Appeal No. UKEAT/0334/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 July 2017
Judgment Handed down
on 31 July 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

PRESIDENT

(SITTING ALONE)

DUDLEY METROPOLITAN BOROUGH COUNCIL APPELLANT

MR G WILLETTS AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SEAN JONES QC (One of Her Majesty's Counsel) Instructed by Harrison Clark Rickerbys Thorpe House 29 Broad Street Hereford HR4 9AR
For the Respondents	MR MICHAEL FORD QC (One of Her Majesty's Counsel) and MR MARK WHITCOMBE (Of Counsel) Instructed by OH Parsons LLP Sovereign House 212-214 Shaftsbury Avenue London WC2H 8PR

SUMMARY

WORKING TIME REGULATIONS – Holiday Pay

1. Payment for voluntary overtime that is normally worked is within the scope of Article 7 and therefore within the concept of 'normal remuneration' for the purposes of calculating Regulation 13 holiday pay.

2. It was open to the Employment Tribunal in this case to conclude that the payments in issue were part of normal remuneration for the Claimants, and no error of law was made out.

3. The appeal was accordingly dismissed.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This appeal raises an important issue affecting the level of holiday pay for workers across the UK: namely, whether payments received in respect of entirely voluntary overtime should be treated as forming part of a worker's "normal remuneration" for the purpose of calculating Regulation 13 holiday pay.

2. The Employment Tribunal (Employment Judge Warren) decided that they should, acknowledging in doing so that it was sailing into "uncharted waters". Dudley Metropolitan Borough Council who are the Appellants (but are referred to as the Respondents for ease of reference) challenge that conclusion, submitting 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.

3. The appeal is resisted. The Claimants, who are lead Claimants for a group of 56 employees in the Respondent's Directorate of Place responsible for the repair and improvement of council-owned housing stock, contend on the principal issue, in summary that:

(a) the exclusion of payments for "voluntary" work which is normally undertaken is inconsistent with the overriding principal of EU case-law that normal remuneration must be maintained so that pay in respect of annual leave "corresponds to"

remuneration while working. To exclude these payments results in financial disadvantage and deters (or might deter) workers from taking annual leave;

(b) in any event, there is, if necessary, a link here between the payments and the performance of duties under the contracts because, when working, these Claimants were required to work and perform tasks required by their contracts.

The factual background and the Employment Tribunal's decision

4. The Claimants are employed in a number of different roles as electricians, plumbers, roofers, storemen, operations officers and "Quick Response Operatives" (who carry out general repairs). They each have set contractual hours (for almost all 37 hours per week) which represent their normal working hours. Many have a contractual right to 2-4 hours' overtime. Payment for this is not in dispute.

5. In addition, they volunteer to perform additional duties which their contracts of employment do not require them to carry out. There is no dispute in that regard that the on-call and additional overtime work is entirely voluntary in the sense that they (the employees) can "drop on and off the rotas to suit themselves whether day by day, week by week, month by month or permanently" (paragraph 42 of the judgment). As the Employment Tribunal held, this additional work was "almost entirely at the whim of the employee, with no right to enforce work on the part of the employer".

6. The following elements of pay for the additional voluntary hours worked are in dispute in this case:

(i) Out-of-hours standby pay;

(ii) Call out allowance;

(iii) Voluntary overtime; and

(iv) Mileage or Travel Allowance linked to the above.

7. The Employment Judge referred to the CJEU's judgment in Williams, concluding that it required her to take into account anything "required of the claimant under his contract of employment which is intrinsically linked to the performance of the required tasks", but to leave out of account "occasional or ancillary costs". She referred to the Opinion of the Advocate General (also in Williams) that employees should suffer no disadvantage in taking leave and must receive normal or average remuneration so as not to suffer a financial disadvantage. She concluded that regardless of the nature of the work, the test is what normal pay is, having observed that loss of "pay" includes "overtime". She applied that test to the facts of the case and dealt with each element as follows:

(i) At paragraph 47:

> **"Out of hours standby - has 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. I am satisfied though that although the work is entirely voluntary it fits within the definition of normal pay, and to include it is remuneration at times of annual leave is entirely within the requirements set out by the CJEU and the Working Time Directive so as not to deter a worker from taking leave. To fail to pay it may deter a worker, who receives it consistently and regularly, from taking leave"**

