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Judgment: approved by the Court for handing down

Delivered: **26/06/2015**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERT PATTERSON

Appellant;

-and-

CASTLEREAGH BOROUGH COUNCIL

Respondent.

Before: Morgan LCJ, Girvan LJ and Gillen LJ

GILLEN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of the Industrial Tribunal ("the Tribunal") dated 21 November 2014. The matter had by agreement proceeded on a liability basis only. Mr Patterson, the applicant, was a lead claimant for the purposes of a multiple claim presented to the Tribunal. He claimed unauthorised deductions from wages contrary to Article 45 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") and/or breach of the Working Time Regulations (Northern Ireland) 1998 ("the 1998 Regulations").

[2] Originally, Mr Patterson alleged that there had been an unlawful deduction from his wages by virtue of the fact he was no longer paid holiday pay with regard to casual work as a recreation assistant, which he carried out over and above his full-time post as an assistant plant engineer. In the course of the hearing, the application was amended to allege in addition that there was a further unlawful deduction in that his holiday pay did not take into account the voluntary overtime he worked as an assistant plant engineer.

[3] The Tribunal found in Mr Patterson's favour in regard to his assertion that earnings received from his casual employment should be included in the calculation of his entitlement to paid annual leave. There is no appeal from this finding. However, the Tribunal rejected his claim that his earnings received as a result of carrying out voluntary overtime in the course of his full-time employment should be included in the calculation of his entitlement to paid annual leave. It is this latter claim which was the subject of the present appeal.

[4] Insofar as the Tribunal found that his entitlement to paid annual leave should be calculated without taking into account voluntary overtime, i.e. work which his employer might request Mr Patterson to do but which the employee was free of any contractual obligation to perform, it is now common case *between the parties* that the Tribunal had fallen into error ("the point of principle"). Mr Wolfe QC, who appeared on behalf of the respondent with Mr Hamill, made this concession ("the concession") on the point of principle whilst at the same time contending that the Tribunal had in fact not fallen into such error but had simply found that the appellant had factually failed to establish the earnings he received pursuant to voluntary overtime and which would have formed part of his normal remuneration. In short, the Tribunal had made a simple factual finding on the evidence, or lack of evidence, before it.

[5] Planting his feet firmly on higher ground, Mr McMillen QC, who appeared on behalf of the appellant with Mr McKee, contended that the Tribunal had confined itself to the issue of principle and had misdirected itself in finding that Article 7 of the Working Time Directive did not require the appellant's voluntary overtime, on foot of his contract of employment with the respondent as an assistant plant engineer, to be included in any calculation of his paid annual leave. It was his submission that it was only this principle that was addressed before the Tribunal and that, whilst the papers before the Tribunal did include factual evidence of the substance of the overtime earned, the Tribunal did not delve into that material because by agreement it confined itself to the principle of the inclusion of voluntary overtime in calculation of paid annual leave.

Preliminary observations

[6] Both parties were at pains to emphasise that the point of principle was one that had attracted legal and academic comment and they were anxious that this court should make a determination thereon and/or lend its imprimatur to the agreed point of principle .

[7] Whilst we consider the concession by Mr Wolfe to have been well made, nonetheless it means that this court has been deprived of any full argument on the issue and our conclusions must therefore be read in this light and with that degree of caution attached to them. For that reason our analysis of the issues in this judgment are couched in relatively short form, recognising as we do that on another day fuller argument on this issue may transpire.

[8] We pause at this stage to observe that, in response to this court's direction, the appellant provided a worked example of how a week's pay should be calculated if the appellant's arguments were correct. Counsel for the appellant produced shortly before the hearing a calculation of overtime payments for the purpose of assessing holiday pay over a reference period of 13 weeks. Over that period Mr Patterson had worked 52 hours overtime, his average overtime per week being four hours which in turn gave rise to average additional pay of £60 per week. It is extremely unfortunate that no such evidence was produced to the Tribunal in this form. This case is a classic example of how a division between liability and remedy can deprive a court of vital evidence, which we consider, in the context of this case, would have greatly simplified the determination of the outcome. Attempting to isolate the question of principle without establishing the underlying factual basis has contributed in no small measure to the unsatisfactory outcome of this case.

Statutory background

The Working Time Directive

[9] Directive 93/104/EC and Directive 2000/34/EC (which amended Directive 93/104/EC) were consolidated and replaced by Directive 2003/88/EC ("the 2003 Directive"). Article 7 of the 2003 Directive provides 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."

The Working Time Regulations (Northern Ireland) 1998 ("the 1998 Regulations")

[10] The 1998 Regulations (as amended by the Working Time (Amendment) Regulations (Northern Ireland) 2007) implement the provisions of Article 7 of the 2003 Directive in Regulation 13. By virtue of this Regulation, workers are entitled to 4 weeks leave annually.

[11] Regulation 16 relates to payments in respect of periods of leave and at 16(1)-(3) provides:

> "A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under

Regulation 13 [and Regulation 13A], at the rate of a week's pay in respect of each week of leave.

(2) Articles 17 to 20 of the [Employment Rights (Northern Ireland) Order 1996] .... shall apply for the purpose of determining the amount of a week's pay for the purpose of this Regulation, subject to the modification set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply –

(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question;

(d) as if the references to Articles 23 and 24 did not apply."

Employment Rights (Northern Ireland) Order 1996

[12] Article 45 of the 1996 Order refers to the right not to suffer unauthorised deductions:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

…….

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that

> occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

The relevant case law

[13] For the reasons set out at paragraph [7] above, we intend only to briefly summarise the principles that we have distilled from the relevant case law.

