# In The Supreme Court of the United Kingdom

**ON APPEAL**

**FROM HER MAJESTY'S COURT OF APPEAL**

**CIVIL DIVISION (ENGLAND)**

**Appeal No: UKSC 2009/0042**

**BETWEEN:**

**BRITISH AIRWAYS PLC**

***Respondent***

**-and-**

**MS SALLY WILLIAMS AND OTHERS**

***Appellants***

---

# APPEAL DOCUMENTS

**SC001, STATEMENT OF FACTS AND ISSUES,
CASE FOR THE APPELLANT, CASE FOR THE RESPONDENT,
APPENDIX AND AUTHORITIES**

---

**BAKER MCKENZIE LLP**

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**London**

**EC4V 6JA**

***Agents for the Respondent***

**THOMPSONS SOLICITORS**

**Congress House**

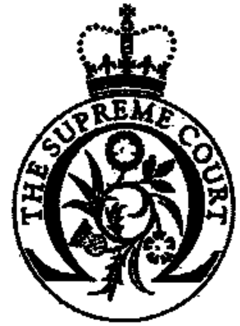
**Great Russell Street**

**London**

**WC1B 3LW**

***Agents for the Appellants***

In the Supreme Court of the United Kingdom




# Notice of appeal

(or application for permission to appeal)

On appeal from

HER MAJESTY'S COURT OF APPEAL (ENGLAND) (CIVIL DIVISION)

BRITISH AIRWAYS PLC Respondent

— V —

MS S.WILLIAMS AND OTHERS Appellants

Appeal number UKSC 2009 / 0042

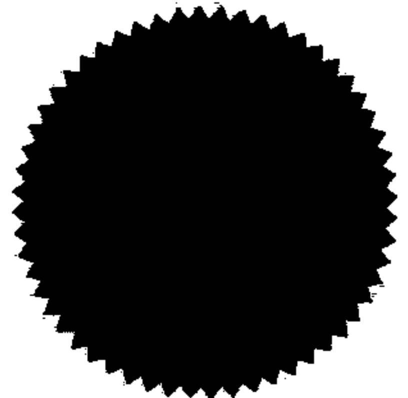
Date of filing 29/SEP/2009
DD MMM YYYY

Appellant's solicitors

Thompsons Solicitors

Respondent's solicitors

Baker & McKenzie LLP





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## 1. Appellant

Appellant's full name: MS S. WILLIAMS AND OTHERS

Original status:
- [x] Claimant
- [ ] Defendant
- [ ] Petitioner
- [ ] Respondent
- [ ] Pursuer
- [ ] Defender

### Solicitor

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London

Telephone no. 020 7290 0000

Fax no. 020 7637 0000

DX no. 35722 BLOOMSBURY

Postcode: WC1B 3LW

Ref. VMP/WILLIAMS/A0960458

Email: victoriaphillips@thompsons.law.co.uk

How would you prefer us to communicate with you?
- [ ] DX
- [x] Email
- [ ] Post
- [ ] Other *(please specify)*

Is the appellant in receipt of public funding/legal aid?
- [ ] Yes
- [x] No

If Yes, please give the certificate number

### Counsel

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## 2. Respondent

Respondent's full name: BRITISH AIRWAYS PLC

Original status:

- [ ] Claimant
- [ ] Defendant
- [ ] Petitioner
- [x] Respondent
- [ ] Pursuer
- [ ] Defender

**Solicitor**

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Ref. JME/SCR

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How would you prefer us to communicate with you?

- [ ] DX
- [ ] Email
- [ ] Post
- [ ] Other *(please specify)*

Is the respondent in receipt of public funding/legal aid?

- [ ] Yes
- [x] No

If Yes, please give the certificate number

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**Counsel**

Name: Mr Andrew Short

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Telephone no. 020 7353 6381

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DX no. LDE 351 (Chancery Lane)

Postcode: WC2R 1BA

Email: andrew.short@outertemple.com

## 3. Decision being appealed

Name of Court: COURT OF APPEAL (CIVIL DIVISION)

Names of Judges: Lord Justice Ward, Lord Justice Lloyd, Lord Justice Rimer

Date of order/interlocutor/decision: 03/APR/2009 (DD/MMM/YYYY)

## 4. Permission to appeal

If you have permission to appeal complete Part A or complete Part B if you require permission to appeal.

**PART A**

Name of Court granting permission: House of Lords

Date permission granted: 0 7 / J U L / 2 0 0 9
D D M M M Y Y Y Y

Conditions on which permission granted: That notwithstanding the time limits imposed by Standing Order I the petition of appeal be lodged in the Registry of the Supreme Court of the United Kingdom after 17 August and no later than 30 September

**PART B**

☐ The appellant applies to the Supreme Court for permission to appeal.

## 5. Information about the decision being appealed

Please set out

- Narrative of the facts
- Statutory framework
- Chronology of proceedings
- Orders made in the Courts below
- Issues before the Court appealed from
- Treatment of issues by the Court appealed from
- Issues in the appeal

Please see Annex to this Notice of Appeal headed "Particulars of section 5 of Notice of Appeal: Information about the decision being appealed"

## 6. Grounds of appeal

Please see Annex to this Notice of Appeal headed: "Particulars of Section 6 of Notice of Appeal: Grounds of Appeal"

Counsel's name or signature:

Jane McNeill QC and Michael Ford

## 7. Other information about the appeal

Are you applying for an extension of time? ☐ Yes ☑ No

If Yes, please explain why

What order are you asking the Supreme Court to make?

Order being appealed ☑ set aside ☐ vary

Original order ☐ set aside ☐ restore ☑ vary

**Does the appeal raise issues under the:**

Human Rights Act 1998? ☐ Yes ☑ No

Are you seeking a declaration of incompatibility?

☐ Yes ☑ No

Are you challenging an act of a public authority?

☐ Yes ☑ No

If you have answered Yes to any of the questions above please give details below:

Court's devolution jurisdiction? ☐ Yes ☑ No

If Yes, please give details below:

**Are you asking the Supreme Court to:**

depart from one of its own decisions or from one made by the House of Lords?

☐ Yes ☑ No

If Yes, please give details below:

make a reference to the European Court of Justice of the European Communities?

☑ Yes ☐ No

If Yes, please give details below:

The Appellants seek a reference to the ECJ only if their primary submissions as to the proper interpretation of the domestic law provisions in the Civil Aviation (Working Time) Regulations 2004 are rejected. The suggested questions and the grounds for applying for a reference are set out in an Annex to this Notice of Appeal headed: "Details of Request for Reference to the European Court of Justice"

Will you or the respondent request an expedited hearing?

☐ Yes ☑ No

If Yes, please give details below:

## 8. Certificate of Service

Either complete this section or attach a separate certificate

The date on which this form was served on the

1st Respondent 2 9 / S E P / 2 0 0 9
D D M M M Y Y Y Y

2nd Respondent __ / ___ / ____
D D M M M Y Y Y Y

I certify that this document was served on

Baker & McKenzie LLP

by

VICTORIA PHILLIPS

by the following method

FAX

Signature

Victoria Phillips

## 9. Other relevant information

Neutral citation of the judgment appealed against e.g. [2009] EWCA Civ 95

2009 / EWCA Civ / 281

References to Law Report in which any relevant judgment is reported.

[2009] ICR 906; [2009] IRLR 491

Subject matter catchwords for indexing.

Employment - working time - paid annual leave - Civil Aviation (Working Time) Regulations 2004 - Directive 2000/79/EC concerning Working Time of Mobile Workers in Civil Aviation - whether flight crew on paid annual leave entitled to pay which is normal/comparable to pay when working

**Please return your completed form to:**

The Supreme Court of the United Kingdom, Parliament Square, London SW1P 3BD
DX 157230 Parliament Square 4
Telephone: 020 7960 1991/1992 Fax: 020 7960 1901
email: registry@supremecourt.gsi.gov.uk
www.supremecourt.gov.uk

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM THE COURT OF APPEAL (ENGLAND)**

**CA No. A2/2008/0632**
**[2009] EWCA Civ 281**

**B E T W E E N:**

**BRITISH AIRWAYS PLC**

**Respondent**

**- and -**

**MS S. WILLIAMS AND OTHERS**

**Appellants**

---

**PARTICULARS OF SECTION 5 OF NOTICE OF APPEAL:**
**INFORMATION ABOUT THE DECISION BEING APPEALED**

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**Facts**

1. The Appellants are airline pilots employed by the Respondent ("BA"). The lead Appellant is Ms S Williams.

2. Pilots at BA, when working normally, are paid basic pay and other allowances including (i) a flying pay supplement and (ii) the taxable element of an allowance for time away from base (the "TAFB allowance"). When they take annual leave, they are paid only their basic pay. As a result, pilots are paid less when they take holiday than when they are working normally. By way of illustration, in 2006, Ms Williams received a mean flying pay supplement of £709.16 per month and a mean TAFB allowance of £86.54 per month. Her holiday pay included neither of these two constituent elements of her normal pay while working.