(ii) At paragraph 48:

> **"Call out allowances – it follows that 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'. Normal pay is what is normally received (per Mr. Justice Langstaff – Bear Scotland"**

(iii) At paragraphs 50-54:

> **"Additional voluntary overtime - Some of the employees undertake regular overtime – such that it will fit within the definition of 'normal pay', others do not. I apply the Advocate General's definition, which is adopted by the CJEU in Williams.**
>
> **51. Mr Woolvin – 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"**

52. Mr Pugh – 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.

53. Mr Robertson and Mr Willetts are unaffected by this type of voluntary overtime.

54. Mr Cree works 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".

(iv) At paragraph 49:

"Travel allowance There is no doubt that as 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"

The legislative framework

8. The Working Time Regulations 1998 ("the WTR") were made under s.2(2) of the European Communities Act 1972 to implement in domestic law the Working Time Directive, now 2003/88/EC, originally 93/104/EC ("the WTD"). Regulation 13 gives every worker an entitlement to four weeks' annual leave, and together with Regulation 13A, provides so far as relevant:

"13 Entitlement to annual leave

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

(2) …

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 –

(a) …

(e) in any leave year beginning on or after 1 April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and Regulation 12(1) is subject to a maximum of 28 days."

A

9. There is a distinction between the right to annual leave created by Regulation 13 and the right to additional leave created by Regulation 13A. The former implements a right found in the WTD whereas the latter does not and is a purely domestic measure. The significance of the distinction is that any entitlement to increased holiday pay premised on rights derived from EU law applies only to Regulation 13 leave. This appeal is concerned only with payments of holiday pay relating to Regulation 13 holiday entitlement.

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10. The right to annual leave in the WTR is discrete from the right to be paid in respect of such leave. The right to payment is created by Regulation 16(1) which provides:

> **"A worker is entitled to be paid in respect of annual leave to which he is entitled under Regulation 12 [and Regulation 13A]. at a rate of a week's pay in respect of each week of leave"**

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Regulation 16(2) specifies a method for calculating the rate of a "week's pay" by providing that ss. 221 to 224 of the Employment Rights Act 1996 (the "ERA 1996") shall apply for these purposes (subject to certain modifications of no relevance here). These are complicated provisions. They work by seeking to divide employees into two broad categories: those who have "normal working hours" and those who do not.

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11. The category of employees with normal working hours sub-divides into three further sub-categories:

(i) Employees whose remuneration varies according to the particular day or time they work their normal hours;

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(ii) Employees whose remuneration varies according to the amount of work that they do during their normal working hours; and

(iii) Employees whose remuneration does not vary in the ways described immediately above.

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Employees in the first two sub-categories have their "week's pay" calculated by, broadly, averaging their remuneration for normal hours over a period of 12 weeks immediately preceding the calculation date if the employee works throughout his normal working hours in a week (see ss.222(2) and 221(3)). For the last sub-category, their "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" (s.221(2)).**

12. To determine whether or not an employee has "normal working hours" it is necessary to consider s.234 ERA 1996 which provides:

> **"(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 number in certain circumstances), and**
> >
> > **(b) that number of 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)".**

13. The effect of s.234 is that if an employee has normal working hours (whether or not their remuneration varies with the time at which the work is done or with the amount of work done), overtime hours do not count when calculating a week's pay unless the contract itself fixes a number of overtime hours that must be worked. Since 'fixed overtime' hours are necessarily hours that the employer is obliged to offer and that the employee is obliged to work, it is common ground that the relevant elements of pay in this case are not part of a "week's pay" under Regulation 16 WTR as a consequence of the deeming provision in s.234 ERA 1996, which effectively excludes payments in respect of overtime hours outside "normal

working hours" from the domestic calculation of a week's pay no matter how regularly or frequently those additional hours are worked. For employees without normal working hours, their "week's pay" is determined by reference to a 12 week averaging calculation specified at s.224(2) ERA 1996.

14. Accordingly, on the face of the WTR and the ERA 1996, each of the Claimants would have normal working hours but the payments in issue relate to hours which are not normal working hours within s.234 ERA 1996 and therefore are not included in a week's pay for holiday pay calculation purposes. However, it is common ground on this appeal that a conforming interpretation of the WTR is possible in accordance with the interpretive obligation required of domestic courts as recognised in Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR I-4135 (and see also in this context, Bear Scotland Ltd v Fulton [2015] ICR 221 where Langstaff P held, at paragraph 66, that a conforming interpretation is possible in the context of non-guaranteed overtime payments, as to which see further below). In any event, the provisions of Article 7 of the WTD are directly effective in this case. The question accordingly is the proper meaning and effect of Article 7 of the WTD, and whether the relevant elements of pay are within its scope.

