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The holiday pay saga continues: *Flowers and others v East of England Ambulance Trust* (EAT, 16 April 2018)

A. INTRODUCTION

In *British Airways plc v Williams*¹ and *Lock v British Gas Trading Ltd.*,² the Court of Justice of the European Union (“CJEU”) handed down two far-reaching judgments concerning the content and calculation of the pay packages that workers are entitled to receive during their annual leave in terms of regulation 16(1) of the Working Time Regulations 1998 (“WTR”)³ and Article 7 of the Working Time Directive (“WTD”).⁴ It was held that the sums paid to workers during their annual leave must correspond to their “normal remuneration”. In these two decisions, this meant that each of the following counted as “normal remuneration”: (a) variable flight supplement payments paid to pilots in addition to their fixed annual salary and (b) sales-based commission payments. That was notwithstanding that during their annual leave periods, the workers concerned had not (a) flown any aeroplanes or (b) earned any commissions on sales for their employers. Subsequent decisions in a slew of domestic cases built on this European jurisprudence to rule that (i) compulsory non-guaranteed overtime,⁵ (ii) voluntary overtime undertaken by the worker over a sufficient period of time on a regular and/or recurring basis to the extent that it had become an indefinite element of the worker’s pay package,⁶ and (iii) travel time payments,⁷ should all be included in workers’ pay packets during their annual leave and treated as “normal remuneration”. What this means is that employers must carefully analyse the terms and conditions of employment of their workers to identify the various elements of their pay package. The fact that certain payments are additional to the fixed basic pay of their workers and/or are variable in their operation does not enable employers to ignore or discount them for the purposes of calculating the pay to which workers are entitled when they are on annual leave. Moreover, *Willets* also ruled that the regular continuity of payments

¹ [2011] IRLR 948.

² [2014] IRLR 648.

³ SI 1998/1833.

⁴ 2003/88/EC (OJ 2003 L299/9).

⁵ *Bear Scotland Ltd. v Fulton* [2015] IRLR 15.

⁶ *Patterson v Castlereagh Borough Council* [2015] IRLR 721 and *Dudley Metropolitan Borough Council v Willets* [2017] IRLR 870.

⁷ *Bear Scotland Ltd. v Fulton* [2015] IRLR 15.

in respect of workplace practices – such as payments for voluntary overtime – may crystallize over time into sums counting as normal remuneration.

These decisions may seem unfair to employers. After all, workers would appear to be earning a windfall without having tendered due consideration in return, since they are by definition, on holiday. However, the key justification given by the CJEU for this line of jurisprudence is a strong one, i.e. that there should be no impediments to workers actually taking their annual leave entitlement. Otherwise, workers will be deterred or disincentivized from taking up their entitlement: if a worker knows that he/she will earn less during a holiday period than he/she would ordinarily earn if he/she were working, one obvious response would be for the worker to decide not to take his/her holidays and instead carry on working. At the root of the concern here is the health and safety of workers, i.e. the notion that workers who are not well rested through sufficient holidays are more susceptible to illnesses and more prone to error.

A final point that should be stressed is that the decisions in each of these cases are only applicable to the twenty days' annual leave to which workers are entitled under regulation 13 of the WTR. The legal source of these twenty days is the WTD, which is a creature of EU Law. However, in the UK, workers have the right to twenty-eight days' holiday. As such, the rules emanating from *Williams, Lock, Fulton, Patterson* and *Willetts* are based on the WTD and do not apply to the remaining eight days made available to workers under regulation 13A of the WTR. In this way, it is perfectly lawful for employers to sever their workers' holiday pay into two twenty-day and eight-day blocks and distinguish the content of the pay package between them.

B. THE FACTS

*Flowers v East of England Ambulance Trust*⁸ is yet another decision of the EAT that adds an additional layer of complexity to the case law on holiday pay. It concerns an employee who claimed that his holiday pay failed to include elements of (a) non-guaranteed overtime which were essentially shift overrun payments (e.g. where towards the end of a shift, the worker was in the process of carrying out a task which they must complete, they were unable to simply leave at the allocated time) and (b) voluntary overtime. On the basis of the decision in *Fulton*,

⁸ UKEAT/0235/17/JOJ, 16 April 2018.

during the legal proceedings, the employer accepted the argument that the calculation of the worker's holiday pay should account for non-guaranteed overtime. However, it challenged the proposition that the terms and conditions of the worker's contract qualified under *Patterson* and *Willetts* as voluntary overtime that ought to be included in the calculation of holiday pay. Here, in *Flowers*, there was no relevant contractual term, since by definition, the overtime was purely voluntary and so no contractual obligation attached to it. Nevertheless, the question was whether the central theme emerging from the European decisions – that workers should be paid no less than their normal pay during annual leave to prevent disincentivization – was so powerful that voluntary overtime should be included in holiday pay to ensure that the worker's normal remuneration received while working was maintained in respect of the period of annual leave.