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM THE COURT OF APPEAL (ENGLAND)**

**CA No. A2/2008/0632**
**[2009] EWCA Civ 281**

**B E T W E E N:**

**BRITISH AIRWAYS PLC**

**Respondent**

**- and -**

**MS S. WILLIAMS AND OTHERS**

**Appellants**

---

**PARTICULARS OF SECTION 6 OF NOTICE OF APPEAL: GROUNDS OF APPEAL**

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1. The Grounds of Appeal below are limited to those upon which the House of Lords granted leave to appeal.

2. The Appellants do not seek to argue that the Aviation Regulations expressly or impliedly incorporate the formula in ss 221-224 of ERA 1996 for the purpose of calculating payment for annual leave. But they submit that an employment tribunal ("ET") is able itself to determine whether a pilot has received payment for annual leave which matches the level of pay which he would normally receive or is comparable to his pay while working, in accordance with the decisions of the European Court of Justice ("ECJ") in ***Robinson-Steele v R D Retail Services Ltd*** [2006] ICR 932 and ***Stringer v Commissioners of Inland Revenue*** [2009] ICR 932 and an ET is able to award compensation where the level of pay is less than normal/comparable pay.

3. The decisions of the ECJ in ***Robinson-Steele*** and ***Stringer*** clearly establish that under the Working Time Directive, and hence under the Aviation Agreement and Directive, workers must receive their normal pay, or pay which is comparable to pay when

A

# In The Supreme Court of The United Kingdom

**ON APPEAL**

**FROM HER MAJESTY'S COURT OF APPEAL**

B

**(CIVIL DIVISION) (ENGLAND)**

**Appeal No: UKSC 2009/0042**

**B E T W E E N :**

C

**BRITISH AIRWAYS PLC**

***Respondent***

**-and-**

D

**MS SALLY WILLIAMS AND OTHERS**

***Appellants***

E

**STATEMENT OF FACTS AND ISSUES**

**FACTS**

F

***Background***

1. The Appellants are all pilots employed by the Respondent ("BA"). Their terms and conditions of employment are governed by collective agreements made between their trade union, the British Airline Pilots Association ("BALPA") and BA. Collectively agreed terms, including terms relating to pay and holiday, are incorporated into pilots' individual contracts of employment.

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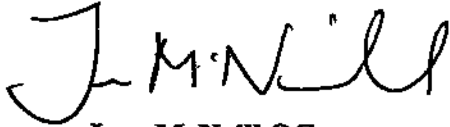
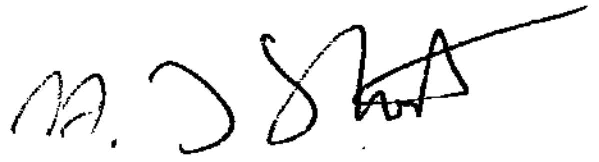
the ECJ under Article 234 of the Treaty Establishing the European Community.





| | |
|---|---|
| **Jane McNeill QC** | **Christopher Jeans QC** |
| **Michael Ford** | **Andrew Short** |
| Counsel for the Appellants | Counsel for the Respondent |
| ................................................... | ........................................ |

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**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL**

**FROM HER MAJESTY'S COURT OF APPEAL**

**(CIVIL DIVISION) (ENGLAND)**

**Appeal No: UKSC 2009/0042**

**B E T W E E N :**

**BRITISH AIRWAYS PLC**

***Respondent***

**-and-**

**MS SALLY WILLIAMS AND OTHERS**

***Appellants***

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# STATEMENT OF FACTS AND ISSUES

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**BAKER MCKENZIE LLP**

**100 New Bridge Street**

**London**

**EC4V 6JA**

***Agents for the Respondent***

**THOMPSONS SOLICITORS**

**Congress House**

**Great Russell Street**

**London**

**WC1B 3LW**

***Agents for the Appellants***

A

**IN THE SUPREME COURT OF THE UNITED KINGDOM** **Appeal No. UKSC/2009/0042**

**ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)**

B

**BETWEEN:**

**BRITISH AIRWAYS PLC**

**Respondent**

C

**-and-**

**SALLY WILLIAMS AND OTHERS**

**Appellants**

D

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**CASE FOR THE APPELLANTS**

---

E

**Introduction**

1. The Appellants in this case are all pilots employed by the Respondent ("BA"). They have presented cases to the employment tribunal claiming compensation for unpaid holiday pay pursuant to regulation 18 of the Civil Aviation (Working Time) Regulations 2004 ("the Aviation Regulations").

F

Auth Tab 10

2. The Aviation Regulations apply to *"persons employed to act as crew members on board a civil aircraft flying for the purposes of public transport"* (regulation 2). *"Crew members"* include members of both flight crew and cabin crew (regulation 3) and the outcome of

G

A

*(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to*

B

*(a) the employer's default in refusing to permit the crew member to exercise his right; and*

*(b) any loss sustained by the crew member which is attributable to the matters complained of".*

C

5. The Aviation Regulations are the domestic law implementation of Council Directive 2000/79/EC ("the Aviation Directive"). In setting out the entitlement of crew members to paid holiday, the Aviation Regulations adopt precisely the same language – *"paid annual leave"* – as appears in the European Agreement on the Organisation of Working Time for Mobile Staff in Civil Aviation ("the Aviation Agreement") which is annexed to and implemented by the Aviation Directive. The Aviation Agreement and the Aviation Directive will be referred to in this Case as "the Aviation Agreement and Directive".

Auth Tab 17

D

E

6. Clause 3 of the Aviation Agreement states:

Auth Tab 17

*"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.*

F

*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

Auth
Tab 13

A

7. The Aviation Agreement and Directive are part of the European labour law code on working time, which includes the Working Time Directive.[1] Clause 3 of the Aviation Agreement is worded in terms which are, in all material respects, identical to Article 7 of the Working Time Directive which confers a right to a minimum of four weeks' *"paid annual leave"* on the majority of workers.

B

8. The structure of pay packages for flight crew and cabin crew varies from airline to airline. The Appellant pilots are entitled to basic pay, Flying Pay Supplement ("FPS") and various allowances, including a Time Away from Base allowance ("TAFB"), which is in part taxable.[2] When on annual leave, the Appellants receive only their basic pay. As the Employment Appeal Tribunal ("EAT") succinctly put it at paragraph 1 of its judgment, the result of being paid basic pay only is that *"when [the Appellants] are on annual leave, they are paid less than when they are working normally"*.

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D

9. The principal issue between the parties on this appeal is whether the payment of basic pay only, without FPS or the taxable element of TAFB, meets the requirements of regulation 4 of the Aviation Regulations.

E

Appendix
p. 231

10. The parties agreed a Schedule of Issues before the employment tribunal and agreed that the first issue to be determined was:

F

*"Whether as a matter of Domestic and Community Law, paid leave for the purposes of Regulation 4 of the Civil Aviation (Working Time) Regulations 2004 is to be calculated in accordance with Regulation*

G

1 Directive 93/104/EC of 23 November 1993, now consolidated in Directive 2003/88/EC, without changes to the wording of Article 7

2 See Statement of Facts and Issues

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)**

**Appeal No. UKSC/2009/0042**

**B E T W E E N :**

**BRITISH AIRWAYS PLC**

**Respondent**

**-and-**

**SALLY WILLIAMS AND OTHERS**

**Appellants**

---

**CASE FOR THE APPELLANTS**

---

THOMPSONS SOLICITORS
Congress House
Great Russell Street
London WC1B 3LW

*Agents for the Appellants*

**Appeal No. UKSC/2009/0042**

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)**

**B E T W E E N: -**

***SALLY WILLIAMS AND OTHERS***

***Appellants***

**- and -**

***BRITISH AIRWAYS PLC***

***Respondent***

---

**CASE FOR THE RESPONDENT**

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**INTRODUCTION**

1. The issue is short. Do the Respondent's pilots receive:

   *"paid annual leave of at least four weeks"?*

   for the purposes of the Civil Aviation Working Time Regulations 2004 ("the Aviation Regulations") [1]?

2. They receive *"annual leave of at least four weeks"*. This is not in dispute. In fact they receive considerably more[2].

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1 Authorities, Tab10.

2 At Heathrow they are contractually entitled to 30 days leave a year, plus two "duty free weeks", making 44 days in all. At Gatwick they are contractually entitled to 42 days of which they are required to take 35 days. See "Statement of Facts and Issues" para 10. Such leave is of course additional to the periods of rest between flights.