15. Article 7 of the WTD provides;

> **"Annual Leave**
>
> **1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation 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."**

A This has been described as a particularly important principle of EU social law from which there can be no derogations: see BECTU [2001] ICR 1152 at paragraph 43. The right to paid holiday is underpinned by Article 31(2) of the Charter of Fundamental Rights of the EU.

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16. Neither Article 7 nor the WTD more generally make provision in respect of the amount of pay that is to be received during any period of annual leave. However, in Robinson-Steele v R D Retail Services Ltd C131/04 and C257/04, [2006] ICR 932, the ECJ held (at paragraph 50):

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> **"The term 'paid annual leave' in [Article 7 (1) of the WTD] means that, for the duration of annual leave within the meaning of the Directive, remuneration must be maintained."**

D The question of what constitutes "normal remuneration" was not addressed in Robinson-Steele but has been considered in the two cases since then referred to above: Williams and Lock. In Williams the relevant EU legislation was Directive 2000/79 ("the Air Crew Directive"), rather than the WTD, but the questions referred to the Court extended to Article 7 of the WTD and both the Advocate General and the CJEU held that the same principles apply to both Directives: see paragraphs 39-43 (AG) and paragraphs 14-15 (CJEU).

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17. The Air Crew Directive made provision for 4 weeks' annual paid leave for mobile staff in civil aviation. Like the WTD, it was silent as to what pay components should be included. In calculating holiday pay, British Airways Plc left out of account two payments: Flying pay supplement and "Time Away from Base" allowance. Those were both payments which arose from the duties that the claimant pilots could be required to perform by their contracts of employment and did not relate to the undertaking of additional voluntary duties (whether by way of non-guaranteed or voluntary overtime).

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A 18. In her opinion Advocate General Trstenjak summarised the effect of Robinson-Steele, stating (at paragraph 47) that it should be read as requiring that:

> **"the level of holiday pay must correspond exactly to that of normal remuneration".**

That in her view was supported by reference to the ILO Convention, C132, and Stringer v Revenue and Customs Commissioners [2009] ICR 932, and at paragraph 51 she said:

> **"it is necessary to ensure in this regard that the worker does not suffer any disadvantage as a result of deciding to exercise his right to annual leave. A prime example of such a disadvantage is any financial loss which…would deter him from exercising that right."**

C 19. The Advocate General observed that while a member state could divide remuneration into different components, an excessively narrow interpretation of what counts as remuneration would carry the risk of employers declaring that individual components do not count or fragmenting pay in such a way as to minimise levels of holiday pay required to be paid.

E 20. She used as her starting point the definition of "pay" to be found in Article 141(2) of the Treaty (now Article 157), emphasising its broad definition and that it has been found to include certain types of overtime payment (see paragraph 77). That wide definition covered payments representing direct consideration for activities carried out by the pilots and indirect payments for the activities performed that were compensatory in nature, for example, for inconvenient working hours. She concluded that the supplements at issue in Williams were material components of pay (see paragraph 79). However, she also stressed that the entitlement is only to "normal remuneration", explaining that there is a temporal component to that question and that "normal" can only refer to something that has existed over a certain period of time and can be used as a point of reference for comparison. Both elements of pay satisfied this requirement too and accordingly were within the concept of "normal remuneration" for holiday pay calculation purposes.

