221–224, the Court of Appeal in *Bamsey v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359, [2004] IRLR 457 held that the definition in s 234 should be applied in calculating a week's pay for the purposes of regulation 16. However both the EAT, and the Court of Appeal, have subsequently held that it was wrong to do so, given the conflicts between the established interpretation of s 234, in relation to overtime in particular, and the requirements of the WT Directive as interpreted out by the ECJ. This is an important point in the development of the case law as, on the face of it, *Bamsey* represented an insuperable hurdle in calculating holiday pay with over time elements included.


6. The question of whether the statutory formula in Regulation 16 complied with the Working Time Directive was considered by the ECJ in *Williams*. The case in fact involved the Civil Aviation (Working Time) Regulations 2004 [SI 2004/756] which provides for “paid annual leave”. The case involved some 2500 pilots who were only paid basic salary without supplements and allowances which were paid for periods spent flying and away from base. The case was referred to the ECJ by the Supreme Court which asked questions in relation to the WTD as well as the CAD. The Court asked, inter alia, 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?

7. Advocate General Trstenjak proposed that under the CAD and Article 7 of the WTD “holiday pay must, in principle, be determined in such a way as to correspond to the worker's normal remuneration”. Where remuneration was supplemented by flying
time and time away from home base the worker was entitled to holiday pay which corresponded to the average earnings based upon a “sufficiently representative reference period”. Where there is part payment relating to expenses then it would only be the balance that would have to be brought into the equation (that balance being the part subjected to income tax).

8. In the European Court the ruling was given as follows:

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Article 7 of Parliament and Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time and clause 3 of the Agreement annexed to Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation, concluded by the Association of European Airlines (AEA), the European Transport Workers’ Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.
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9. In its judgment the ECJ noted its previous decisions in which it had stated that the worker must “receive their normal remuneration” and that “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.”


10. The Civil Aviation WT Regulations only referred to “annual leave” and the Supreme Court had to consider how to apply the principles to achieve comity with European law. The Supreme Court held that that, in the absence of a detailed legislative scheme, or collective agreement, for the assessment of paid annual leave where disputed, it was for the employer in the first instance to choose a period of reference within the parameters of what could reasonably be judged to be representative. Should the employer not do so, it would be a matter for domestic judicial determination, and an employment tribunal was capable of making its own assessment of pilots’ average remuneration over a representative reference period. Since any component of the allowances intended exclusively to cover costs had to be
excluded, the tribunal had to consider on what basis the pilots’ time away from base allowance was agreed and paid during any relevant period; but that, a detailed evaluation of the precise need for, or reasonableness of, the allowance was not required, the question being whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs.

11. Thus the employer may set a representative period, which does not have to be the 12 weeks in the ERA 1996. The flying pay supplement was to be included and the case was remitted to consider how it was to be calculated. The Supreme Court did not address the compatibility of the formula in Regulation 18 and ERA 1996 with the ECJ’s approach but it was apparent from the decision that a Tribunal would need to give full effect when construing regulation 16 and ERA sections 221-224 and 234.

(d) Neil v Freightliner Ltd Case 1315342/12 (12 July 2013, unreported).

12. A Birmingham Tribunal in Neil considered a case where there was a 35 hour week of 7 hour shifts but, in fact there was a rota which meant that up to nine hour shifts were worked and the employee was paid for those hours. Holiday pay was calculated on the 35 hours. The Tribunal held that all elements must be taken into account since they were intrinsically linked to the performance of the tasks he was required to carry out. Words were read into Regulation 16(3) that sections 223(3) and 234 of ERA do not apply (the latter being necessary because of Bamsey [2004] ICR 1083 which had applied section 234, that now being considered incompatible with European law.

13. In Fulton v Bear Scotland Ltd Case S/4112472/12 (29 April 2013, unreported), supplements paid for overtime, shift work and standby duties and in Smyth v Hertel (UK) Ltd Case 2603803/2012 (4 February 2014, unreported), payments for overtime, a complex attendance bonus and travelling time and radius allowances had been excluded and the Tribunals held that they should have been included in the calculation.

