Appeal No. UKEAT/0235/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 12 & 16 April 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR N FLOWERS & OTHERS — APPELLANTS

EAST OF ENGLAND AMBULANCE TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR SEAN JONES (One of Her Majesty's Counsel) Instructed by: Unison Legal Services Unison Centre 130 Euston Road London NW1 2AY
For the Respondent	MR PAUL NICHOLLS (One of her Majesty's Counsel) Instructed by: Mills & Reeve LLP Solicitors Botanic House 100 Hills Road Cambridge CB1 1PH

SUMMARY

WORKING TIME REGULATIONS - Holiday pay

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

The Claimant employees contended that the calculation of their holiday pay pursuant to (i) clause 13.9 of their contractual terms and conditions and/or (ii) Article 7 of the **Working Time Directive** 2003/88/EC ("WTD") should take account of (a) non-guaranteed overtime and (b) voluntary overtime. The Respondent Trust conceded the **WTD** claim in respect of non-guaranteed overtime, following **Bear Scotland Ltd v Fulton** [2015] ICR 221; but otherwise resisted the claims.

The ET allowed the contractual claims in respect of non-guaranteed overtime, but dismissed the claims in respect of voluntary overtime. The Claimants appealed and the Respondent cross-appealed.

The EAT allowed the Claimants' appeal on each basis and dismissed the Respondent's cross-appeal. The **WTD** claims were remitted for case-by-case assessment by the Tribunal: **Dudley Metropolitan Borough Council v Willetts** [2018] ICR 31 followed. On its proper construction, clause 13.9 included voluntary overtime and provided the basis of calculation. The claims were also remitted for that calculation to be made.

THE HONOURABLE MR JUSTICE SOOLE

1. This is the Claimants' appeal and the Respondent Trust's cross-appeal from the Judgment of the Employment Tribunal at Bury St Edmunds (Employment Judge Laidler), sent to the parties on 15 May 2017, concerning the calculation of the Claimants' holiday pay pursuant to (1) their contractual terms and conditions and (2) Article 7 of the **Working Time Directive** 2003/88/EC ("WTD").

2. The Claimants are all employed by the Trust in a range of roles concerned with the provision of ambulance services. The question is whether the calculation of their holiday pay should take account of overtime falling within two categories, known as non-guaranteed overtime and voluntary overtime.

3. Non-guaranteed overtime is also referred to as shift overrun payments. These arise where, at the end of a shift, one of these employees is in the middle of carrying out a task which they must see through to the end. Examples are when caring for patients to whom an ambulance has been dispatched or dealing with a call made to emergency services. In such circumstances, the obligation to complete the task continues beyond the end of the shift. In return, the employee is entitled to payment for this shift overrun.

4. Employees may also be offered voluntary overtime. The statement of agreed facts records that:

> **"21. None of the Claimants are or have ever been required or expected to volunteer for overtime shifts and all of the Claimants are and have always been completely free to choose whether or not to work any voluntary overtime shifts."**

A The Claimants' only witness, Mr Sharp, accepted that it could not be said that for everyone voluntary overtime was something they normally did.

B 5. The Tribunal held that the Claimants' contractual terms and conditions entitled them to have their non-guaranteed overtime taken into account in the calculation of their holiday pay, but not their voluntary overtime. As to the claim under the **WTD**, the Trust conceded in the light of the EAT decision in **Bear Scotland Ltd v Fulton** [2015] ICR 221, that non-guaranteed C overtime should be taken into account. The Tribunal accepted the Trust's argument that voluntary overtime was in a different category. The appeal and cross-appeal are against the respective adverse findings.

D 6. The critical contractual provision is clause 13.9 of the NHS terms and conditions of service. This provides:

> **"Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work. This would be based on the previous three months at work or any other reference period that may be locally agreed."**

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F 7. The Trust being an emanation of the State, the non-contractual claim is brought directly under the **WTD** rather than under the domestic provisions of the **Working Time Regulations 1998**. Article 7 of the **WTD** is headed "*Annual leave*". It 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."**

G

H The purpose and full content of Article 7 has to be ascertained from decisions of the European Court of Justice and as further reviewed in domestic authority.