British Airways Plc v Williams [2012] UKSC 43

[14] In this matter the Supreme Court considered the case of the holiday pay entitlement of a pilot in circumstances where the claimant's remuneration consisted of a basic salary along with payments for time spent flying and to account for time away from her home base. Were the two allowances to be reflected in holiday pay? The Supreme Court referred a number of key questions to the Court of Justice of the European Union (CJEU) (see [2012] 1 C.M.L.R. 23). That court at paragraph [19] determined that "workers must receive their normal remuneration for that period of rest" and at paragraph [20] "that 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".

[15] At paragraph [24] the CJEU said:

> "Any inconvenient aspect [sic] 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 … must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave."

Lock v British Gas [2014] 3 C.M.L.R 53

[16] In this case the ECJ found that national legislation and practice, under which a worker whose remuneration consisted of a basic salary and commission was entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary, was contrary to Article 7(1) of the Working Time Directive. The Court held that where such a worker was paid commission calculated on the basis of the sales that he had made, that commission must also be included in the calculation of the holiday pay.

Bear Scotland Limited and Others [2015] 1 C.M.L.R 40

[17] In this case, the appellant construction companies, in conjoined appeals, appealed against decisions that they had made unauthorised deductions from the wages of the respondent employees by failing to include overtime which employees were required to work, but which the employers were not obliged to offer as a minimum, when calculating holiday pay. The Employment Appeal Tribunal held, inter alia, that Article 7 of the 2003 Directive required overtime which employees were required to work, but which their employers were not obliged to offer as a minimum, to be included when calculating holiday pay. This case, of course, related only to non-guaranteed overtime as defined and not all overtime that may be worked by a worker.

[18] The editors of Harvey on Industrial Relations and Employment Law (Volume 2) Division H (Continuity of Employment etc.), in light of these authorities, have observed that whether overtime work (including voluntary overtime) will fall into the reckoning for the purposes of calculating entitlement to paid annual leave is likely to be a fact specific question for tribunals and courts to resolve in any particular case. It summarises the position at paragraph [871.07] where the authors state:

> "In the absence of any statutory definition of 'normal working hours' it must be a question of fact whether a particular worker has normal working hours; if not, a week's pay will be the average pay received in respect of the reference period including any pay for overtime, whether voluntary or compulsory. Thus, overtime will count if there are normal working hours because the worker has to, and does work a certain number of hours of overtime … At the other end of the scale a worker who works occasional voluntary overtime may be found to have normal working hours comprising the basic week excluding overtime, in which the overtime would not count. In between lie the myriad patterns of working some overtime, whether or not in accordance with a contractual obligation to work, but not routinely involving the same amount of overtime actually worked. Judgments whether such workers have normal weekly hours, and if so whether the 'normal' includes the overtime, will determine whether overtime pay counts towards statutory holiday pay. The effects of the decision may thus extend to some workers working only voluntary overtime, but may lead to some who work non-guaranteed overtime but not to a

> consistent pattern, being excluded from the effects of the decision."

[19] This coincides with the opinion expressed by the Advocate General (AG) in the Williams case before the CJEU where at AG 82 the AG said:

> "…the concept of "normal remuneration" also has a temporal component. According to the natural meaning of the word, "normal" can only refer to something which has existed over a certain period of time and can later be used as a point of reference for comparison …….the expression essentially implies that remuneration which in itself fluctuates at regular intervals is levelled out to an amount representing average earnings. As the parties …rightly recognise, the determination requires a sufficiently representative reference period …."

[20] The rationale behind the 2003 Directive is, as declared in paragraph [44] of the Bear Scotland decision and consistent with the principles explained by the CJEU, that a worker should not have any disincentive placed in his path that may lead to him not taking his holidays – if he comes to expect a certain level of pay as normal then he should receive that during his holiday period. Whilst from a purely practical viewpoint this may smack more of theory than reality in most instances, it is the rationale that purportedly underpins the Directive and drives the case law thereon.

[21] We are satisfied therefore, in light of these authorities that Mr Wolfe correctly conceded that in principle there is no reason why voluntary overtime should not be included as a part of a determination of entitlement to paid annual leave. It will be a question of fact for each Tribunal to determine whether or not that voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the necessary remuneration to trigger its inclusion in the calculation.

Applying that principle to this case

[22] Unravelling the threads of the decision we have come to the conclusion that the Tribunal erroneously determined that "voluntary overtime" could not as a matter of principle be included in the calculation of holiday pay for the purposes of the Working Time Regulations.

[23] In coming to this conclusion and in the interests of brevity, we cite alone paragraph 7.5 of the Tribunal decision which was couched in the following terms:

> "7.5 In light of the foregoing, since the claimant's overtime was 'voluntary' and not 'non-guaranteed

> overtime', as defined, the Tribunal was not satisfied that Article 7 of the WTD (*the Working Time Directive)* required the said voluntary overtime worked by the claimant, on foot of his contract of employment with the respondent as an assistant plant engineer, to be included in any calculation of his paid annual leave. In the Tribunal's judgment, following the decision and reasons set out in Bear Scotland, since voluntary overtime was not part of his 'normal remuneration' for the purposes of the Directive, it was not therefore required to be reflected in an average taken over an appropriate reference period."

[24] We are satisfied that this paragraph of the Tribunal's decision dispenses with Mr Wolfe's submission that the Tribunal had dismissed this case simply because no evidence had been provided by the claimant of the nature of the voluntary overtime payments he was receiving. On the contrary, we are satisfied that Mr McMillen is correct in asserting that the Tribunal had made an unequivocal finding of principle which was in error in light of our conclusions and that the question of what actual overtime had been received over a reference period was not before the Tribunal at this hearing at the time it gave its decision.

Conclusion

[25] We consider that the case should be remitted to the Tribunal to hear further evidence of the overtime actually worked within a suitable reference period and to make a determination on the circumstances posited in accordance with the principles of law that we have herein set out.