14. These cases were appealed (though Neil settled – see below at (f)).

15. The next case in the chronology is Lock. This was a case where pay was made up in part of commission on sales. Mr Lock’s monthly remuneration consisted of a basic salary and commission calculated by reference to sales actually achieved, which constituted more than 60% of the total remuneration. Commission was not taken into account in calculating his holiday pay. When he was on paid annual leave he was not able to make any new sales or follow up on potential sales and consequently generated no commission during that period. This had an adverse effect on the salary he received during the months following that leave. He brought a claim before an employment tribunal, pursuant to regulation 16 of the Working Time Regulations 1998, for outstanding pay in respect of the period he had been on leave.

16. The European Court of Justice ruled as follows:

1 Article 7(1) of Parliament and Council Directive 2003/88 of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary.

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

17. This ruling was further considered by the English Court as set out below at (i).

(f) Bear Scotland Ltd v Fulton [2015] IRLR 15, [2015] ICR 221

18. On appeal to the EAT, the Tribunal decisions at (d) were upheld by the higher Court. Article 7 of the Directive means that pay for non guaranteed overtime, where the employee must accept the work if offered must be included as part of the calculation of normal pay. Langstaff J stated “Insofar as the test seeks an intrinsic or direct link to tasks which a worker is required to carry out (stressing those last four words) it would be perverse to hold that the overtime in these cases was not.” The EAT held that it was possible and necessary to read words into Regulation 16(3)(d) to clarify the application of sections 221-224. The regulation is to be read as follows: "(d) as if the references to sections 227 and 228 did not apply, and, in the case of the entitlement under regulation 13, sections 223(3) and 234 do not apply."
reference to section 223(3) means that the calculation will be at the actual rate of overtime and not just the normal rate.

19. Langstaff J held that there was no reason to depart from the calculation in the WTR for the additional leave under Regulation 13A. This may have implications for claiming arrears of pay where the holiday leave is designated as Regulation 13 or 13A holiday. The position is different with Regulation 13A payments and "it may be that the legislature has to consider whether to adjust the provisions in respect of "Bamsey" payments for the additional leave for which regulation 13A provides."

20. On the question of whether a gap of more than three months between deductions meant that the claim could not be made, Langstaff J said:

"...a period of any more than three months is generally to be regarded as too long a time to wait before making a claim. The intention is that claims should be brought promptly. I doubt, therefore, that the draftsman had in mind that a deduction separated by a year from a second deduction of the same kind would satisfy the temporal link. It would have been perfectly capable of justifying a claim at the time, and within three months of it. Whereas when considering a series, as when considering whether there has been "conduct extending over a period" (the analogous provision in the Equality Act 2010) some events in the series may take colour from those that come either earlier or later, or both, so that the factual similarities can only truly be appreciated when a pattern of behaviour is revealed, the essential claim here is for payment in a sum less than that to which there is a contractual entitlement. The colour of such a deduction is, though not inevitably, at least likely to be clear within a short time after it occurs, if not at the time.

81. Since the statute provides that a Tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (sections 23(2) and (3) ERA 1996 taken together) (unless it was not reasonably practicable for the complaint to be presented within that three month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid."
19. There were serious concerns expressed about the prospect of workers being able to make claims for a series of deductions going back to the inception of the WTR in October 1998. These regulations were brought in to limit claims for a two year back period. Thus section 23 of the ERA has been amended to state:

“(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).”

The regulations apply to most claims for unlawful deductions from wages, including deductions from salary, holiday pay, commission and bonuses. Some types of claim are specifically excluded, such as deductions from statutory sick pay and statutory maternity, paternity or adoption pay. Regulation 16 now provides under 16(4) that “and paragraph (1) does not confer a right under that contract”, thus excluding a contractual claim under 16.