21. In its judgment in Williams the CJEU endorsed the conclusion of the Advocate General, following Robinson-Steele, 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" (paragraph 21). It held:

> **"19 In that context, the court has already had occasion to state that the expressly "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 Robinson-Steele v R D Retail Services Ltd (Jointed Cases C-131/04 and C-257/04) [2006] ICR 932; [2006] ECR 1-2531, paragraph 50, Stringer, 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, para 58 and Stringer, para 60.**
>
> **21 As the Advocate General states in 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 European Union law.**
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> **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, that 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 para 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 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 under 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.**
>
> **26 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, para 58 and Stringer, para 60.**

> **27 That stated, it must also be pointed out that the court has already held that an employee, working as a purser for an airline company and transferred, by reason of her pregnancy, temporarily to ground work, was entitled, during her temporary transfer, not only to maintenance of her basic salary but also to pay components or supplementary allowances relating to her professional status as an employee. Accordingly, allowances relating to her seniority, her length of service and her professional qualifications had to be maintained: see, to that effect, Parviainen v Finnair Ovi (Case C-471/08) [2011] ICR 99; [2010] ECR I-6529, para 73. That case law also applies to a pregnant worker who has been granted leave from work: see Grassmayr v Bundesminister für Wissenschaft und Forschung (Case C-194/08) [2010] ECR I-6281, para 65."**

22. Lock concerned the question whether normal remuneration for holiday pay purposes should include an element to reflect commissions that formed a significant element of earnings and that Mr Lock, a salesman, would have made had he not taken holiday.

23. In his opinion Advocate General Bot observed that the CJEU's analysis of the situation in Williams enabled the court to lay down several criteria for including or excluding as appropriate, certain components of pay as 'normal remuneration' for annual leave pay calculation purposes. He identified the general rule that the structure of a worker's remuneration cannot detract from the right to maintenance of normal remuneration (paragraph 24). He concluded that a decisive criterion for including certain components would be where there was an intrinsic link between the pay components and the performance of tasks the worker is required to carry out under his contract of employment (paragraph 27). Another criterion for inclusion in normal remuneration was identified as pay components that relate to the personal and professional status of the worker, for example, allowances relating to his or her seniority, length of service or professional qualifications.

24. Applying the first of these criteria, the Advocate General considered the commission in Lock to be "normal remuneration". At paragraphs 31 to 33 he explained:

> **"31. The commission in question is directly linked to the work normally carried out by Mr Lock under his contract of employment… Moreover, such commission does in fact constitute remuneration for the work Mr Lock has carried out himself. The**

> **commission is therefore directly linked to that worker's own work within his undertaking.**
>
> **32. …although the amount of commission may fluctuate from month to month … such commission is none the less permanent enough for it to be regarded as forming part of that worker's normal remuneration. In other words, it constitutes a constant component of his remuneration. …**
>
> **33. In my view, an intrinsic link does therefore exist between the commission received each month by a worker such as Mr Lock and the performance of the tasks he is required to carry out under his contract of employment…"**

25. The Court reiterated the approach adopted in Williams (see paragraphs 26-31), agreeing with the Advocate General and expressly endorsing his approach at paragraphs 31 to 33. The CJEU concluded that:

> **32. …the commission received by Mr Lock is directly linked to his work within the company. Consequently, there is an intrinsic link between the commission received each month by Mr Lock and the performance of the tasks he is required to carry out under his contract of employment."**

26. In terms of domestic authority, two decisions to which I was referred are relevant though neither is determinative of the particular issues in this case. In Bear Scotland Ltd v Fulton and another [2015] ICR 221 the Employment Appeal Tribunal (Langstaff P) was concerned with overtime identified and described as "non-guaranteed overtime" (in other words overtime the employer is not obliged to provide but if it is offered, the employee is obliged to perform it) and whether payments for non-guaranteed overtime were normal remuneration within the scope of Article 7 of the WTD. Among the arguments advanced was an argument advanced by Bear Scotland that overtime hours on a voluntary or non-guaranteed basis are special hours attracting special remuneration which was not part of 'normal remuneration' as it was not intrinsically linked to the worker's tasks under the contract because a worker has a right to refuse to perform those tasks. Such payments are not for carrying out duties under the contract (paragraph 33B-C). In rejecting this argument, the Employment Appeal Tribunal held:

> **"44. Despite the subtlety of many of the arguments, the essential points seem relatively simple to me. "Normal pay" is that which is normally received. As Advocate Genral Trstenjak observed in Williams, there is a temporal component to what is normal:**

> **payment has to be made for a sufficient period of time to justify that label. In cases such as the present, however, where the pattern of work is settled, I see no difficulty in identifying "normal" pay for the purposes of EU law and accept that, where there is no such "normal" remuneration, as average taken over a reference period determined by the member state is appropriate. Accordingly, the approach taken in Williams is unsurprising. The court in Lock looked for a direct link between the payment claimed and the work done. In the Hertel and Amec cases, the work was required by the employer. On the evidence, the employment tribunal was entitled to think it was so regularly required for payments made in respect of it to be normal remuneration.**
>
> **45. In so far 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 overtime in these cases was not. In my view, therefore, article 7 requires and required non-guaranteed overtime to be paid during annual leave. I see no scope for any such uncertainty as would persuade me to make a reference to the Court of Justice".**