**Appeal No. UKSC/2009/0042**

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)**

**B E T W E E N: -**

***SALLY WILLIAMS AND OTHER***

***Appellants***

**- and -**

***BRITISH AIRWAYS PLC***

***Respondent***

---

**CASE FOR THE RESPONDENT**

---

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**Harmondsworth**
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**UB7 0GB**

**&**

**Baker & McKenzie**
**100 New Bridge Street**
**London**
**EC4V 6JA**

H02.02.10-CJ

# In The Supreme Court of the United Kingdom

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

CIVIL DIVISION (ENGLAND)

**Appeal No: UKSC 2009/0042**

**BETWEEN:**

BRITISH AIRWAYS PLC

***Respondent***

-and-

MS SALLY WILLIAMS AND OTHERS

***Appellants***

---

# APPENDIX

---

**BAKER MCKENZIE LLP**
**100 New Bridge Street**
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**EC4V 6JA**

***Agents for the Respondent***

**THOMPSONS SOLICITORS**
**Congress House**
**Great Russell Street**
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**WC1B 3LW**

***Agents for the Appellants***

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## TO

## APPENDIX


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| 3. | Order of the Employment Appeal Tribunal | 03.03.08 | 30-31 |
| 4. | Transcript of proceedings and judgment of Employment Appeal Tribunal | 03.03.08 | 32-64 |
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Her Majesty's
Court of Appeal
-3 APR 2009

COURT 63
Appeal No.

A2/2008/0632

FRIDAY 3RD APRIL 2009

# IN THE COURT OF APPEAL 11441

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

UKEAT037707MAA

**BEFORE** LORD JUSTICE WARD
LORD JUSTICE LLOYD
And LORD JUSTICE RIMER

06 APR 2009

**B E T W E E N**

BRITISH AIRWAYS PLC

APPELLANT

- and -

SALLY WILLIAMS and others

RESPONDENTS

**ON READING** the Appellant's Notice sealed on the 20th March 2008 filed on behalf of the Appellant on appeal from the order of The Employment Appeal Tribunal dated 28th February 2008

**ON READING** the Respondents' cross-appeal set out in the Respondent's Notice filed on behalf of the Respondents on 4th April 2008 and sealed on 10th April 2008

**AND ON HEARING** Mr Christopher Jeans QC and Mr Andrew Short of Counsel on behalf of the Appellant and Miss Jane McNeill QC, Mr Keith Bryant and Mr Michael Ford on behalf of the Respondents

**IT IS ORDERED** that

1) the Appellant's appeal be allowed;

2) the Respondents' cross-appeal be dismissed

**IT IS DECLARED** that the Respondents are unable to establish that the Appellant was in breach of its obligation under Regulation 4 of the Civil Aviation (Working Time) Regulations 2004 in paying for leave at the rate of basic pay;

**AND IT IS FURTHER ORDERED** that

Court of Appeal A

# British Airways plc *v* Williams and others

[2009] EWCA Civ 281

2008 Nov 26, 27; Ward, Lloyd, Rimer LJJ
2009 March 19; B
April 3

*Employment — Working time provisions — Paid annual leave — Airline workers receiving supplementary payments additional to basic pay when working — Whether pay during annual leave to include supplementary allowances — Civil Aviation (Working Time) Regulations 2004 (SI 2004/756), reg 4 — Council Directive 93/104/EC, art 7 — Council Directive 2000/79/EC, art 3* C

The claimants, pilots employed by the appellant employers, were paid a basic salary plus additional amounts designated as "flying time" and "time away from base" when working, but during periods of annual leave they received the basic pay without the additional allowances. They made complaints to an employment tribunal that by paying only the basic pay the employers had refused to permit them to exercise their right to paid annual leave provided by regulation 4 of the Civil Aviation (Working Time) Regulations 2004[1], which implemented the Aviation D Directive 2000/79/EC[2], adopted following a European-wide agreement in 2000[3] to make provision for workers in the air transport industry, who had been excluded from the Working Time Directive 93/104/EC[4]. At a pre-hearing review an employment tribunal decided as a preliminary issue that the claimants' pay during periods of annual leave should be calculated in accordance with section 224 of the Employment Rights Act 1996[5]. The Employment Appeal Tribunal dismissed an appeal by the employers, holding that, in the absence of any formula in the E Regulations, the pay of a pilot on annual leave was to be calculated so as to accord with the pay which article 7 of the Working Time Directive required workers to receive while on annual leave, which had been interpreted as being remuneration comparable to that received when working, and, in the case of the claimants, that had to include the supplements they received in addition to their basic salary when working.

On an appeal by the employers and a cross-appeal by the claimants— F

*Held*, allowing the appeal and dismissing the cross-appeal, that the ordinary meaning of the pay element in "paid annual leave" in regulation 4 of the Civil Aviation (Working Time) Regulations 2004 was not pay measured in some way by reference to the pay that a pilot could expect to earn while working, nor were sections 221 to 224 of the Employment Rights Act 1996, which had nothing to do with fixing holiday pay unless specifically adopted and adapted for that purpose, somehow impliedly incorporated into regulation 4; that, although "paid annual G leave" in article 7(1) of the Working Time Directive, and in clause 3 of the Aviation Agreement, required pay which was "normal" or "comparable" to pay earned during

[1] Civil Aviation (Working Time) Regulations 2004, reg 4: see post, para 24.
Reg 18: see post, para 25.
[2] Council Directive 2000/79/EC, art 3: see post, para 18.
[3] Aviation Agreement (2000), cl 3: see post, para 15.
[4] Council Directive 93/104/EC, art 7: see post, para 11. H
[5] Employment Rights Act 1996, s 224: "(1) This section applies where there are no normal working hours for the worker working under the contract in force on the calculation date. (2) The amount of a week's pay is the amount of the worker's average weekly remuneration in the period of 12 weeks ending—(a) where the calculation date is the first day of the period of leave in question, with that period, and (b) otherwise, with the last complete week before the first day of the period of leave in question."

# EMPLOYMENT APPEAL TRIBUNAL

Appeal No UKEAT/0377/07/MAA

**BEFORE**

THE HONOURABLE MR JUSTICE KEITH
MR C EDWARDS
MR I EZEKIEL

IN THE MATTER of an Appeal under Section 21(1) of the Employment Tribunals Act 1996 from the Judgment of an Employment Tribunal sitting at London South and entered in the Register on the 11th day of May 2007

**BETWEEN:**

British Airways Plc — Appellant

- and -

Ms S Williams and Others — Respondents

UPON HEARING Mr Christopher Jeans one of Her Majesty's Counsel and Mr Andrew Short of Counsel on behalf of the Appellant and Ms Jane McNeill one of Her Majesty's Counsel and Mr Keith Bryant of Counsel on behalf of the Respondents

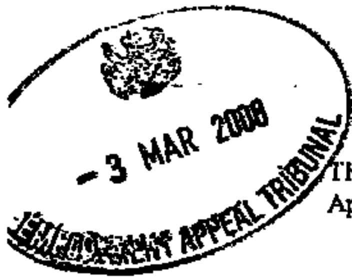
AND UPON the matter having been heard on the 22nd and 23rd days of November 2007 when Judgment was reserved and upon the matter coming on for Judgment this day

THE TRIBUNAL ORDERS THAT:

1. The Appeal and the Cross-Appeal be dismissed
2. Annual leave pay should be calculated in accordance with sections 221-224 of the Employment Rights Act 1996

AND UPON the application of the Appellant for leave to appeal to the Court of Appeal

THE TRIBUNAL FURTHER ORDERS that the aforesaid application be granted. This case has wide ramifications within the industry and very considerable sums of money are involved. That is a sufficiently compelling reason for the appeal to be heard, and we give British Airways permission to appeal pursuant to rule 52.3(6)(b) of the Civil Procedure Rules.




THE TRIBUNAL FURTHER DIRECTS that the appeal do be lodged with the Court of Appeal within 21 days of the seal date of this Order

**D A T E D** the 28th day of February 2008

**TO:** British Airways Plc Legal Department for the Appellant
Messrs Simpson Millar Solicitors for the Respondents

The Secretary, Central Office of Employment Tribunals, England & Wales

(Case No.3311270/06 3314875/06 & Others)

Appeal No. UKEAT/0377/07/MAA

# EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 22 and 23 November 2007
Judgment handed down on 28 February 2008

**Before**

**THE HONOURABLE MR JUSTICE KEITH**

**MR C EDWARDS**

**MR I EZEKIEL**

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BRITISH AIRWAYS PLC — APPELLANT

MS S WILLIAMS & OTHERS — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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Case Number: 3314875/2006

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** LONDON SOUTH

**BEFORE:** MS M E STACEY

**MEMBERS:** MS B C LEVERTON
MR J R GELEIT

**BETWEEN:**

Mrs S A Williams and others — Claimant

AND

British Airways Plc — Respondent

**ON:** 15 and 16 March 2007 and 20 March 2007 (in chambers)

**APPEARANCES:**

For the Claimant: Ms J McNeil, QC
Mr K Bryant, Counsel, instructed by Simpson Miller Solicitors

For the Respondent: Mr C Jeans, QC
Mr S Jones, Counsel, instructed by the Respondent Legal Department

## JUDGMENT ON A PRE-HEARING REVIEW

The unanimous judgment of the Tribunal is that as a matter of domestic and community law, the Claimants' paid leave for the purposes of Regulation 4 of the Civil Aviation (Working Time) Regulations 2004 is to be calculated in accordance with sections 221-224 Employment Rights Act 1996.

