

JUDGMENT OF THE COURT (First Chamber)

15 September 2011 \*

In Case C-155/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom), made by decision of 24 March 2010, received at the Court on 2 April 2010, in the proceedings

**Williams and Others**

v

**British Airways plc,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, E. Levits (Rapporteur), and M. Berger, Judges,

Advocate General: V. Trstenjak,  
Registrar: L. Hewlett, Principal Administrator,

\* Language of the case: English.

having regard to the written procedure and further to the hearing on 14 April 2011,

after considering the observations submitted on behalf of:

- Ms Williams and Others, by J. McNeill, QC, and M. Ford, Barrister,
- British Airways plc, by C. Jeans and A. Short, QC,
- the Danish Government, by V. Pasternak Jørgensen and C. Vang, acting as Agents,
- the European Commission, by M. van Beek and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2011,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) and Clause 3 of the Agreement annexed to Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation

of Working Time of Mobile Workers in Civil Aviation, concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ 2000 L 302, p. 57) ('the European Agreement').

- 2 This reference has been made in proceedings between, on the one hand, Ms Williams and Others and, on the other, their employer, British Airways plc ('British Airways'), concerning the remuneration which they receive during their paid annual leave.

## **Legal context**

### *European Union legislation*

- 3 Article 7 of Directive 2003/88, entitled 'Annual leave', provides:

'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.’

4 Clause 3 of the European Agreement reads:

‘1. Mobile staff in civil aviation are 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.’

*National legislation*

5 The Civil Aviation (Working Time) Regulations 2004 (*Statutory Instruments* 2004 No 756) provide as follows:

‘4. (1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in respect of a period of employment of less than one year.

(2) Leave to which a crew member is entitled under this regulation –

(a) may be taken in instalments;

(b) may not be replaced by a payment in lieu, except where the crew member's employment is terminated.'

6 Regulation 9 of those Regulations provides that every employer must ensure that:

'... in any month –

(a) no person employed by him shall act as a crew member during the course of his working time, if during the period of 12 months expiring at the end of the month before the month in question the aggregate block flying time of that person exceeds 900 hours; and

(b) no crew member employed by him shall have a total annual working time of more than 2000 hours during the period of 12 months expiring at the end of the month before the month in question.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 7 Ms Williams and the other appellants in the main proceedings are pilots employed by British Airways ('the pilots'). The terms of their employment are negotiated with British Airways by the pilots' union, the British Air Line Pilots Association. Those terms of employment are contained in a Memorandum of Agreement ('the MOA') of 1 April 2005.
- 8 Under the MOA, the remuneration of pilots comprises three components. The first component is a fixed annual sum. The second and third components are supplementary payments which vary according to, first, the time spent flying, this supplement being calculated at the rate of GBP 10 per planned flying hour, and, second, the time spent away from base, the supplement in this case being GBP 2.73 per hour. The supplement for time spent flying is remuneration which is fully taxable, whereas, in the case of the supplement for time spent away from base, 82% is treated as having been paid on account of expenses and only 18% is treated as taxable remuneration.
- 9 The amount of time which a pilot spends flying depends upon his or her allocated routes and rosters. According to the Supreme Court of the United Kingdom, it is typically about 15 days a month.
- 10 Under the MOA, the amount paid in respect of paid annual leave is based exclusively on the first component of the remuneration, that is to say, the fixed annual sum.
- 11 The pilots contend that, under European Union ('EU') law, the amount paid in respect of annual leave must be based on their entire remuneration, including the supplementary payments.

- 12 Both the Employment Tribunal and the Employment Appeal Tribunal found in favour of the appellants. The Court of Appeal (England and Wales) (Civil Division) accepted the contrary view put forward by British Airways, finding that the fixed annual sum alone constituted remuneration.
- 13 The referring court expresses doubts as to the meaning of the term ‘paid annual leave’ and as to the extent of the discretion available to national legislation or practice to lay down ‘conditions for entitlement to, and granting of, such leave’.
- 14 In those circumstances, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Under (a) Articles 7 of Council Directive 93/104/EC [of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41] and Directive 2003/88/EC and (b) Clause 3 of the European Agreement ...:

(1) to what, if any, extent does European law define or lay down 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?

- (2) 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?
- (3) 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 3(a) or (b):

- (4) 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?

- (5) 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?’

### **Consideration of the questions referred**

- <sup>15</sup> By its questions, which it is appropriate to examine together, the Supreme Court of the United Kingdom asks the Court of Justice, in essence, whether any indication (and, if so, what indication) is provided by Article 7 of Directive 2003/88 and Clause 3 of the European Agreement with regard to the remuneration to which an airline pilot is entitled during his annual leave.
- <sup>16</sup> First, it should be pointed out that Directives 2000/79 and 2003/88 have the same subject-matter, namely, the organisation of working time in the interests of the safety and health of workers, and that the wording of Clause 3 of the European Agreement is, in essence, identical to Article 7 of Directive 2003/88. It follows, as the Advocate General has indicated in point 43 of her Opinion, that the principles which the Court

has developed in its case-law through the interpretation of Article 7 are transposable to Clause 3 of the European Agreement. The interpretation of Article 7 of Directive 2003/88 must be undertaken in the light of its wording as well as with regard to the objective which it pursues.

- 17 The wording of Article 7 of Directive 2003/88 makes no specific reference to the remuneration to which a worker is entitled during his annual leave. The case-law, however, points out that it follows from the very wording of Article 7(1) - a provision from which that directive allows no derogation - that every worker is entitled to paid annual leave of at least four weeks and that that right to paid annual leave must be regarded as a particularly important principle of Community social law (see Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Stringer and Others* [2009] ECR I-179, paragraphs 22 and 54 and the case-law cited).
- 18 The right to such an annual period of paid leave is, moreover, expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) EU recognises as having the same legal value as the Treaties.
- 19 In that context, the Court has already had occasion to state that the expression ‘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 Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 50, and *Schultz-Hoff and Stringer and Others*, 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 and Others*, paragraph 58, and *Schultz-Hoff and Stringer and Others*, paragraph 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 EU law.
- 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 paragraph 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 and Others*, paragraph 58, and *Schultz-Hoff and Stringer and Others*, paragraph 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, Case C-471/08 *Parviainen* [2010] ECR I-6533, paragraph 73). That case-law also applies to a pregnant worker who has been granted leave from work (Case C-194/08 *Gassmayr* [2010] ECR I-6281, paragraph 65).
- 28 It follows that, in addition to the components of the total remuneration set out in paragraph 24 of the present judgment, all those which relate to the personal and professional status of an airline pilot must be maintained during that worker's paid annual leave.

29 Finally, it remains to be pointed out that both Directive 2003/88 and the European Agreement provide only for minimum protection with regard to the entitlement of workers on annual leave to receive remuneration.

30 Thus, there is no provision of EU law which prevents the Member States, or, as the case may be, management and labour from exceeding the minimum protection of workers guaranteed by EU legislation and providing for the maintenance of all the components of the total remuneration to which such workers are entitled during their period of work (see, to that effect, *Parviainen*, paragraph 63).

31 In the light of all the foregoing, the answer to the questions referred is that Article 7 of Directive 2003/88 and Clause 3 of the European Agreement must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot. It is for the national court to assess whether the various components comprising that worker's total remuneration meet those criteria.

## Costs

32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Clause 3 of the Agreement annexed to Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation, concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.**

**It is for the national court to assess whether the various components comprising that worker's total remuneration meet those criteria.**

[Signatures]