



17 October 2012

PRESS SUMMARY

British Airways plc (Respondent) v Williams and others (Appellants) [2012] UKSC 43
On appeal from [2009] EWCA Civ 281

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Mance, Lord Clarke, Lord Sumption

BACKGROUND TO THE APPEAL

The appeal concerns the nature and assessment of paid annual leave required by the Civil Aviation (Working Time) Regulations 2004 ('the Regulations').

The appellants are pilots employed by the respondent ('British Airways'). Their terms of employment are found in a Memorandum of Agreement ('MOA'). The MOA provides for pilots to receive a fixed annual sum plus two supplementary payments varying according to the time spent flying, namely the Flying Pay Supplement ('FPS') of £10 per flying hour and the Time Away From Base allowance ('TAFB') paid at £2.73 per hour. TAFB was introduced in place of meal allowances and to cover other costs. Pilots are taxed on 18% of TAFB as the tax authorities regard it as providing more than needed purely for costs. The two supplementary payments are subject to limits because pilots are limited to a number of permissible hours flying or on duty each year. The MOA requires pilots to take a certain period of annual leave and entitles them to take periods of additional leave. When on leave, pilots are paid the basic fixed pay.

Pilots are required to receive 'paid annual leave' under the Regulations, which implemented the provisions of Council Directive 2000/79/EC ('the Aviation Directive'). The appellants brought claims against British Airways arguing that pursuant to the Regulations, they were entitled to both the supplementary payments as well as the fixed annual sum as part of their 'paid annual leave'. They succeeded in the Employment Tribunal and the Employment Appeal Tribunal, but the Court of Appeal allowed British Airways' appeal. In 2010 the Supreme Court heard the appellants' appeal against that judgment, and decided it was under a duty to refer five questions concerning the interpretation of the relevant European law on the meaning of 'paid annual leave' to the Court of Justice of the European Union ('CJEU') (*British Airways plc v Williams* [2010] UKSC 16).

The CJEU gave its response in a judgment dated 15 September 2011 (*British Airways v Williams* (Case C-155/10) [2012] ICR 847). The matter thereafter returned to the Supreme Court to rule on its consequences for the dispute between the parties.

JUDGMENT

The Supreme Court, in the light of the judgment of the CJEU, unanimously remits the appellants' claims to the Employment Tribunal for further consideration of the appropriate payments to be made to them in respect of periods of paid annual leave. The judgment is given by Lord Mance.

REASONS FOR THE JUDGMENT

The CJEU had ruled that the purpose of the requirement for ‘paid annual leave’ in the Aviation Directive was to put the worker in a position which was, as regards remuneration, comparable to periods of work. A specific analysis of the various components of a worker’s pay was required. Any aspect which ‘is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment ...such as, in the case of airline pilots, the time spent flying’ was to be taken into account. By contrast, components ‘intended exclusively to cover occasional or ancillary costs arising at the time of performance’ need not be. It was for the national court to assess whether the various components comprising the worker’s total remuneration met those criteria, such assessment to be carried out on the basis of an average over a reference period which was judged to be representative [9-14].

The appellants argued that their claims should now be remitted to the Employment Tribunal for assessment, and that their remuneration on leave should include basic pay, FPS and 18% of TAFB. British Airways, however, submitted that the Regulations were too unspecific to give effect to the Aviation Directive and the requirement for an ‘average over a reference period which is judged to be representative’ required a detailed legislative scheme which could not be supplied by an employment tribunal [15-19].

The wording of regulation 4 of the Regulations was taken from article 7 of the Aviation Directive. The same principles must govern the wording of both. If British Airways’ choice of a representative reference period was not acceptable to an individual pilot, a court or tribunal could take its own view. Even though the Regulations did not expressly address complaints relating to the payment of annual leave, complaint to a court was in fact permitted by Regulation 18(1) in respect of a refusal by an employer to permit the exercise of any right enjoyed by the employee under Regulation 4 and compensation could be awarded under Regulation 18(4) [20-27].

As for the proportion (if any) of TAFB to be included in paid annual leave, the test stated by the CJEU excluded sums intended exclusively to cover costs. The Supreme Court did not have the material before it to determine the real basis for the payment of TAFB and British Airways’ genuine intention would need to be considered by the employment tribunal. The attitude of the tax authorities was irrelevant [28-32].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html



24 March 2010

PRESS SUMMARY

British Airways plc (Respondent) v Williams and others (Appellants) [2010] UKSC 16; on appeal from [2009] EWCA Civ 281

JUSTICES: Lord Walker, Lady Hale, Lord Brown, Lord Mance and Lord Clarke

BACKGROUND TO THE APPEAL

Pilots working for British Airways plc are entitled to at least four weeks “paid annual leave”. While on leave, a pilot is paid his or her basic fixed pay. A pilot on leave is not paid two types of supplement (the ‘Flying Pay Supplement’ and the ‘Time Away from Base Allowance’) which he or she would receive if at work as additional pay for hours spent flying and being away from base. The two types of allowance are subject to limits (because of limits to the permissible hours spent flying or on duty) which limits pilots might already have reached.

The requirement that civil aviation workers receive “paid annual leave” is implemented in the UK by the Civil Aviation (Working Time) Regulations 2004, which enforces domestically the UK’s obligations under Council Directive 2000/79/EC of 27 November 2000 (the Aviation Directive). The term “paid annual leave” is found in the Working Time Directive (Council Directive 93/104/EC) as well as the Aviation Directive.

The pilots brought claims against British Airways arguing that they were entitled to both types of supplement, in addition to basic fixed pay, as part of their “paid annual leave”. The Employment Tribunal and the Employment Appeal Tribunal both agreed the pilots were entitled to the supplements. The Court of Appeal allowed the appeal of British Airways, finding that “paid annual leave” encompassed basic fixed pay only.

JUDGMENT

In a judgment delivered by Lord Mance, the Supreme Court unanimously holds that the appeal raises an issue of general principle and that the answer is not obvious. It raises a number of questions relating to the definition of “paid annual leave” under European Union law. Consequently, the Supreme Court is under a duty to refer the questions in issue in the appeal to the European Court of Justice (paras [18], [30]).

REASONS FOR THE JUDGMENT

- The questions referred to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union are:
 - (i) Under (a) articles 7 of Council Directives 93/104/EC and 2003/88/EC and (b) clause 3 of the European Agreement annexed to the Council Directive 2000/79/EC: (1) to what, if any, extent does European law define or lay down the any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (2) to what, if any, extent may Member States determine how such payments are to be calculated?

- (ii) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?
- (iii) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's "normal" pay?

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

- (iv) Is the relevant measure or comparison (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?
- (v) How should "normal" or "comparable" pay be assessed in circumstances where (a) a worker's remuneration while working is supplemented if and to the extent that he or she engages in a particular activity; (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave? (para [30])
- The Court notes that the legal basis of the relevant Directives was to protect health and safety. The present leave arrangements for pilots with British Airways do not pose a risk to health and safety, and pilots do in fact take their leave. It is not clear from the case law of the Court of Justice whether "paid annual leave" has a closely defined autonomous European meaning or whether individual Member States retain a discretion to define the term and its application (paras [19]-[20], [25]-[26]).
 - Previous cases in which the Court of Justice has considered the term "paid annual leave" were in a different context to the present case. It is not clear to the Court what was intended by previous cases requiring that holiday pay should be "comparable" to the employee's "normal remuneration", or what that would involve in the present circumstances (paras [27]-[29]).

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