## REASONS

1. This case concerns the calculation of statutory holiday pay for pilots at British

# Appellant's notice
(All appeals except small claims track appeals)

| For Court use only | |
|---|---|
| Appeal Court Ref. No. | |
| Date filed | |

Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.

## Section 1 Details of the claim or case you are appealing against

Claim or Case no. UKEAT/0377/07/MAA

Name(s) of the ☐ Claimant(s) ☑ Applicant(s) ☐ Petitioner(s)

BRITISH AIRWAYS PLC

Name(s) of the ☐ Defendant(s) ☑ Respondent(s)

MS S WILLIAMS AND OTHERS

Details of the party appealing ('The Appellant')

Name

BRITISH AIRWAYS PLC

Address (including postcode)

WATERSIDE (HBA3)
PO BOX 365
HARMONDSWORTH
HILLINGDON
UB7 OGB

| | |
|---|---|
| Tel No. | 0208 738 6883 |
| Fax | 0208 738 9962 |
| E-mail | navdeep.deol@ba.com |

Details of the Respondent to the appeal

Name

MS S WILLIAMS AND OTHERS

Address (including postcode)

HAZEL COTTAGE
HASELOR
ALCESTER
WARWICKSHIRE
BL49 6LX

| | |
|---|---|
| Tel No. | 07967 109011 |
| Fax | |
| E-mail | salwilliams@btinternet.com |

Details of additional parties (if any) are attached ☑ Yes ☐ No

# Respondent's Notice

| In the COURT OF APPEAL | |
|---|---|
| Appeal Court Reference No. | A2/2008/0632/A |

**Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.**

| For Court use only | |
|---|---|
| Date filed | 04 APR 08 |

## Section 1 Details of the claim or case

Name of court EMPLOYMENT APPEAL TRIBUNAL

Case or claim number UKEAT/0377/07

Name or title of case or claim BRITISH AIRWAYS PLC V SALLY WILLIAMS & OTHERS

In the case or claim, were you the
*(tick appropriate box)*

☒ claimant ☐ applicant ☐ petitioner

☐ defendant ☐ respondent ☐ other *(please specify)* ______

## Section 2 Your (respondent's) name and address

Your (respondent's) name SALLY WILLIAMS & OTHERS (PLEASE SEE ATTACHED SCHEDULE)

Your solicitor's name SIMPSON MILLAR LLP *(if you are legally represented)*

Your (your solicitor's) address

33-41, Dallington Street,
LONDON
EC1V OBB

Your reference or contact name JOYD.SH.BAL 20100 124

Your contact telephone number 08708551400

DX number DX 53329 - Clerkenwell

Details of other respondents are attached ☒ Yes ☐ No

## Section 3 Time estimate for appeal hearing

**Do not complete if appealing to the Court of Appeal**

| | Days | Hours | Minutes |
|---|---|---|---|
| How long do you estimate it will take to put your case to the appeal court at the hearing? | | 2 | |

Who will represent you at the appeal hearing? ☐ Yourself ☐ Solicitor ☒ Counsel

IN THE EMPLOYMENT APPEAL TRIBUNAL    Appeal No ______.

BETWEEN:-

BRITISH AIRWAYS PLC    **Appellant**

and

SALLY WILLIAMS and others    **Respondents**

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**NOTICE OF APPEAL**

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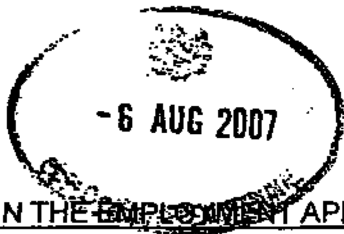
1. The Appellant is British Airways PLC of Waterside, PO Box 365, Harmondsworth, Hillingdon, UB7 0GB.

2. Any communication relating to this appeal may be sent to the Appellant care of Navdeep Deol, British Airways Plc, Waterside, PO Box 365, Harmondsworth, Hillingdon, UB7 0GB. Tel: 020 8738 6883. E-mail: Navdeep.Deol@ba.com.

3. The Appellant appeals from the judgment of an Employment Tribunal sitting at London South on 15, 16 and 20 March 2007 and sent to the parties on 11 May 2007 holding that as a matter of domestic and community law, the claimants' paid leave for the purposes of regulation 4 of the Civil Aviation (Working Time) Regulations 2004 is to be calculated in accordance with sections 221-224 of the Employment Rights Act 1996. Copies of the following documents are attached to this notice: (1) the Employment Tribunal's judgment and reasons; (2) the Claim Form (ET1) dated 5 April 2006; (3) the Response to an Employment Tribunal Claim (ET3) dated 23 May 2006; (4) the Claim Form (ET1) dated 5 July 2006; and (5) the Response to an Employment Tribunal Claim (ET3) dated 1 August 2006; and (6) amendment to the Claim Form.




IN THE EMPLOYMENT APPEAL TRIBUNAL UKEAT/0377/07/MAA

BETWEEN:

BRITISH AIRWAYS PLC **Appellant**

- and -

MRS SALLY WILLIAMS and others **Respondents**

RESPONDENTS' ANSWER

1. The Respondents are Mrs Sally Williams of Hazel Cottage, Haselor, Alcester, Worcestershire BL49 6LX and the other claimants named on the schedules attached to the claim forms in this case.

2. Any communication relating to this appeal may be sent to the Respondents c/o Joy Drummond, Simpson Millar, 2nd Floor, 33-41 Dallington Street, London EC1V 0BB. Telephone number 0870 855 1400. E-mail Joy.Drummond@simpsonmillar.co.uk.

3. The Respondents intend to resist the appeal of British Airways plc. The grounds on which the Respondents will rely are the grounds relied upon by the employment tribunal for making the judgment appealed from and the grounds set out in 3 (i) and (ii) below.

The employment tribunal's judgment

The Appellant ("BA") contends in paragraph 6.11 of its Grounds of Appeal that the employment tribunal has erred in law in failing to give effect to the express disapplication of regulation 16 of the Working Time Regulations 1998 ("WTR") by regulation 18(2)(b) of the WTR. The Respondents dispute this contention. It was common ground between the parties that regulation 16 was disapplied by regulation 18(2)(b) and the employment tribunal so held at paragraph 59 of its decision. In holding that paid leave should be calculated "in accordance with" sections 221-224 of the Employment Rights Act 1996

FORM 4

## APPEAL FROM DECISION OF INDUSTRIAL TRIBUNAL

## APPELLANT'S REPLY TO CROSS APPEAL

CASE NAME British Airways Plc Appellant v Ms S Williams and Others Respondent

APPEAL NO.UKEAT/0377/07/MAA

1. I have received a sealed copy of the above-mentioned cross-appeal. YES

2. My address for service is :- LEGAL DEPARTMENT (HBA 3)
BRITISH AIRWAYS PLC
WATERSIDE
PO BOX 365
HARMONDSWORTH, HILLINGDON
UB7 0GB

* ~~3. I do not desire to resist the cross-appeal.~~

* 4. I desire to resist the cross-appeal for the following reasons:

PLEASE SEE GROUNDS OF RESISTANCE TO CROSS APPEAL ATTACHED.

DATE: 5 SEPTEMBER 2007. SIGNED: N. DEOL SOLICITOR.
FOR & ON BEHALF OF THE APPELLANT

* Please delete the appropriate paragraph and return the completed form, signed and dated by the date given in the attached letter.

<u>IN THE EMPLOYMENT APPEAL TRIBUNAL</u> <u>UKEAT/0377/07/MAA</u>

**B E T W E E N :**

**BRITISH AIRWAYS PLC** <u>**Appellanta**</u>

**-and-**

**MRS S. WILLIAMS and others** <u>**Respondents**</u>

## <u>AGREED STATEMENT OF EVIDENCE</u>

The EAT asked the parties to agree a note of the evidence before the ET on two matters:

(i) the calculation of holiday pay in airlines other than BA in relation to both flight crew and cabin crew and the evidence as to unionised and non-unionised airlines;

(ii) the evidence as to whether pilots were required to take their annual leave and whether they could elect not to take any part of their holidays.

**Issue (i)**

1. PAUL DOUGLAS, head of flight operations, gave evidence for BA about his discussions and correspondence with BALPA (the pilots' union) and the grievance process which had been instituted. He had challenged the union to identify a single airline which paid variable pay (i.e. pay additional to basic pay) for holiday periods: e.g. notes of grievance hearing at p. 334 of ET bundle (the notes of the grievance hearing are annexed to this statement of agreed facts). At paragraph 23 of his witness statement he states:

   > "In response to a request from me BALPA were unable to identify one other airline that paid variable pay during periods of holiday".

2. At paragraph 6 of his Supplementary Statement, he adds that when asked whether BALPA was aware

   > "of any other airline that paid allowances during periods of annual leave; they declined to answer the question".

# Employment Tri_nal Claim Form

You can make a claim to an Employment Tribunal by completing and editing the form offline. You can save a part or fully completed form, email a saved form to another person for approval, and submit it securely online to the Employment Tribunal Service.

Please make sure you have read the guidance notes on our website or in our booklet on how to make a response before you fill in the form.

