

More specifically the questions raised were:

1. Where:

- a worker's annual pay comprises basic pay and commission payments made under a contractual right to commission; – the commission is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's work;

- Commission is paid in arrears and the amount of commission received in a given reference period fluctuates according to the value of sales achieved and contracts entered into and the time of such sales;

- during periods of annual leave, the worker does not undertake any work that would entitle him to those commission payments and accordingly does not generate commission in respect of such periods;

- during the pay period which includes a period of annual leave, the worker is entitled to basic pay and will continue to receive commission payments based on commission earned earlier; and

- his average commission earnings over the course of the year will be lower than they would be if the worker had not taken leave, because, during the leave period, he will not have undertaken any work that would entitle him to commission payments, does Article 7 of [Council] Directive 93/104/EC, as amended by Directive 2003/88, require that Member States take measures to ensure that a worker is paid in respect of periods of annual leave by reference to the commission payments he would have earned during that period, had he not taken leave, as well as his basic pay?

2. What are the principles which inform the answer to Question 1?

3. If the answer to Question 1 is "Yes", what principles (if any) are required to be adopted by Member States in calculating the sum that is payable to the worker by reference to the commission that the worker would or might have earned if he had not taken annual leave?

The Law

Article 7, headed 'Annual leave', is worded as follows:

'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 and/or practice.'

2. *The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.*'

Regulation 16 of the Working Time Regulations 1998 provides:

'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 ..., at the rate of a week's pay in respect of each week of leave.*

2. *Sections 221 to 224 of the 1996 Act [(Employment Rights Act 1996)] shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation...*'

The Employment Rights Act 1996 provides, in section 221:

'221 — General

(1) *This section ... [applies] where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

(2) *..., if the employee's remuneration for employment in normal working hours ... does not vary with the amount of work done in the period.*

(3) *..., if the employee's remuneration for employment in normal working hours ... 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.*

(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.'*

Arguments and Judgment

The UK Government and British Gas argued that under national legislation and practice, the objective of Article 7 is achieved, because during paid annual leave Mr. Lock received a salary comparable to that earned during a period of work. This was because he received his basic pay and commission earned in the weeks preceding the annual leave.

The Court of Justice could not accept that argument.

British Gas having accepted that in the period following his annual leave, Mr. Lock was paid reduced remuneration comprising of his basic salary (because he did not earn commission when on annual leave), the Court of Justice found that *"that adverse financial impact may deter the worker from actually taking that leave"*. [In his Opinion (dated 5th December 2013) (point 34) the Advocate General stated that a scenario such as that was all the more likely where the salary comprised of up to 60% commission, as in this case]. Noting *"The purpose of providing payment for annual leave is to put the worker, during such leave, in a position which is, as regards his salary"*, the Court of Justice concluded that notwithstanding the remuneration received by Mr Lock during his annual leave, the financial disadvantage which, although

deferred, is nonetheless genuinely suffered by him during the period following that leave, may deter him from exercising his right to annual leave.

Answers

The Court of Justice answered Questions 1 and 2 as follows:

In short the ECJ answered yes to the first question. They concluded:

“Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and 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”.

The Court of Justice answered Question 3 as follows:

“The methods of calculating the commission to which a worker, such as the applicant in the main proceedings, 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 Court’s case-law and in the light of the objective pursued by Article 7 of Directive 2003/88.”

In other words they left the method of calculation to be decided by the national courts.

Summary and Implications

This case reaffirms other case law (notably *Williams v British Airways*) the leading case, which involved Andrew Short QC, one of the employment lawyers in the MILS team, and the principle that workers should receive salary comparable to normal pay whilst on holiday. This means for workers who earn a basic salary with a commission or variable element of salary, an average wage should be calculated and paid to include commission.

The idea is that workers should not be discouraged from taking annual leave which, if they are only paid basic salary, is likely as they may not wish to suffer a reduction in salary.

This case is now likely to be remitted to the Leicester Employment Tribunal to consider whether our domestic legislation can be interpreted in line with the ECJ’s decision and if so, what level of holiday pay Mr Lock will be entitled to.

Given other tribunals’ interpretation of the British Airways case, it is expected that the Leicester tribunal will consider an average salary applying Mr Lock’s wages over the 12 weeks preceding his annual leave. No doubt other tribunals will follow suit. Employers are therefore advised to review their contractual leave arrangements with a view to ensuring commission or other variable salary payments are factored into holiday pay calculations.