27. The Employment Appeal Tribunal held that given the WTR were intended to implement the WTD, and there was no intrinsic reason why holiday pay should exclude payment for overtime worked where the worker was contractually bound to work if required, even though his employer was not bound to offer it, Regulation 16 could and should be construed so as to conform with Article 7. The conclusion that a conforming interpretation is possible was challenged unsuccessfully in the Court of Appeal in British Gas Trading Ltd. v Lock [2017] ICR 1 where the Court unanimously concluded that the WTR could and should be interpreted as requiring commission earnings to be taken into account when calculating holiday pay in that case, albeit making clear that its judgment was confined to Mr Lock's case.

28. I accept as Mr Jones QC submits that the workers in Bear Scotland had no right to refuse to perform the overtime work offered to them, whereas in this appeal the position is different. Furthermore, in rejecting this argument, the Employment Appeal Tribunal did not decide (and was careful not to decide) whether payments for voluntary overtime fall to be treated in the same way, in other words, as normal remuneration for these purposes.

29. The question whether voluntary overtime pay should count as "normal remuneration" was in issue in Patterson v Castlereagh Borough Council [2015] NICA 47. The NICA

decided that such pay should count but the point of principle was not fully argued, because it was conceded. Although the judgment of the CJEU at paragraph 24 of Williams was cited, there is no analysis of it at all by the NICA. I accept, as Mr Jones submits, that the decision is not binding on this Appeal Tribunal and given the points to which I have just referred, cannot have significant persuasive effect.

Ground 1: the scope of Article 7

30. In light of those authorities, Mr Jones submits that the CJEU has twice considered whether particular payments should or should not be treated as "normal remuneration" (albeit that on neither occasion were the payments concerned with the performance of tasks that were voluntary). On both occasions, in determining what should count as "normal remuneration" and what should not count, the Court used a criterion that expressly required an intrinsic link between the payment and the performance of tasks that the worker is required to carry out under his contract of employment.

31. Mr Jones submits that once it is accepted that only normal remuneration, rather than all remuneration counts, a test is required to identify those components of pay that count as normal remuneration and those that do not. He relies on paragraph 24 of Williams (read with paragraph 26) as setting the test for what components of pay count as "normal remuneration". The test, he submits, requires an intrinsic link between the payment and the performance of tasks that the worker is required to carry out under his contract of employment. That compulsory contractual language was repeated in Lock and is a critical feature of the test. Paragraph 24 having set out the test, paragraph 26 of Williams describes how the national court should apply that test, hence the wording at the beginning of this paragraph, "in that regard". If paragraph 24 does not set the test it is difficult to see why the concept of an

A intrinsic link is used and difficult to see why the Advocate General in Lock referred to this as a "decisive criterion".

B 32. Moreover, Mr Jones submits that it is unsurprising that the application of that test in Williams resulted in a conclusion that flying pay and "time away from base" pay are part of normal remuneration. Flying pay is intrinsically linked to the task required to be performed by pilots under their contracts of employment and it is in the nature of their employment to be C inconvenienced by having to perform such tasks. There is also an obvious link in respect of "time away from base" pay where the consequence of performing the flying task is to take the pilot away from home. This attracts payment allowances because spending time away as a D consequence of performing duties under their contracts puts pilots to inconvenience. The same is true of Lock. However in the case of voluntary overtime the necessary requirement linking the payment to the performance of tasks carried out under the contract of employment is missing. Voluntary overtime is not performed under the contract of employment but by E reference to a separate agreement between the parties.

F 33. In resisting these submissions, Mr Ford QC submits that the overarching principle is that the purpose of this requirement is to ensure that workers benefit from remuneration comparable to that paid in respect of periods of work; or to put it another way, do not suffer any financial disadvantage as a result of taking annual leave. Because any financial G disadvantage may deter a worker (subject to de minimis principles) it is incompatible with the objectives of Article 7 to exclude pay for voluntary overtime from the calculation of pay for Regulation 13 annual leave.