Once you have completed your form you can submit it securely online to the relevant Tribunal office. You will receive an email to confirm we have received it. Online responses are processed faster than ones sent by post.

If this claim is one of a number of claims arising out of the same or similar circumstances please fill in a claim form for the first claimant and then give details of the other claimants on the multiple form.

Select the type of claim you wish to make:

- [ ] I want to make a claim.
- [x] I want to make a claim on behalf of more than one person.

Select the reason(s) for the claim:

- [ ] Unfair dismissal or constructive dismissal
- [ ] Discrimination
- [ ] Redundancy payments
- [x] Other payments you are owed
- [x] Other complaints

**Need Help?**

If you require any help completing your form or have a general question about the tribunals process please contact the Employment Tribunals Enquiry Line on

0845 795 9775

minicom 08457 573 722

Between 9.00am and 5.00pm Monday to Friday, our lines are closed on bank holidays.

We regret we cannot provide any legal advice.

**Please Note:**

By law, your claim must be on an approved form provided by the Employment Tribunals Service, and you must provide the information marked with ★ and, if it is relevant, the information marked with ● (see 'Information needed before a claim can be accepted')

**General Information:**

Once you have completed your form you can submit it securely on-line to the ETS. On-line forms are processed faster than ones sent by post.

Save | Submit | Print | Clear | Continue →

## 9 Other complaints

**Please fill in this section only if you believe you have a complaint that is not covered elsewhere.**

9.1 Please explain what you are complaining about and why.
Please include any relevant dates.

DETAILS OF CLAIM

INTRODUCTION

1. THIS CLAIM IS BROUGHT BY SALLY WILLIAMS AND ABOUT 2750 OTHER PILOTS WHOSE NAMES ARE SET OUT IN THE APPENDED SCHEDULE.

2. THE CLAIMANTS ARE ALL PILOTS EMPLOYED BY THE RESPONDENT.

3. THE CLAIMANTS CLAIM COMPENSATION IN RESPECT OF UNPAID HOLIDAY PAY PURSUANT TO REGULATION 18 OF THE CIVIL AVIATION (WORKING TIME) REGULATIONS 2004.

PLEASE SEE ATTACHED DETAILS OF CLAIM DOCUMENT.

## 10 Other information

10.1 Please do not send a covering letter with this form.
You should add any extra information you want us to know here.

PLEASE AVOID ALLOCATING THIS MATTER TO TRIBUNALS IN THE SOUTHAMPTON REGION AS COUNSEL WHO HAS BEEN INSTRUCTED SITS AS A TRIBUNAL CHAIRMAN IN THAT REGION.

# Response to an Employment Tribunal claim

**IN THE CLAIM OF:** mrs SA Williams -v- British Airways Plc

Case number:3311270/2006
(please quote this in all correspondence)

**This requires your immediate attention.** If you want to resist the claim made against you, your completed form must reach the tribunal office within 28 days of the date of the attached letter. If the form does not reach us by 05/05/2006 you will not be able to take part in the proceedings and a default judgment may be entered against you.

Please read the **guidance notes** and the notes on this page carefully **before** filling in this form.

By law, you **must** provide the information marked with ✱ and, if it is relevant, the information marked with ● (see guidance on Pre-acceptance procedure).

Please make sure that all the information you give is as accurate as possible.

Where there are tick boxes, please tick the one that applies.

If you fax the form, do not send a copy in the post.

**You must return the full form, including this page, to the tribunal office.**

ET3

## 1 Your details

| | | |
|---|---|---|
| 1.1 | Title: | Mr ~~Mrs~~ ✓ Miss Ms Other |
| 1.2* | First name (or names): | SALLY ANNE |
| 1.3* | Surname or family name: | WILLIAMS |
| 1.4 | Date of birth (date/month/year): | 04 02 1961 Are you: male? female? ✓ |
| 1.5* | Address: Number or Name | HAZEL COTTAGE |
| | Street | HASELOR |
| | Town/City | ALCESTER |
| | County | WARWICKSHIRE |
| | Postcode | BL49 6LX |
| 1.6 | Phone number (where we can contact you during normal working hours): | 07967109011 |
| 1.7 | How would you prefer us to communicate with you? (Please tick only one box) | E-mail ✓ Post Fax |
| | E-mail address: | salwilliams @ btinternet.com |
| | Fax number: | |

## 2 Respondent's details

| | | |
|---|---|---|
| 2.1* | Give the name of your employer or the organisation you are claiming against. | BRITISH AIRWAYS PLC |
| 2.2* | Address: Number or Name | WATERSIDE |
| | Street | PO BOX 365 |
| | Town/City | HARMONDSWORTH |
| | County | |
| | Postcode | UB7 0GB |
| | Phone number: | 0870 850 9850 |
| 2.3 | If you worked at an address different from the one you have given at 2.2, please give the full address and postcode: | HEATHROW AIRPORT<br>234 BATH ROAD<br>HAYES<br>MIDDLESEX |
| | Postcode | UB3 5AP |
| | Phone number: | 020 8745 7950 |

2.4* If your complaint is against more than one respondent please give the names, addresses and postcodes of additional respondents.

Employment Tribunals Service
Watford (29)
PA/Case No: 3314875/06
-5 JUL 2006
Received on
Code: WTY IAL
Initials:

# Response to an Employment Tribunal claim

**IN THE CLAIM OF:** Mrs SA Williams -v-British Airways Plc

Case number:3314875/2006
(please quote this in all correspondence)

**This requires your immediate attention.** If you want to resist the claim made against you, your completed form must reach the tribunal office within 28 days of the date of the attached letter. If the form does not reach us by **04/08/2006** you will not be able to take part in the proceedings and a default judgment may be entered against you.

Please read the **guidance notes** and the notes on this page carefully **before** filling in this form.

By law, you **must** provide the information marked with ✱ and, if it is relevant, the information marked with ● (see guidance on Pre-acceptance procedure).

Please make sure that all the information you give is as accurate as possible.

Where there are tick boxes, please tick the one that applies.

If you fax the form, do not send a copy in the post.

**You must return the full form, including this page, to the tribunal office.**

ET3

WILLIAMS v. BA

PROPOSED AMENDMENT TO ET1

....

Proper Meaning of Paid Holiday

18. The Claimants contend that:

(a) Council Directive 2000/79/EC required Member States to bring into force domestic laws to implement the relevant terms of the European Agreement;

(b) The European Agreement provides that workers such as the Claimants should be entitled to paid leave in accordance with national legislation;

(c) Council Directive 2000/79/EC and the European Agreement were implemented, at least in part, by the 2004 Regulations;

(d) However, since the 2004 Regulations are silent as to the method of calculating pay for the purposes of paid leave, the applicable national legislation in that respect is set out in the 1998 Regulations;

(e) Alternatively, the expression "paid annual leave" in the 2004 Regulations should be interpreted according to its ordinary, natural and common sense meaning and/or in a manner which is consistent with the meaning of "pay" and "remuneration" in other areas of domestic and Community law, including Sections 221 to 224 and 69 of the Employment Rights Act 1996. The relevant calculation should take

**IN THE EMPLOYMENT TRIBUNAL**
**WEST CROYDON**

**BETWEEN:**

**SALLY WILLIAMS AND OTHERS**

**Claimants**

**And**

**BRITISH AIRWAYS**

**Respondent**

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## SCHEDULE OF ISSUES

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1. Whether, as a matter of Domestic and Community Law, paid leave for the purposes of Regulation 4 of the Civil Aviation (Working Time) Regulations 2004 is to be calculated in accordance with Regulation 16 of the Working Time Regulations 1998, and, if not, how it is to be calculated.

2. Applying the method of calculation determined under the first issue above, whether "Flying Pay Supplement" and the taxable element of "Time Away From Base Allowance" which the Claimants are paid pursuant to their contracts of employment, properly form part of their remuneration for the purposes of calculating their statutory entitlement to paid leave under the Civil Aviation (Working Time) Regulations 2004.

3. Applying the findings upon issues 1 and 2 above, how much, if any, is to be awarded by way of compensation to each Claimant.

# MEMORANDUM OF AGREEMENT

Dated 1 April 2005

Between British Airways Plc (herein referred to as "the Employer") and the British Air Line Pilots Association (herein referred to as "the Association") in respect of

PILOT OFFICERS

Employed by

BRITISH AIRWAYS

## 1. SCOPE OF AGREEMENT

The Agreement shall be restricted in its application to the grades of pilot referred to in Schedule 'A' hereto, and employed by the Employer on airline duties.

This agreement covers pilots in British Airways mainline and pilots in Shorthaul Operation London Gatwick except where they have specific separate agreements as referred to in the text.

The terms of the Agreement shall apply to male and female pilots. The terms of the Agreement as applicable to pilots on contract of fixed term employment are those outlined in this Agreement and as amended in Schedule J.

## 2. OVERRIDING EXISTING AGREEMENTS

Except as otherwise specially provided, this agreement supersedes all memoranda of agreement previously entered into by the Employer or any predecessor Corporation or Company with the Association in respect of the grades of pilots referred to in paragraph 1 above.