8. Under the contractual claim, the Tribunal concluded that clause 13.9 on its proper construction required a distinction to be drawn between the two types of overtime. It held that the non-guaranteed overtime formed part of the Claimants' "*pay*" within the meaning of clause 13.9, and thus must be taken into account in the calculation of their holiday pay. This was because shift overrun work was a contractual obligation, thus:

> **"41. All the Respondent's witnesses acknowledged that it was not open to any of the Claimants to leave their job at the end of the shift if they were in the middle of an emergency call, be it on the road to an accident or in a call centre. It was an essential requirement of their contractual role that they remain on that shift and conclude the matter that they were dealing with. …"**

By contrast, voluntary overtime was in a different category, thus:

> **"42. … This is by its very nature voluntary. There is no contractual obligation for the Claimants to perform it. Although it was submitted on the [Claimants'] behalf that the Respondents rely upon it the tribunal is satisfied that it must have in place other options in case the take-up for voluntary overtime is not sufficient to cover all its obligations. As found, this could be by way of agency staff or private ambulances. As an examination of the time sheets and further information demonstrated there is no pattern to the voluntary overtime. It varies depending on the nature of the role, the type of work undertaken and the needs of the organisation. It is not part of pay for the purposes of calculating the [Claimants'] annual leave."**

9. As to the **WTD**, The Tribunal made clear that it considered the Trust's concession in respect of non-guaranteed overtime to be correct. As to voluntary overtime, it concluded, in the light of European authority and in particular **British Airways plc v Williams** [2012] ICR 847, that this did not form part of an employee's "normal remuneration", and thus fell outside the ambit of Article 7. The reason was that such overtime being purely voluntary was not work which the employee was required to do by his/her contract of employment: see paragraphs 49 to 51.

10. Since the Tribunal's decision, the EAT has handed down its judgment in **Dudley Metropolitan Borough Council v Willetts** [2018] ICR 31. The issue was whether payments for voluntary overtime fell within the **WTD** concept of "normal remuneration". Simler P held that it did.

The Appeal on *WTD*

11. Counsel for the Claimants, Mr Sean Jones QC, submits that the present case is on all fours with the decision in **Dudley** and that the appeal on the **WTD** claim must therefore succeed. Counsel for the Trust, Mr Paul Nicholls QC, submits that the decision in **Dudley** wrongly interpreted the European Court case law and that I should not follow it. In any event, he submits that the present case can be distinguished it from **Dudley** on the facts. I respectfully disagree on both counts.

12. Simler P's decision followed an extensive review of European Court authority, particularly the decisions in **British Airways v Williams** and in **Lock v British Gas Trading Ltd** [2014] ICR 813. She also took account of the domestic decision in **Bear Scotland v Fulton**, a decision of Langstaff P.

13. The central propositions that Simler P derived from this analysis were that:

(1) The right to paid annual leave is a particularly important principle of EU social law from which there can be no derogation;

(2) The overarching principle is that normal remuneration must be maintained in respect of the period of annual leave guaranteed by Article 7. Thus the payments in that period must correspond to the normal remuneration received while working;

(3) The purpose of this requirement is to ensure that a worker does not, by taking leave, suffer a financial disadvantage, which is liable to deter him from exercising that right;

(4) Payments in respect of overtime - whether that be compulsory, non-guaranteed, or voluntary - constitute remuneration;

(5) For a payment to count as "normal" remuneration, it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count. Items that are usually paid and regular across time may do so;

(6) The structure of a worker's remuneration cannot detract from the right to maintenance of normal remuneration;

(7) One decisive criterion or test for determining whether a particular component of pay is part of normal remuneration is where there is an "intrinsic link" between the payment and the performance of tasks that the worker is required to carry out his or her contract of employment;

(8) However that is not the only decisive criterion or test. What matters is the overarching principle and its object.

14. In the light of these principles, Simler P held that the exclusion of payments for voluntary work which is normally undertaken by the employee in question would offend the overarching principle and would give rise to the real risk of pay structures being fragmented in order to minimise levels of holiday pay. She cited what she called "*the current proliferation of zero hours contracts*" as a particular example of that risk (paragraph 43).

