

Review

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Update on Holiday Pay and Retirement Age

Holiday Pay not limited to basic salary

The European Court of justice considered the calculation of holiday pay in the case of *Williams nad others v british airways plc* (20110 All ER (D) 65 (Sep))

Williams and Others are pilots employed by British Airways. BALPA (the pilots' trade union) negotiated with British Airways terms of employment that were contained in a Memorandum of Agreement ("MOA"). Under the MOA, the pilots receive three types of pay:

1. a fixed annual sum; plus
2. a supplementary allowance which varies according to the amount of time spent flying; and
3. a supplementary allowance which varies according to the amount of time spent away from the pilot's home base

However, the amount the pilots received while they were on paid annual leave was calculated only using the amount of their fixed annual basic pay.

Williams and Others alleged that they had not been paid the full amount of holiday pay that they should have received under the EU Working Time Directive (No. 2003/88) ('the Directive'). Article 7 of the Directive states that workers have the right to take paid annual leave but does not specify how a worker's pay while on annual leave should be calculated. The Directive is incorporated into UK law by the Working Time Regulations 1998 and the Civil Aviation (Working Time) Regulations 2004. The Working Time Regulations state that workers should be entitled to receive their normal remuneration at the rate that they have received in the 12 weeks before they went on paid annual leave. However airline pilots and cabin crew are instead covered by the Civil Aviation (Working Time) Regulations 2004 ('the regulations'), which do not contain any similar provision detailing how holiday pay should be calculated.

The pilots issued a claim against their employer, arguing that their pay while on statutory annual leave should be calculated

based on their entire taxable pay and not just the fixed basic pay.

The claim progressed to the Supreme Court. The Supreme Court referred the question to the European Court of Justice ("ECJ") and asked whether holiday pay should be calculated using basic salary alone, or should the calculation include allowances on top of basic salary?

The ECJ held that generally pay during annual leave should be similar to pay during periods of work because people should not be discouraged from taking annual leave. While on annual leave the pilots were entitled to be paid an amount based on the pilots' basic salary plus any allowances which are essential for them to perform their jobs. However, any allowance which is only occasional or to meet ancillary costs is unlikely to meet this test and therefore could not be used in such a calculation.

The ECJ did not rule on the question of exactly which elements of pay should be incorporated into holiday pay in the particular case and referred this issue back to the UK Courts to make a decision on the facts, applying the principles laid down by the ECJ referred to above.

Although the ECJ only considered the provisions of the Civil Aviation (Working Time) Regulations 2004, which only apply to pilots and crew members working on commercial aircraft, the decision may be helpful for workers in other sectors who receive task-related allowances as part of their pay when making representations to employers on how much holiday pay they are entitled to.



Age Restriction Contained in Collective Agreement Contrary to EU law

In the case of *Prigge and others v Deutsche Lufthansa AG* [2011] All ER (D) 102 (Sep) the Claimants were employed as pilots by Deutsche Lufthansa. Under international and German law, pilots aged 65 or older are not permitted to fly commercial aircraft. Pilots aged between 60 and 64 are permitted to fly commercial aircraft, however they must fly the aircraft as a member of a multi-pilot crew and be the only pilot in that crew to be over 60 years old.

The claimants had contracts of employment which automatically terminated when they turned 60. The relevant term was contained in a collective agreement. The claimants alleged that they had suffered age discrimination in breach of the EU Equal Treatment Framework Directive (No.2000/78) ("the Directive"). The Directive was incorporated into German law by national German legislation. The Directive states that an employee must not be treated differently and less favourably because of their age or for a reason related to their age. Article 2(5) and Article 4(1) of the Directive provide certain exceptions to this rule against discrimination in limited circumstances. The claimants brought claims in the national German courts against their employer. The Employer argued that it was necessary to impose a strict age limit on commercial airline pilots for air safety reasons.

The case proceeded to the Federal Labour Court in Germany, which then referred a number of questions to the European Court of Justice ('ECJ') regarding the Directive, including;

1. whether the rule imposing an age limit of 60 on pilots was a measure that was necessary for the protection of public security within the definition of Article 2(5) of the Directive; and
2. whether the rule which imposed an age limit of 60 on pilots was a genuine occupational requirement that was a proportionate way of achieving the legitimate aim of protecting public safety and could therefore fall within the exception in Article 4(1) of the Directive.

Regarding Article 2(5), the ECJ held that the banning any commercial pilots from working at age 60 was not necessary to secure public safety within the definition of Article 2(5). The ECJ noted that both international and German national laws did not stop pilots from flying commercial planes after the age of 60 and pilots between the ages of 60 and 64 still had the physical abilities needed to work as a pilot.

Regarding Article 4(1), the ECJ held that possessing particular physical capabilities may be a genuine occupational requirement for airline pilots. Protecting public air safety was a legitimate objective which could justify treating some pilots differently and less favourably on the ground of their age. However, in this case imposing an age limit of 60 was not proportionate. In particular, it was noted that international and German legislation did not prevent pilots aged between 60 and 64 from working as pilots. Therefore the ECJ held that the collective agreement was not compatible with the Directive and was contrary to EU law. This decision shows that, although protecting public air safety is a legitimate objective, in order to justify a provision that is age discriminatory it is still necessary to have evidence that the provision is, in fact, necessary to achieve that objective.

For more information on this see our Employment Law Review at www.simpsonmillar.biz/downloads/newsletters/employment and www.simpsonmillar.co.uk/news

Employment Department Contacts:

Linda Stewart

At our Wimbledon office Tel: 0844 858 3800
Email: linda.stewart@simpsonmillar.co.uk

Asha Wije

At our Wimbledon office Tel: 0844 858 3800
Email: asha.wije@simpsonmillar.co.uk

Emma Dickinson

At our Wimbledon office Tel: 0844 858 3800
Email: emma.dickinson@simpsonmillar.co.uk

Joy Drummond

At our London office Tel: 0844 858 3400
Email: joy.drummond@simpsonmillar.co.uk

Rachel Blythe

At our Leeds office Tel: 0844 858 3200
Email: rachel.blythe@simpsonmillar.co.uk

Steve Esmond

At our Leeds Office Tel: 0844 858 3200
Email: steve.esmond@sm-commercial.co.uk

UK Offices:

21-27 St Pauls Street, **LEEDS**, LS1 2JG
Tel: 0844 858 3200 Fax: 0844 858 3299

Trafford House, Chester Road, Stretford,
MANCHESTER, M23 0RS
Tel: 0844 858 3300 Fax: 0844 858 3399

Floor 2, 33-41 Dallington Street, **LONDON**, EC1V 0BB
Tel: 0844 858 3400 Fax: 0844 858 3499

47 Summer Lane, **BIRMINGHAM**, B19 3TH
Tel: 0844 858 3500 Fax: 0844 858 3599

20 Church Road, Lawrence Hill, **BRISTOL**, BS5 9JA
Tel: 0844 858 3600 Fax: 0844 858 3699

271 Cowbridge Road East, **CARDIFF**, CF5 1JB
Tel: 0844 858 3700 Fax: 0844 858 3799

165 The Broadway, **WIMBLEDON**, London, SW19 1NE
Tel: 0844 858 3800 Fax: 0844 858 3899

15A Walker Terrace, **GATESHEAD**, NE8 1EB
Tel: 0844 858 3000 Fax: 0844 858 3015

Velocity House Business & Conference Centre,
Suite 8, 3 Solly Street, **SHEFFIELD** S1 4DE
Tel: 0844 858 3100 Fax: 0844 858 3110



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