British Airways plc v Williams & ors: holiday pay

Supreme Court and European Court of Justice rulings in *British Airways plc v Williams* on holiday pay for pilots highlight a possible challenge to the method of calculating holiday pay for all employers. Jahad Rahman reports

Rahman: implications will be felt outside aviation sector

The facts

British Airways pilots were employed on terms set by collective agreement and received a basic salary plus a flying pay supplement and an allowance for time spent away from their base. The terms did not specify how holiday pay was to be calculated and in practice the pilots received only their basic pay. The pilots claimed that their holiday pay should include both the supplement and allowance.

The Civil Aviation (Working Time) Regulations 2004 implement the Aviation Directive 2000/79/EC in the UK. Under regulation 4 crew members are entitled to four weeks' 'paid annual leave' but no method of calculation is stipulated.

In contrast, regulation 16 of the Working Time Regulations 1998 implementing the Working Time Directive 2003/88/EC provides for a week's pay per week of annual leave, calculated according to ss.221 to 224 of the Employment Rights Act 1996.

Both employment tribunal and EAT ruled that the pilots could look to ss.221-224 WTR to calculate holiday pay, which should reflect normal remuneration; the Court of Appeal disagreed. In March 2010, the Supreme Court made a reference to the ECJ to determine the meaning of 'paid annual leave' under the Aviation Directive and Working Time Directive.

The ECJ decision

The ECJ ruled that a worker should receive 'normal remuneration' for annual leave. Applying *Robinson-Steele v RD Retail Services Ltd*, the ECJ held that the point of being paid for annual leave was to put the worker 'in a position which is, as regards remuneration, comparable to periods of work'. Therefore, pilots' pay during annual leave could not be confined to basic pay and should include supplementary payments 'linked intrinsically to the performance of the tasks', which the pilots were required to carry out under their contracts of employment, such as the flying pay supplement. By contrast, payments intended exclusively to cover ancillary costs or expenses – for example, travel and subsistence costs incurred while away from base – could be excluded.

The ECJ concluded that it was for the national courts to assess the 'intrinsic link' and calculate pay based on a 'reference period, which is judged to be representative', though it did not specify what such a reference period might be.

The Supreme Court decision

In the Supreme Court, British Airways argued that the aviation regulations were 'too unspecific' to give effect to the judgment of the ECJ and that it was not appropriate for tribunals to assess average payments for annual leave over a 'reference period which is judged to be representative'. The Supreme Court unanimously rejected this submission, ruling that the choice of a reference period was, in the first instance, for British Airways to make within the parameters of what could reasonably be judged to be representative. With regard to the time spent away from base payments, the court held that it had insufficient material to determine whether the payments were made exclusively to cover costs or expenses; this would need to be considered by the tribunal.

Comment

The judgment clarifies that pilots' holiday pay must include all elements of remuneration, rather than just basic pay. The case will affect thousands of similar claims in the aviation sector but also has implications outside that sector because the relevant wording also appears in the Working Time Directive.

Pursuant to regulation 16 WTR, regular commission, bonus and other allowances are currently excluded from the calculation of a 'week's pay', as is the pay for overtime which is not guaranteed but is compulsory if requested by the employer and is regularly worked (pursuant to the Court of Appeal in *Bamsey & ors v Albon Engineering & Manufacturing plc)*. Workers are likely to rely on this case to argue for the inclusion of such sums in the calculation of their holiday pay, whether by seeking direct enforcement of the Working Time Directive (if public sector) or a consistent construction of the WTR (private sector).

Resolving this case could affect the tribunal statistics next year: during 2010/11, 30 per cent of the 382,400 claims received related to the Working Time Directive and, in particular, 'airline cases'. This will need to be remembered when assessing any future government announcements on the success of its reforms in reducing claims.

Jahad Rahman, Rahman Lowe Solicitors

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Cases referred to:

- *British Airways plc v Williams & ors* [2012] UKSC 43; C-155/10 [2011] IRLR 948
- *Robinson-Steele v RD Retail Services Ltd* [2006] ICR 932
- *Bamsey & ors v Albon Engineering & Manufacturing plc* [2004] EWCA Civ 359