In the EAT's decision in *Willetts*, Simler J had ruled that in the case of voluntary overtime, the court should determine whether the voluntary pattern of work had carried on for such a length of time with sufficient regularity that the worker had received payments that were equally regular as his/her basic pay, thus amounting to normal remuneration. Counsel for the employer sought to challenge Simler J's approach in *Willetts* on the ground that it was contrary to the CJEU's decision in *Williams*. In *Williams*, the CJEU had expounded the "intrinsic link" test. This test stated that a payment will constitute normal remuneration where there is an intrinsic link between that payment and the performance of the worker's tasks in terms of his/her contract of employment or "worker" contract. Since the source of the voluntary overtime undertaken by the worker in *Flowers* was not the employment contract, counsel for the employer claimed that Simler J had taken a wrong, and impermissible, turn in *Willetts*.

In *Flowers*, Mr Justice Soole gave this argument short shrift, stressing that Simler J had identified and applied the key principle in *Willetts*, namely that normal remuneration must be maintained in respect of the period of annual leave guaranteed by regulation 16(1) of the WTR and Article 7 of the WTD, i.e. the relevant period of twenty days. Seen from this perspective, the payments in that period would have to correspond to the normal remuneration received by the worker while working. What all these cases underline is what Langstaff P noted in *Fulton*: "the essential point... seem[s] relatively simple to me. "Normal pay" is that which is normally received..."⁹

⁹ *Bear Scotland Ltd. v Fulton* [2015] IRLR 15, 22.

C. CONCLUSION

Of course, the level of payment that is normally received is not a constant and is purely an evidential issue. In this way, albeit non-contractual, in some cases voluntary overtime ought not to be excluded from account in calculating holiday pay. However, in other cases, it will. Much will depend on the evidence and the degree of continuity with which the workers concerned are actually performing voluntary overtime. To that extent, this requirement for continuity shares some affinities with the central concept of “mutuality of obligation” for the establishment of a contract of employment and employment status,¹⁰ i.e. the notion that there must be a regular commitment on the part of the putative employer to provide a reasonable and minimum amount of work to the putative employee in the future and pay for it, and a corresponding obligation imposed on the putative employee to perform that reasonable and minimum amount of work when offered in the future. In effect, it may be a more straightforward exercise for an individual employed on the basis of a contract of employment to persuade a tribunal or court that he/she is a regular performer of voluntary overtime than one who is engaged on a “worker” contract, where mutuality of obligation is not a necessary prerequisite for the recognition of such an agreement.

The result of *Flowers* has been to cement in position the highly casuistic mode of reasoning adopted by Simler J in *Willetts*. What this means is that there is no hard and fast proposition of law to the effect that voluntary overtime invariably must be included in a worker’s holiday pay as a matter of course: the position will differ from one case to another and proof will need to be established. Of course, a critical question is whether such an uncertain rule is the correct one to adopt in the circumstances. For employers, a bright-line rule would have been more desirable, but it should be recalled that the legal position is perhaps unsurprising: the regulation of working time and annual leave is not an area of employment law that could ever be held up as a model of clarity and precision.¹¹

¹⁰ *Carmichael v National Power plc* [2000] IRLR 43.

¹¹ For example, the recent case of *King v Sash Window* [2018] IRLR 142 where it was held that if an employer does not allow or enable a worker to exercise his entitlement to paid leave (e.g. where the worker’s status is misclassified), then the full period of untaken annual leave will carry over indefinitely. Likewise, in the case of the exact period of carry-over of untaken holiday leave entitlement where the employee was unable to take his/her leave because he/she was absent due to sickness: see *KHS AG v Schulte* [2012] IRLR 156 and *Plumb v Duncan Print Group Ltd*, [2015] IRLR 711.