## 3. TERMINATION OF AGREEMENT

This Agreement shall remain in force for six calendar months after the Employer or the Association shall have given notice in writing to the other party of the intention to terminate the whole, or part, of the Agreement or any Schedule within the Agreement.

**IN THE EMPLOYMENT TRIBUNAL** **Case Nos: 331270/2006 & others**

**LONDON SOUTH** **Case Nos: 3314875/2006 & others**

**BETWEEN :-**

**SALLY WILLIAMS AND OTHERS** **Claimants**

**- and -**

**BRITISH AIRWAYS PLC** **Respondent**

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## STATEMENT OF AGREED FACTS

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1. The Claimants are all pilots employed by the Respondent. The Claimants are all "flight crew" for the purposes of the Civil Aviation (Working Time) Regulations 2004 ("the Regulations"). The Claimants are covered by collective agreements called the Pilot Officers' Memorandum of Agreement ('MOA') and the Bidline Rules, the relevant sections of which are incorporated into individual contracts of employment. The collective agreements together set out the arrangements for the taking of annual leave. The Respondent contends that the provisions of the Bidline rules and the MOA have the effect that holiday pay is limited to basic pay. The Claimants reserve their position on that contention.

2. The Claimants pilot the Respondent's aircraft in return for which they receive a basic salary, Flying Pay and various allowances based on their trip including Time Away From Base Allowance ('TAFB'). Flying Pay is paid at a rate of £10.00 for each flying hour and TAFB at a rate of £2.73 per hour. Flying Pay is fully taxable whilst only 18% of TAFB is taxable.

3. Flying Pay is based on planned flying hours (see page 120 of the Bundle). TAFB is only paid for each hour a pilot is away from his or her base, and includes both flying time and time on the ground (see page 122 of the Bundle). Each of Flying Pay and TAFB and the circumstances in which they are paid are set out in the MOA.

4. During periods of annual leave the Claimants at present receive only their basic salary and do not receive Flying Pay or TAFB. Neither Flying Pay / TAFB nor their predecessors have ever been paid to pilots during periods of holiday. The Respondent's position is that Flying Pay is not payable because the pilots are not flying and TAFB is not payable because the pilots are not away from base those being the conditions for payment set out in the MOA. The Claimants contend that following the introduction of the Regulations, Flying Pay and the taxable element of TAFB should be taken into account in calculating holiday pay. This argument was first raised by BALPA in 2006, after the Regulations came into force.

5. The Claimants consider it relevant to the issues in dispute that BA does include Flying Pay and the taxable element of TAFB when calculating pay for pilots who are required, under safety rules, to perform ground-based duties whilst pregnant. The Respondent accepts that that is its practice but disputes its relevance to the matters in issue.

6. Full and agreed details of the lead Claimant's salary between November 2005 and February 2007 are appended to this statement as Appendix 1.

7. The Claimants' Trade Union submitted a collective grievance regarding this matter which has been considered by the Respondent at hearing and appeal stage. The Respondent has rejected the Claimants' grievance.

8. During the formal consultations which led to the Regulations there was no discussion about how holiday pay should be calculated.

Dated

## APPENDIX 1

| | Basic Pay (gross) | Flying Pay (gross) | Taxable TAFB (gross) | Total gross variable pay | Total net pay |
|---|---|---|---|---|---|
| | | | | | |
| Nov 2005 | 7938.17 | 748.32 | 91.38 | 1300.99 | 5643.33 |
| Dec 2005 | 7938.17 | 367.50 | 26.63 | 520.43 | 5075.18 |
| Jan 2006 | 7938.17 | 672.49 | 71.32 | 1786.15 | 5840.59 |
| Feb 2006 (7) | 7938.17 | 680.00 | 79.75 | 1748.07 | 5845.87 |
| Mar 2006 | 7938.17 | 592.51 | 63.63 | 976 | 5400.83 |
| Apr 2006 | 7901.69 | 841.67 | 89.29 | 1374.60 | 5690.35 |
| May 2006 (7) | 8092.02 | 864.17 | 126.93 | 1634.34 | 5865.14 |
| June 2006 | 8092.02 | 675.82 | 82.60 | 1174.69 | 5631.20 |
| July 2006 | 8092.02 | 778.33 | 85.26 | 3982.96 | 7295.41*[1] |
| Aug 2006 (2) | 8092.02 | 793.33 | 126.86 | 1563.08 | 5928.68 |
| Sept 2006 (8) | 8092.02 | 551.66 | 80.89 | 3467.72 | 6946.82*[2] |
| Oct 2006 | 8092.02 | 577.50 | 71.52 | 1004.81 | 5739.51 |
| Nov 2006 | 8092.02 | 809.16 | 104.05 | 1432.20 | 5913.91 |
| Dec 2006 (1) | 8092.02 | 673.34 | 56.39 | 1006.61 | 5545.31 |
| Jan 2007 | 8092.02 | 523.33 | 86.41 | 1053.39 | 5590.10 |
| Feb 2007 | 8092.02 | 606.67 | 65.74 | 1596.99 | 5933.56 |
| | | | | | |

[1] Includes Employee Reward Plan payment
[2] Includes EG 300 Lump Sum payment

# INDEX

# TO

# LIST OF AUTHORITIES

| No. | Description of Document |
|---|---|

## VOLUME I

### A. Domestic Legislation

1. Trade Union and Labour Relations (Consolidation) Act 1992, s. 188
2. Employment Rights Act 1996, ss 89, 123, 221-234
3. Employment Tribunal (Extension of Jurisdiction)(England and Wales) Order 1994
4. Working Time Regulations 1998 (as originally enacted)
5. Working Time Regulations 1998 (as applicable at time of claims)
6. Working Time Regulations 1998, regs 13-16, 26A and 30 (current)
7. Merchant Shipping (Hours of Work) Regulations 2002
8. Merchant Shipping (Working Time: Inland Waterways) Regulations 2003
9. Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004
10. Civil Aviation (Working Time) Regulations 2004

### B. European Materials

11. Treaty Establishing the European Community, Article 118a
12. Consolidated Treaty Establishing the European Community Articles 137, 139, 234
13. Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.
14. Directive 98/59/EC of 20 July 1998 on the approximation of laws of the Member States relating to collective redundancies
15. Council Directive 1999/63/EC and European Agreement on the organisation of working time of seafarers
16. Directive 2000/34/EC of 22 June 2000, amending Directive 93/104/EC

| No. | Description of Document |
|---|---|

17. 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.

18. Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

19. Council Directive 2009/13/EC

**C. Other International Instruments**

20. International Labour Organisation, Holidays with Pay Convention of 1936 (C52)
21. International Labour Organisation, Holidays with Pay Convention of 1970 (C132).

**VOLUME II**

**D. Domestic authorities**

22. *Bamsey v Albon Engineering and Manufacturing* [2004] ICR 1083
23. *Bleuse v MBT Transport Ltd and another* [2008] ICR 488
24. British Airways v Noble [2006] ICR 1227
25. *Duncombe v Secretary of State for Children Schools and Families* [2009] EWCA Civ 1355
26. Evans v Malley Organisation [2003] IRLR 156
27. *Gibson v East Riding of Yorkshire Council* [2000] ICR 890
28. Hayward v Cammell Laird Shipbuilders [1988] AC 894
29. *Marshalls Clay v Caufield; Clarke v Frank Staddon* [2004] ICR 1518
30. *MPB v Munro* [2004] ICR 430
31. *Revenue and Customs Comrs v Stringer* [2009] ICR 985
32. *S & U Stores v Wilkes* [1974] ICR 645
33. Secretary of State for Employment v Haynes [1980] ICR 371
34. Tarmac Roadstone Holdings Ltd v Peacock [1973] ICR 273

| No. | Description of Document |
|---|---|

## E. European Authorities

35. *Anklagemyndigheden v Hansen & Soen* [1990] I ECR 2911
36. *Dellas v Premier Ministre* [2005] ECR I-10253

## VOLUME III

37. *Francovich v Italian Republic* [1995] ICR 722
38. *Landeshauptstadt Kiel v Jaeger* [2004] ICR 1528
39. *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135
40. *Pfeiffer v Deutsches Rotes Kreuz* [2005] ICR 1307
41. *R (BECTU) v Secretary of State for Trade and Industry* [2001] ICR 1152
42. *Robinson-Steele v R D Retail Services* [2006] ICR 932
43. *Stringer v HM Revenue and Customs* [2009] ICR 932
44. *United Kingdom v EU Council* [1997] ICR 443

(7) No award may be made under this section in respect of terms and conditions of employment which are fixed by virtue of any enactment.

[669]

NOTES

Modified as noted to s 146 at [632].

*Prohibition of union recognition requirements*

**186 Recognition requirement in contract for goods or services void**

A term or condition of a contract for the supply of goods or services is void in so far as it purports to require a party to the contract—

(a) to recognise one or more trade unions (whether or not named in the contract) for the purpose of negotiating on behalf of workers, or any class of worker, employed by him, or

(b) to negotiate or consult with, or with an official of, one or more trade unions (whether or not so named).