15. Applying the overarching principle, Simler P held that:

> **"44. … in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis to justify the description "normal", the principle in *Williams* applies and it will be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration."**

16. In the alternative, she held that the test of an intrinsic link between the payment in question and tasks which a worker is required to carry out under his contract of employment,

was in any event satisfied. A contract of employment which provided for the possibility of voluntary overtime was an umbrella contract. In its absence the specific agreement or arrangement for overtime would not exist. Once an agreed shift or voluntary overtime began, the employee was performing tasks required of him or her under the contract of employment (paragraph 46).

17. Mr Nicholls submits that the European Court decisions clearly demonstrate that the sole test of whether a payment constitutes normal remuneration is the existence of an intrinsic link between the payment and the performance of tasks required under the contract of employment. He cited, in particular, paragraph 24 of the European Court's decision in **Williams**. It was not open to a domestic Court - i.e. the EAT in **Dudley** - to hold otherwise. When pressed with Simler P's example of zero hours contracts and the consequent risk of defeating any claim for pay during the **WTD** period of annual leave, he submitted that this could be distinguished from the present case. A zero hours contract, with no guarantee of work, provided the framework and sole basis for any work that was in fact performed. Thus the intrinsic link was established. By contrast, the Claimants' contracts of employment were the source of the standard hours and basic pay, but not of any voluntary overtime. That was the result of a separate agreement or arrangement which was not intrinsically linked to the contract of employment.

18. Mr Nicholls further submitted that Simler P's depiction of the test in European Court case law was inconsistent with the approach of Langstaff P in **Bear v Scotland**. He cited, in particular, paragraph 45 of the latter where the then President stated:

> **"45. In so far as the test seeks an intrinsic or direct link to tasks which a worker is required to carry out (stressing those last four words) …"**

19. In any event, it was wrong to say that there was a contractual obligation from any source to perform voluntary overtime. The point had not been taken below. If it had been, the Trust's witnesses would have said that employees can and do pull out of voluntary overtime which they have agreed to do, whether by changing their mind at the last minute or even during a shift. The absence of contractual obligation was also demonstrated by the agreed facts on voluntary overtime and by Mr Sharp's acceptance in evidence that it could not be said that, for everyone, voluntary overtime was something they normally did.

20. I consider that the decision of Simler P in **Dudley** was clearly right. In my judgment the challenge to her analysis of the effect of the European Court decisions fails to engage with the overarching principle which she rightly identified, and in consequence leads to a conclusion which conflicts with that principle.

21. This was exemplified in the attempt to distinguish the case of a zero hours contract from the present case. On the logic of the Trust's central argument that the remunerated task must have been required by the contract of employment, there is no basis for the distinction which was advanced. In consequence, the application of a sole or exclusive test of an intrinsic link would permit evasion of Article 7 and undermine the overarching principle. In any event, as Mr Jones observed, if zero hours contracts could be distinguished on the basis suggested, Article 7 could then be evaded by the device of contractual terms which imposed a requirement to work for e.g. one hour per week. This would all be quite contrary to the object of the **Directive**.

22. I do not accept that **Bear Scotland** is inconsistent in any way with the principles set out in **Dudley**. As the President observed, Langstaff P was careful not to decide whether payments

for voluntary overtime fell to be treated as normal remuneration: see also paragraph 22 of that decision. Furthermore, and consistently with the propositions subsequently identified in **Dudley**, Langstaff P stated:

> **"44. Despite the subtlety of many of the arguments, the essential points seem relatively simple to me. "Normal pay" is that which is normally received. …"**

23. The argument that an employee's agreement to carry out specified hours of voluntary overtime for reward gives rise to no contractual obligation is, in my judgment, untenable. As to the agreed facts and the evidence of Mr Sharp, these do not affect the question of whether a particular Claimant employee in fact had a pattern of voluntary overtime which was sufficiently regular and settled to be taken into account in the calculation of normal remuneration.

24. Whilst acknowledging that the Tribunal did not have the benefit of the subsequent decision in **Dudley**, my conclusion is that it was wrong to hold that voluntary overtime necessarily fell outside the calculation of annual leave pay under the **WTD**. In consequence, the claims must be remitted for a case-by-case assessment in accordance with the considerations identified in **Dudley**.