(h) Fulton and Baxter v Bear Scotland Ltd, Case S/4112472/2012 and others, Employment Judge P Cape

21. When Bear Scotland was referred back to the Glasgow Tribunal it was agreed by the parties that the first 20 days of holiday should be designed as Regulation 13 leave. It was also held that any period of more than three months between the dates of payments broke the chain of what would have been a series of deductions extending back over a number of years. It also rejected the argument that it had not been reasonably practicable to bring earlier claims which were time barred by the three month rule. There was also not a new cause of action in respect of such claims on termination of employment. The Judge stated:

“I am bound to conclude that the chain linking a series of deductions is broken when there occurs a period of three months or more between successive deductions, it follows that the under-payments occurring prior to the claims in 4112472/12, 41000534/13, 4102156/13 and 4106915/13 cannot be linked as part of a series to any subsequent under-payment as the most recent under-payment was already more than three months old at the date of presentation. Further, there are more than three months separating under-payments in subsequent holiday years."
22. The Lock case was referred back to the Tribunal, appealed to the EAT ([2016] IRLR 316; ICR 503 – in which Singh J followed Bear Scotland) and the Court of Appeal. The Court of Appeal reached the same conclusion as in Bear Scotland that words could be read into Regulation 16 to give full effect to the Directive, where regular commission payments were part of the employee’s remuneration but would be excluded from the calculation of holiday pay because of section 221, ERA 1996. The differential treatment in the scheme of the Regulations was simply not foreseen when they were enacted and that the grain or thrust of the 1998 Regulations could fairly be identified as directed at providing holiday pay for workers measured by reference to criteria required by article 7 as explained by the Court of Justice. The claimant was entitled to have his holiday pay calculated by reference to his normal remuneration, which required his commission earnings to be taken into account; and that necessitated the implication of words into the Regulations to make that meaning clear.

23. The Court of Appeal stated that the Tribunal had expressed itself too widely as the case was confined to Mr Lock and in so far as it had referred to all types of commission and not just to contractual “results-based commission” that was the subject of Mr Lock’s case, the words therefore needed to be amended.

24. The Bear Scotland case was appealed a second time to the EAT. The Tribunal excluded as time barred all claims or parts of claims where a period of more than three months had elapsed between successive non or underpayments of holiday pay, as set out at (h) above. The claimants appealed and sought to argue that the passages in the EAT decision might not be binding or even that they were wrongly decided, but that if they were binding, their effect was to create a strong presumption rather than a binding rule that where the series of deductions is broken by a gap of three months or more the claims is time barred. In the EAT, it was held that the relevant passages in the earlier EAT decision were part of the ratio decidendi and the Tribunal had correctly identified them as binding upon it.
25. Lady Wise stated:

The reason why further enquiry was not required in this particular case was because of the agreement between parties about the relevant facts. Had the dates or circumstances of leave taken been in dispute, there might have been scope for an argument about whether the Tribunal had correctly applied the law to the facts. In the absence of any dispute, the Tribunal did what it was bound to do and excluded those claims or parts of claims where there had been a gap of three months or more between two successive alleged non or under payments. Standing the agreed facts, there was simply no need for the tribunal to assess the material before it further than as set out in the judgment. Once satisfy that the temporal link was broken, the factual similarities became irrelevant. They could only have been relevant if the applicable authority had indicated that factual similarities were sufficient on their own to satisfy the requirements of section 23(3), but the authority binding on the Tribunal was to the opposite effect.

(k) Dudley Metropolitan Borough Council v Mr G Willetts and others [UKEA/0334/16/J0J]

(l) It had been accepted by the parties before the Northern Ireland Court of Appeal in Patterson v Castlereagh BC [2015] ICR ICA 47, [IRLR] 721 that voluntary overtime was to be included in the calculation. Simler P stated that this decision was not binding on the EAT in Dudley Metropolitan Borough Council v Mr G Willetts and others [UKEA/0334/16/J0J]. Nevertheless, the Judge reached the same conclusion. The argument of the employer was that the decisions of the CJEU in two important cases, British Airways Plc v. Williams and Others C-155/10 [2012] ICR 847 and Lock v. British Gas Trading Ltd C-539/12 [2014] ICR 813 “make clear that such payments should not count as “normal remuneration” because they lack the necessary intrinsic link to the performance of tasks required under the contract of employment.”