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34. Mr Ford relies on the Opinions of the Advocates General and the Court in Williams and Lock as establishing that principle. Accordingly, in addition to basic pay, payment in respect of annual leave must include payments for any "inconvenient aspect" linked to tasks a worker is required to carry out under his contract (Williams at paragraph 24); payments for seniority, length of service and professional qualifications (Williams at paragraph 27); and payments by way of commission (Lock at paragraph 32). These are all illustrations of payments which necessarily fall within the overarching principle established by these cases, and therefore within Article 7. The proper approach, he submits, is that in each case, the disputed payment must be assessed in light of the objective of Article 7, which is to maintain normal remuneration, as the analysis in both Williams and Lock shows.

35. I prefer the submissions of Mr Ford on this question. My reasons follow.

36. There is no doubt that the right to paid annual leave is a particularly important principle of EU social law, enshrined in Article 31(2) of the Charter. There is no provision for its derogation in the WTD. Recital 6 to the WTD requires account to be taken of the principles of the ILO Convention with regard to the organisation of working time. The ILO has adopted paragraph C132 which is the source of the requirement that the full period of holiday to which a worker is entitled should be paid at a rate that is "at least his normal or average remuneration". There is also no doubt that payments in respect of overtime (whether that be compulsory, non-guaranteed or voluntary), constitute remuneration as a matter of domestic and EU law.

37. EU law requires that normal (not contractual) remuneration must be maintained in respect of the four-week period of annual leave guaranteed by Article 7. That overarching

principle means that the payments should "correspond to the normal remuneration received by the worker" while working: see Williams and Lock. The purpose of this requirement is to ensure that a worker does not suffer a financial disadvantage by taking leave, which is liable to deter him from exercising this important right from which there can be no derogation.

38. It follows in my judgement, that the CJEU in Williams, having expressly endorsed the conclusion of the Advocate General at paragraph 90.2, did not purport to set a narrower test at paragraph 24 of its judgment that would have the effect of restricting the application of the overarching principle.

39. Having set out the overarching principle, the CJEU made clear that the division of pay into different elements cannot affect a worker's right to receive "normal remuneration" in respect of annual leave. In 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 (paragraphs 22 and 23).

40. Further, for a payment to count as "normal" it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so.

41. Read in that light, paragraph 24 of Williams is unsurprising and simply reflects the Court's assessment of the specific payments at issue in that case as examined in light of the overarching principle. That is reinforced by the reference to "inconvenient aspects" which

were directly relevant to the two payments at issue. Paragraph 24 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.

42. 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.

43. 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.

44. 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.

45. Accordingly, the Employment Tribunal in the present case made no error of law in finding that remuneration linked to overtime work that was performed on a voluntary basis could be included in normal remuneration for calculating holiday pay.

46. 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. It seems to me that the contract of employment constitutes an umbrella contract in that sense. Whatever the position in advance

of a particular shift, it seems to me that once the Claimants commenced working a shift of voluntary overtime or a period of standby duty or callout, they were performing tasks required of them under their contracts of employment even if there was also a separate agreement or arrangement. The payments made were all directly linked to tasks they were required to perform under their contracts of employment and, once those shifts or standby periods began, they were in no different position from an employee who is required by his contract to work overtime or be on standby or attend callouts.

Ground 2: callout allowances

47. This ground of appeal relates to the Employment Tribunal's finding that callout payments were linked to compulsory work because (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: see paragraph 48 of the judgment.

48. Mr Jones submits that this approach impermissibly erodes the distinction between compulsory and voluntary work. Applying approach (a) any voluntary work could be considered compulsory, because a worker will always be required actually to perform the tasks required of him if he is to receive remuneration for a voluntary shift. If there is compulsion it arises from a specific agreement to work the additional hours and not the contract of employment. Equally, applying approach (b) would he submits render voluntary work compulsory wherever it was the sort of work carried out ordinarily by that worker. This is likely to be the majority of voluntary work because when arranging overtime or callout work employers will typically seek to deploy workers who are trained for or accustomed to that type of work. That does not mean the extra work is "intrinsically linked" to the ordinary work.