The Appeal and Cross-Appeal on the Contractual Claim

25. The Claimants contend that, the Tribunal having correctly held that non-guaranteed overtime fell within the meaning of "*pay*" in clause 13.9, it should equally have held that voluntary overtime fell within that provision. The Trust contends that neither form of overtime work and remuneration was caught by clause 13.9.

26. In support of the appeal, Mr Jones places primary emphasis on the second sentence of the clause, namely "*Pay is calculated on the basis of what the individual would have received*

had he/she been at work". The parties thereby provided that the Claimants should be entitled to receive holiday pay calculated by reference to what they would have received had they been at work. The third sentence then provided that the pay which the particular employee would have received was to be determined by reference to the previous three months at work "*or any other reference period that may be locally agreed*". The first sentence made clear that the calculation would include "*regularly paid supplements*" including those specifically identified. He accepted that overtime, in either of the two categories, was not a "*supplement*". In each case, it was part of "*pay*".

27. On this interpretation, there was no justification for the distinction drawn by the Tribunal between overtime which was/was not required by the contract of employment. Viewed as a whole, the purpose of clause 13.9 was to calculate holiday pay on the basis of what the employee would in fact have been paid if at work; and to base that calculation on the reference period identified or otherwise agreed. Furthermore the clause was to be construed against the background of the **WTD**, thus reflecting the overarching principle that holiday pay should correspond to the normal remuneration received by the worker.

28. In reply and in support of the cross-appeal, Mr Nicholls submitted that the first sentence of clause 13.9 defined the components of holiday pay. The second sentence provided the method of calculation of those components, i.e. by reference to what the employee would have received if at work. The third sentence then identified the period for that calculation. Returning to the first sentence, on its proper construction this identified the components of holiday pay as basic pay and the regularly paid supplements. It was common ground that overtime was not a "*supplement*", nor was it "*regularly paid*". It was paid at different times according to individuals' circumstances.

29. Nor did overtime form part of "*pay*" for these purposes. Mr Nicholls pointed to section 1 of the NHS terms, headed "*Pay structure*", which was focused on the "*Pay spines*" and basic pay. Overtime payments were dealt with separately in section 3. Overtime was thus in a distinct category from the other components of the first sentence of clause 13.9, involving a different rate of pay. Its omission from the clause must be taken to be deliberate. Furthermore the Claimants' construction involved an impermissible rewriting of clause 13.9.

30. I prefer the Claimants' construction. First, I consider that the purpose of the first sentence of clause 13.9 is to provide that holiday pay shall include the identified "*regularly paid supplements*". It does not expressly define the other components of "*pay*".

31. Secondly, I see no good reason to construe the references to "*pay*" in a way which confines it to basic pay and excludes overtime. The natural interpretation that overtime is part of pay and the pay structure is confirmed by clause 2.9 of section 1, which provides the link to the overtime provisions in section 3.

32. Thirdly, such construction of "*pay*" is further supported by the second sentence of clause 13.9. The clause must be read as a whole. Its objective intention is to maintain the overall level of remuneration which the employee would have received if working. I do not accept that the second sentence merely provides calculation machinery for the first sentence. However, even if it is so confined, that calculation is of pay which includes overtime pay.

33. Fourthly, this construction accords with the background context of the **WTD**. I was told that clause 13.9 appeared in its current form in 2009. As Simler P's analysis in **Dudley** demonstrates, the European Court had by at least 2006 established the principle that, for the

duration of annual leave within the meaning of the **Directive**, remuneration must be maintained: paragraph 60 of her judgment. It makes obvious sense for the contract to march in step with the **WTD** so far as possible.

34. Fifthly, I do not accept that the Claimants' case involves a rewriting of the contract. It is a question of construction. In my judgment there is no good basis to construe clause 13.9 so as to exclude overtime in the calculation of holiday pay.

35. In consequence of this construction and contrary to the Tribunal's conclusion, I see no basis to distinguish between non-guaranteed and voluntary overtime. In this case, the calculation will be based on the three-month period identified in the final sentence of clause 13.9.

36. For all these reasons, I uphold the Claimants' appeal, dismiss the Trust's cross-appeal, and remit the matter to the Tribunal for the further assessment required in each case.