27. After considering the case law in detail, Simler P stated that “each case the relevant element of pay must be assessed in light of the overarching principle and objective of Article 7 which is to maintain normal remuneration so that holiday pay corresponds to (and is not simply broadly comparable to) remuneration while working”. She concluded, in relation to Williams that:

Paragraph 24 [of Williams] does not however, set a sole or exclusive test of “normal remuneration” dependent on a link between pay and the performance of duties undertaken under compulsion of the contract of employment. Nor does it restrict the application of the overarching
principle. If there is an intrinsic link between the payment and the performance of tasks required under the contract that is decisive of the requirement that it be included within normal remuneration. It is a decisive criterion but not the or the only decisive criterion. The absence of such an intrinsic link does not automatically exclude such a payment from counting. That is supported by the fact that payments that are personal to the individual such as those relating to seniority, length of service and professional qualifications also count for normal remuneration purposes even though they are not necessarily linked to performance of tasks the worker is required to carry out under the contract of employment or to inconvenient aspects of such tasks.

Mr Jones’ argument places too much weight on the reference to tasks required to be carried out under the contract of employment. This was not an issue in Williams or Lock. In Williams the court was deciding whether the payments were intrinsically linked to work done by the claimants for the employer or whether they reimbursed expenses incurred by them; and not to whether the work was compulsorily required under the contract or done on a voluntary basis. Furthermore at paragraph 32 of Lock in particular, the CJEU appears to treat work within the company as synonymous with the performance of tasks required to be carried out under the contract of employment.

Furthermore, the exclusion as a matter of principle of payments for voluntary work which is normally undertaken would amount to an excessively narrow interpretation of normal remuneration that gives rise to the risk of fragmenting of pay into different components to minimise levels of holiday pay. It would result in a risk of a worker suffering a financial disadvantage that might deter him from exercising these rights contrary to the underlying objective of Article 7. It would carry the risk identified by Advocate General Trstenjak of employers setting artificially low levels of basic contracted hours and categorising the remaining working time as “voluntary overtime” which does not have to be accounted for in respect of paid annual leave. This is not a fanciful but a real objection to the Respondents’ argument as demonstrated by the current proliferation of zero hours contracts.

It seems to me that applying the overarching principle established by the CJEU in Williams and Lock, in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis to justify the description “normal”, the principle in Williams applies and it will be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration.”

28. If the approach was wrong, then in the alternative, there was a link with the contract:

“If I am wrong and there is a requirement of an intrinsic link, the link is between the payment in question and tasks which a worker is required to carry out under his contract of employment, and I consider that this test is satisfied here. Absent a contract of employment, the specific agreement or arrangement made for voluntary overtime would not exist. The duties or tasks carried out in either case are the same.”
29. The important questions is whether payments are sufficiently settled and regular. This issue is considered below.

PRACTICAL ISSUES

Working out holiday pay

30. We now know that just about every element of pay will need to be taken into account when we are calculating holiday pay. This will include regular payments, even if the work or obligation is not incurred each week provided that it is sufficiently regular. There appear to be a number of issues of potential contention here:

a. The reference period will have to be considered. The 12 week period under the ERA may not give a proper picture of regularity. In some cases it may be that the reference period will need to be a longer period.

b. Where there is a large one off payment, such as commission or bonus on an annual basis the holiday pay will be vastly skewed if that period is taken into account. In such a case, a reference period may be needed of a longer duration; say dividing the bonus by 52 weeks and simply working out holiday pay from that 52 week period or the previous year.

c. Where the worker is paid monthly on commission but has generated a large amount of work (had a good month) this may distort the holiday pay so that provision may need to be made for this. This could also be the position where there is a large amount of overtime during a particular period.

d. The three month time limit is a potential trap for the worker. There is an argument that employers can designate whether the time off are under regulation 13 or 13A. If it is designed as 13A and there is a sufficient gap between the regulation 13 holiday periods then the limitation period may come into play. It remains to be seen whether this will be accepted by the Tribunals.

e. A different calculation will be needed for 13 and 13A as the latter does not have to include all the additional elements. Whether this is administratively worthwhile remains to be seen.

f. A key issue is going to be the issue of regularity. The Dudley case contains some useful comments in this respect. It is apparent that there can be gaps of weeks for particular elements but these may still have to be brought into the calculation. This is where the reference period will become crucial.
g. It is still not clear whether some items, such as tips or payments under a tronc scheme, must be included in any calculations.