[670]

**187 Refusal to deal on grounds of union exclusion prohibited**

(1) A person shall not refuse to deal with a supplier or prospective supplier of goods or services if the ground or one of the grounds for his action is that the person against whom it is taken does not, or is not likely to—

(a) recognise one or more trade unions for the purpose of negotiating on behalf of workers, or any class of worker, employed by him, or

(b) negotiate or consult with, or with an official of, one or more trade unions.

(2) A person refuses to deal with a person if—

(a) where he maintains (in whatever form) a list of approved suppliers of goods or services, or of persons from whom tenders for the supply of goods or services may be invited, he fails to include the name of that person in that list; or

(b) in relation to a proposed contract for the supply of goods or services—

(i) he excludes that person from the group of persons from whom tenders for the supply of the goods or services are invited, or

(ii) he fails to permit that person to submit such a tender; or

[(iii)] he otherwise determines not to enter into a contract with that person for the supply of the goods or services [or

(c) he terminates a contract with that person for the supply of goods or services.]

(3) The obligation to comply with this section is a duty owed to the person with whom there is a refusal to deal and to any other person who may be adversely affected by its contravention; and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

[671]

NOTES

Sub-s (2): original para (c) renumbered as sub-para (iii) of para (b), and new para (c) and the word immediately preceding it added, by the Trade Union Reform and Employment Rights Act 1993, s 49(1), Sch 7, para 23.

CHAPTER II

PROCEDURE FOR HANDLING REDUNDANCIES

*Duty of employer to consult ... representatives*

**188 Duty of employer to consult ... representatives**

[(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be [affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.]

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

[(1B) For the purposes of this section the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

PART I STATUTES

| (1) | (2) |
|---|---|
| Pensions Act 1995 (c 26) | Employment Tribunals Act 1996 (c 17) |
| Sch 3, para 8 | s 18(1) |
| Sch 3, para 9 | s 21(1) |
| Disability Discrimination Act 1995 (c 50) | Employment Tribunals Act 1996 (c 17) |
| s 62 | s 12 |
| s 63(1), (2) | s 32(1), (2) |
| s 63(3) | s 32(3)–(6) |
| s 63(4), (5) | s 32(7) |
| s 63(6) | s 32(8) |
| Sch 3, Pt I, para 1(1) | s 18(2) |
| Sch 3, Pt I, para 1(2) | s 18(3) |
| Sch 3, Pt I, para 1(3) | s 18(6) |
| Sch 3, Pt I, para 1(4) | s 18(7) |
| Sch 6, para 2 | s 21(1) |

| (1) | (2) |
|---|---|
| Reserve Forces Act 1996 (c 14) | Employment Rig Act 1996 (c 18) |
| Sch 10, para 17† | s 38(4) |
| Equal Pay (Amendment) Regulations 1983, SI 1983/1794 | Employment Tribunals Act 1996 (c 17) |
| Reg 3 | ss 5(2), 7(3)(h), (4) |
| Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, SI 1995/2587 | Employment Tribunals Act 1996 (c 17) |
| Regs 12(3), 13(3) | s 18(1) |
| Reg 14(4)* | s 10(5) |

† Not repealed

* Repealed in part

[1005]

PART I STATUTES

# EMPLOYMENT RIGHTS ACT 1996

(1996 c 18)

ARRANGEMENT OF SECTIONS

## PART I
## EMPLOYMENT PARTICULARS

*Right to statements of employment particulars*

1 Statement of initial employment particulars [1006]
2 Statement of initial particulars: supplementary [1007]
3 Note about disciplinary procedures and pensions [1008]
4 Statement of changes [1009]
5 Exclusion from rights to statements [1010]
6 Reasonably accessible document or collective agreement [1011]
7 Power to require particulars of further matters [1012]
7A Use of alternative documents to give particulars [1013]
7B Giving of alternative documents before start of employment [1014]

*Right to itemised pay statement*

8 Itemised pay statement [1015]
9 Standing statement of fixed deductions [1016]
10 Power to amend provisions about pay and standing statements [1017]

*Enforcement*

11 References to employment tribunals [1018]
12 Determination of references [1019]

## PART II
## PROTECTION OF WAGES

*Deductions by employer*

13 Right not to suffer unauthorised deductions [1020]
14 Excepted deductions [1021]

and any reference in this section to an offer made by the employer shall be construed as including a reference to an offer made by any such employer."

4. Schedule 4 to the 1978 Act shall have effect as if for paragraph 1 there were substituted the following paragraph—

"1. The amount of a redundancy payment to which an employee is entitled in any case to which the Redundancy Payments (National Health Service) (Modification) Order 1993 applies shall, subject to the following provisions of this Schedule, be calculated by reference to the period ending with the relevant date during which he has been employed in relevant health service."

5. Schedule 6 to the 1978 Act shall have effect as if in paragraph 1 for the words "Schedule 4" there were substituted the words "Schedule 4 as modified by the Redundancy Payments (National Health Service) (Modification) Order 1993".

[2250]

**NOTES**

"The 1978 Act": for provisions as to redundancy payments, etc see now the Employment Rights Act 1996, Pt XI (ss 135–181). The equivalent provisions in the 1996 Act to those referred to are: s 81(1) and (4): now ss 135, 155, 162(1), (2), and 155 respectively, of the 1996 Act; s 82(7): now s 146(1); s 84(7): now s 146(1); Sch 4, para 1: now s 162(1); Sch 6: repealed by the Employment Act 1989, s 17, Sch 7.

APPENDIX

EMPLOYERS WITH WHICH EMPLOYMENT MAY CONSTITUTE RELEVANT HEALTH SERVICE

Any employer described in Schedule 1 whether or not in existence at the time of the relevant event.

[2251]

# [EMPLOYMENT TRIBUNALS] EXTENSION OF JURISDICTION (ENGLAND AND WALES) ORDER 1994

(SI 1994/1623)

**NOTES**

Made: 11 July 1994.

Authority: Employment Protection (Consolidation) Act 1978, ss 131(1), (4A), (5), (5A), 154(3) (repealed). This Order now has effect as if made under the Employment Tribunals Act 1996, ss 3(1), 8(2)–(4), 41(4).

Commencement: 12 July 1994.

Title: words in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(b).

This Order applies only to England and Wales. For the equivalent Scottish Order, see the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, SI 1994/1624 at **[2262]**.

Tribunal jurisdiction: the Employment Act 2002, ss 31, 38, at **[1493]**, **[1496]** apply to proceedings before the employment tribunal relating to a claim under this Order; see ss 31(1), 38(1) of, and Schs 3, 5 to, the 2002 Act at **[1508]**, **[1510]**. Note, however, that s 31 of, and Sch 3 to, the 2002 Act were repealed by the Employment Act 2008, s 20, Schedule, Pt 1, as from 6 April 2009, subject to a variety of transitional provisions and savings in the Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008, SI 2008/3232, Schedule, Pt 1 at **[3475X]**. Section 31 of the 2002 Act (Non-completion of statutory procedure: adjustment of award) is replaced by the Trade Union and Labour Relations (Consolidation) Act 1992, s 207A at **[692A]** (as inserted by the Employment Act 2008). That section provides that in proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Sch A2 of the 1992 Act at [853A] (which includes this Order) the tribunal may adjust any award given if the employer or the employee has failed to comply with the relevant Code of Practice issued for the purposes of Chapter III of the 1992 Act. See also the revised Acas Code of Practice 1 – Disciplinary and Grievance Procedures (2009) at **[4790]**. Note also that s 32 of, and Sch 4 to the 2002 never applied to proceedings before the employment tribunal relating to a claim under this Order. Those provisions have now also been repealed by the 2008 Act as from 6 April 2009.

Conciliation: proceedings in respect of which an employment tribunal has jurisdiction by virtue of the Employment Tribunals Act 1996, s 3 are proceedings to which s 18 of that Act applies; see s 18(1)(e) at **[975]**.

For the circumstances in which the normal time limit for presenting complaints under this Order is extended for a period of three months, see the Employment Act 2002 (Dispute Resolution) Regulations 2004, SI 2004/752, regs 15 and 18 at **[3096]** and **[3098]**, and art 7(ba) of this Order at **[2258]**. Note that 2004 Regulations will lapse (on 6 April 2009) following the repeal of their enabling authority by the Employment Act 2008, s 1. For transitional provisions and savings in relation to the continued application of the pre-April 2009 dispute resolution procedures, see the Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008, SI 2008/3232, Schedule, Pt 1 at **[3475X]**.

See *Harvey* T(A), U2.

# Statutory Instrument 1998 No. 1833

## The Working Time Regulations 1998

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STATUTORY INSTRUMENTS

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**1998 No. 1833**

**TERMS AND CONDITIONS OF EMPLOYMENT**

The Working Time Regulations 1998

# WORKING TIME REGULATIONS 1998

(SI 1998/1833)

## NOTES

Made: 30 July 1998.
Authority: European Communities Act 1972, s 2(2).
Commencement: 1 October 1998.