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49. In agreement with Mr Ford, and for the reasons already given, I do not accept the premise of this argument. The focus of the overarching principle derived from Williams is on the maintenance of normal pay; in other words, the pay that is normally received by the worker when he or she is working. The WTD draws no distinction between work that involves tasks that are contractually required and those that are done as a consequence of volunteering to be on standby or callout or working overtime under other special or separate arrangements. That is simply not its focus. In applying the intrinsic link test, the focus is on the link between the payment and the performance of duties or work that is normally done within the company or for the employer, to ensure no financial disadvantage as a result of taking annual leave in the interests of a worker's health and safety. 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. The question in every case, irrespective of the label put on the payment, is whether the payment forms part of the worker's normal remuneration. If payments for voluntary shifts, standby or callout payments are normally paid, they must be included in pay for holiday leave to ensure that there is no financial disadvantage as a result of taking such leave, irrespective of the source of the obligation to perform the work in question.

50. Nor do I consider that there was any error in the Employment Tribunal's reference to the similarity of the work done on the rota or when called out as compared with the work ordinarily required during normal contractual working hours. It seems to me that this was a relevant factor for the Tribunal to consider and as Mr Ford submits, it reinforced the conclusion that the callout payments were for work which was required of the Claimants

under their contracts of employment. These workers were called out both because they are plumbers in their day jobs and had volunteered to be on the out of hours rota.

Ground 3: out of hours payments

51. The Respondents contend that, even if contrary to ground 1 there is no principled reason why remuneration linked to voluntary work cannot be included in the calculation of holiday pay, nevertheless the Tribunal erred in law in holding that the out of hours pay (both standby and callout pay) represented "normal pay": see paragraphs 47 and 48 of the judgment.

52. Here it is argued that the Tribunal wrongly conflated the concept of "normal" with the concept of "regular". It is 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. However, the Respondents contend that it does not follow that such work is normal because the statute requires a tribunal to determine a worker's remuneration in a normal week. Normal weeks for these particular workers were, on that basis, weeks when they were not on call. Mr Jones submits that a distinction must be drawn between regular overtime performed every week or most weeks which does form part of a normal week, and overtime that is performed, albeit regularly, in only a minority of weeks. The latter pattern of work gives rise to normal weeks which are the majority of weeks without overtime and to extraordinary or special weeks, where the worker performs overtime or is on call. He submits that remuneration earned in such special weeks is not part of normal remuneration. He contends that this distinction is consistent with the underlying purpose of the WTD. Workers typically take holiday in blocks of one, two or perhaps three weeks. If such a worker performs overtime on a regular weekly pattern, he will necessarily be forgoing overtime by taking holiday. However where the overtime is performed less frequently, say

A once a month, the worker may take holiday in between shifts of overtime so as to retain all available opportunities to earn additional remuneration. That, he submits, is what happened in this case. In these circumstances the Claimants were not deterred from taking holiday. They simply took it in between their weeks on call and the effect of the Tribunal's judgment B is accordingly to overcompensate them by paying them in respect of an opportunity that they have not missed.

C

53. I do not accept these arguments. The focus in Article 7 is on normal remuneration and not the normal working week. As already indicated, whether a payment is normal is a question of fact and degree. Questions of frequency and regularity are likely to play a part in D 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.

E

54. 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 F 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.

G

55. Nor do I accept that as a matter of law, if workers have the opportunity to take annual leave in weeks with no overtime or out of hours shifts, this means they are not deterred from taking holiday by the failure to include within normal remuneration for paid leave pay for H such overtime or out of hours shifts. A deterrent effect is inferred from a reduction in

remuneration rather than from actual evidence that a worker has not taken annual leave. The real question is whether normal remuneration is maintained in respect of annual leave guaranteed by Article 7. If it is not, a deterrent effect is presumed irrespective of the opportunity the worker had to take annual leave at a different time or suffered a financial loss as a result of taking annual leave when he or she did.

56. So far as the individual position of each Claimant is concerned, I accept Mr Ford's submission that the issue of individual loss was not before the Tribunal and the Tribunal made no findings in this regard. It will be a question for a future hearing whether each individual Claimant suffered loss as a result of taking leave when he or she did. That will require a focus on issues such as the working pattern of each individual, what they normally did and when at work and what they would have earned if they did not take annual leave. I do not read the judgment as having determined these issues.

Conclusion

For all these reasons and notwithstanding the clear and well articulated arguments advanced by Mr Jones, the appeal is dismissed. I am grateful to both counsel for their assistance in dealing with this appeal.