Regularity

31. There is useful guidance in Dudley both in the Employment Tribunal and the EAT. Although this was concerned with voluntary overtime there is no reason why the approach should not apply to other period overtime or other obligations.

32. In the Tribunal, Employment Judge Warren considered the various components that were being claimed:

a. Out of hours standby – This had been paid to each of these claimants over a period of years, at a rate of 1 week in 4 or 1 week in 5, with some variation when they swap on the rota. This may be a case therefore for an average payment to be calculated individually.

b. Call out allowances – If a worker is called out, he is being reimbursed for the inconvenience of undertaking out of hours work. Whilst this is a voluntary rota, once on it he is, at the time, required to attend the call out and this is intrinsically linked to the work required of him. For example, he is called out because he is a plumber in his day job, with the council. The payment reflects the antisocial nature of the work. He is on the rota because the respondent allows him to volunteer, an opportunity not available to every employee. This arises out of his employment and the remuneration he receives is ‘normal’.

c. Additional voluntary overtime - Some of the employees undertake regular overtime – such that it will fit within the definition of ‘normal pay’, others do not. The Tribunal gave examples of these employees:

i. Mr W – works regular overtime which borders on the non-guaranteed as it is expected of him under his job description. I consider such to fall within normal pay. This is not unusual or rare, but regular.

ii. Mr P – is subject to voluntary overtime provisions, but he advised the Tribunal that such overtime is very rare, and as such this cannot be said to be part of his normal pay.

iii. Mr R and Mr W are unaffected by this type of voluntary overtime.

iv. Mr C was regular Saturdays and is paid overtime. He sees it as an extension to his working week and he is normally paid for it. It falls within normal pay.
d. Travel allowance - This is paid at a rate higher than that recognised by the Inland Revenue to be purely to recompense the cost of travel, there is an element of a benefit in kind. It is calculated on the mileage undertaken. There is no suggestion that it is designed to pay for the employee’s time, which is reimbursed separately. Part of this is clearly the equivalent of the train ticket, the taxed balance is not. I conclude that such part of the allowance as is the subject of tax as a benefit in kind, is part of the claimant’s ‘normal’ pay in accordance with Williams. It is not designed to recompense for expenditure, and it is subject to tax. It is always payable if mileage is undertaken in a private vehicle.

33. In the EA T, two components were further considered:
   a. callout allowances - It was noted that (a) once on the rota a worker cannot refuse to attend a callout and/or (b) the Claimants were called out to do the type of work ordinarily required of them. “It would be inconsistent with the overarching principle to exclude payments for ‘voluntary’ work that must be performed once the worker commences an overtime shift or standby duty and that is normally worked, simply because they are not required by the contract of employment.”
   b. out of hours payments - It was accepted that the out of hours work done by the Claimants was broadly regular because they were on call for one week in every four weeks or one week in every five weeks over a number of years. The approach to take is as follows:

   ...whether a payment is normal is a question of fact and degree. Questions of frequency and regularity are likely to play a part in determining whether a payment is normal because a payment that is made on a regular basis suggests that it is a “systemic component” of remuneration (see paragraph 86 of the Advocate General’s Opinion in Williams) that is usually or normally paid. Moreover, I see no difficulty in principle in concluding that a payment is normally made if paid over a sufficient period of time on a regular basis, say for one week each month or one week in every five weeks, even if it is not paid more frequently or even each week. These are questions of fact for a tribunal and here, in my judgment, the Tribunal was entitled to find that pay for working on this basis was part of normal remuneration. It was neither exceptional nor unusual. Fluctuations in the amount paid would be catered for by the 12 week average.”

34. The approach taken above demonstrates why the reference period is likely to be so important.
34. Rolled up holiday pay

It is not proposed to go into detail on this area in this Briefing. However, it should be noted that if holiday pay is rolled into remuneration and paid as an add on, many of the problems of calculation will not arise (though commission and one off bonus are not likely to be calculated in this way). Though the European Court has set its face against rolled up holiday pay this may be one way out of the headache for employers of trying to work out holiday pay where there are a large amount of sporadic payments that fluctuate greatly. If this approach is to be adopted it will have to be worked through very carefully given the case law that has developed on this topic.

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