These Regulations are the domestic implementation of Council Directive 93/104/EC on working time at [3834], and (in part) of Council Directive 94/33/EC on the protection of young people at work at [3835]. As to the 1993 Council Directive, see now Council Directive 2003/88/EC concerning certain aspects of the organisation of working time at [4090], which consolidates the 1993 Directive and a subsequent amending Directive, as from 2 August 2004.

Conciliation: employment tribunal proceedings and claims which could be the subject of employment tribunal proceedings under reg 30 of these Regulations are proceedings to which the Employment Tribunals Act 1996, s 18 applies; see s 18(1)(ff) of that Act, at [975].

Employment Appeal Tribunal: an appeal lies to the Employment Appeal Tribunal on any question of law arising from any decision of, or in any proceedings before, an employment tribunal under or by virtue of these Regulations; see the Employment Tribunals Act 1996, s 21(1)(h) at [978].

See *Harvey* A9, B1(B), DII, R, T(A), U2.

## ARRANGEMENT OF REGULATIONS

### PART I
### GENERAL

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2 Interpretation ..... [2412]

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### RIGHTS AND OBLIGATIONS CONCERNING WORKING TIME

3 General ..... [2413]
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5A Maximum working time for young workers ..... [2416]
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6A Night work by young workers ..... [2418]
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10 Daily rest ..... [2422]
11 Weekly rest period ..... [2423]
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13 Entitlement to annual leave ..... [2425]
14 Compensation related to entitlement to leave ..... [2426]
15 Dates on which leave is taken ..... [2427]
15A Leave during the first year of employment ..... [2428]
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19 Domestic service ..... [2432]
20 Unmeasured working time ..... [2433]
21 Other special cases ..... [2434]
22 Shift workers ..... [2435]
23 Collective and workforce agreements ..... [2436]
24 Compensatory rest ..... [2437]
24A Mobile workers ..... [2438]
25 Workers in the armed forces ..... [2439]

(b) one uninterrupted rest period of not less than 48 hours in each such 14-day period, in place of the entitlement provided for in paragraph (1).

(3) Subject to paragraph (8), a young worker is entitled to a rest period of not less than 48 hours in each seven-day period during which he works for his employer.

(4) For the purpose of paragraphs (1) to (3), a seven-day period or (as the case may be) 14-day period shall be taken to begin—

(a) at such times on such days as may be provided for the purposes of this regulation in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply, at the start of each week or (as the case may be) every other week.

(5) In a case where, in accordance with paragraph (4), 14-day periods are to be taken to begin at the start of every other week, the first such period applicable in the case of a particular worker shall be taken to begin—

(a) if the worker's employment began on or before the date on which these Regulations come into force, on 5th October 1998; or

(b) if the worker's employment begins after the date on which these Regulations come into force, at the start of the week in which that employment begins.

(6) For the purposes of paragraphs (4) and (5), a week starts at midnight between Sunday and Monday.

(7) The minimum rest period to which [a worker] is entitled under paragraph (1) or (2) shall not include any part of a rest period to which the worker is entitled under regulation 10(1), except where this is justified by objective or technical reasons or reasons concerning the organization of work.

(8) The minimum rest period to which a young worker is entitled under paragraph (3)—

(a) may be interrupted in the case of activities involving periods of work that are split up over the day or are of short duration; and

(b) may be reduced where this is justified by technical or organization reasons, but not to less than 36 consecutive hours.

[2423]

NOTES

Paras (1), (2), (7): words in square brackets substituted by the Working Time (Amendment) Regulations 2002, SI 2002/3128, regs 2, 12.

## 12 Rest breaks

(1) Where [a worker's] daily working time is more than six hours, he is entitled to a rest break.

(2) The details of the rest break to which [a worker] is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.

(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

(4) Where a young worker's daily working time is more than four and a half hours, he is entitled to a rest break of at least 30 minutes, which shall be consecutive if possible, and he is entitled to spend it away from his workstation if he has one.

(5) If, on any day, a young worker is employed by more than one employer, his daily working time shall be determined for the purpose of paragraph (4) by aggregating the number of hours worked by him for each employer.

[2424]

NOTES

Paras (1), (2): words in square brackets substituted by the Working Time (Amendment) Regulations 2002, SI 2002/3128, regs 2, 13.

## 13 Entitlement to annual leave

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(2) ...

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

PART 2 STATUTORY INSTRUMENTS

# 2002 No. 2125

# MERCHANT SHIPPING

## The Merchant Shipping (Hours of Work) Regulations 2002

| | |
|---|---|
| *Made - - - - -* | *13th August 2002* |
| *Laid before Parliament* | *14th August 2002* |
| *Coming into force - -* | *7th September 2002* |

Whereas the Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to measures relating to the safety of ships and the health and safety of persons on them(b) and to the employment of children and young persons(c):

And whereas, in so far as the following Regulations are made in exercise of the powers conferred by section 85 of the Merchant Shipping Act 1995(d), the Secretary of State has in pursuance of section 86(4) of that Act consulted the persons referred to in that subsection:

Now, therefore, the Secretary of State, in exercise of the powers conferred by the said section 2(2) of the European Communities Act 1972, and by sections 85(1)(a) and (b), (3), (5) and (7) and 86(1) and (2) of the Merchant Shipping Act 1995 and of all other powers enabling him in that behalf, hereby makes the following Regulations:

### Citation and commencement

**1.** These Regulations may be cited as the Merchant Shipping (Hours of Work) Regulations 2002 and shall come into force on 7th September 2002.

### Interpretation

**2.**—(1) In these Regulations—

"the Act" means the Merchant Shipping Act 1995;

"collective agreement" means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992(e), the trade union parties to which are independent trade unions within the meaning of section 5 of that Act;

"company", in relation to a ship, means the owner or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner;

"complaint" means any information or report submitted by a member of the crew, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship, including an interest in safety or health hazards to its crew;

---

(a) 1972 c. 68.
(b) S.I. 1993/595.
(c) S.I. 1996/266.
(d) 1995 c. 21; sections 85 and 86 were amended by the Merchant Shipping and Maritime Security Act 1997 (c. 28), section 8, and are applied to hovercraft by virtue of the Hovercraft (Application of Enactments) Order 1989 (S.I. 1989/1350) to which there are amendments not relevant to these Regulations.
(e) 1992 c. 52.

[DfT12884]

STATUTORY INSTRUMENTS

# 2003 No. 3049

## MERCHANT SHIPPING

### SAFETY

### CANALS AND INLAND WATERWAYS

# The Merchant Shipping (Working Time: Inland Waterways) Regulations 2003

| | |
|---|---|
| *Made - - - - -* | *27th November 2003* |
| *Laid before Parliament* | *3rd December 2003* |
| *Coming into force - -* | *24th December 2003* |

Whereas the Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to measures relating to the safety of ships and the health and safety of persons on them(b) and the organisation of working time(c):

And whereas, in so far as the following Regulations are made in exercise of the powers conferred by section 85 of the Merchant Shipping Act 1995(d), the Secretary of State has in pursuance of section 86(4) of that Act consulted the persons referred to in that subsection:

Now, therefore, the Secretary of State, in exercise of the powers conferred on him by the said section 2(2) of the European Communities Act 1972, and by sections 85(1), (3) and (7) and 86(1) of the Merchant Shipping Act 1995, hereby makes the following Regulations:

## PART 1

## GENERAL

**Citation and Commencement**

**1.** These Regulations may be cited as the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 and shall come into force on 24th December 2003.

**Interpretation**

**2.**—(1) In these Regulations—

"collective agreement" means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation Act 1992(e), the trade union parties to which are independent trade unions within the meaning of section 5 of that Act;

"employer", in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed;

(a) 1972 c. 68.
(b) S.I. 1993/595.
(c) S.I. 1997/1174.
(d) 1995 c. 21; sections 85 and 86 were amended by the Merchant Shipping and Maritime Security Act 1997 (c. 28), section 8. Sections 85 and 86 apply to hovercraft by virtue of the Hovercraft (Application of Enactments) Order 1989 (S.I. 1989/1350), to which Order there are amendments not relevant to these Regulations.
(e) 1992 c. 52.

[DfT 13185]

STATUTORY INSTRUMENTS

# 2004 No.1713

## MERCHANT SHIPPING

## The Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004

| | |
|---|---|
| *Made - - - -* | *5th July 2004* |
| *Laid before Parliament* | *13th July2004* |
| *Coming into force - -* | *16th August 2004* |

Whereas the Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to measures relating to the safety of ships and the health and safety of persons on them(b) and the organisation of working time(c):

And whereas, in so far as the following Regulations are made in exercise of the powers conferred by section 85 of the Merchant Shipping Act 1995(d), the Secretary of State has in pursuance of section 86(4) of that Act consulted the persons referred to in that subsection:

Now, therefore, the Secretary of State, in exercise of the powers conferred on him by section 2(2) of the European Communities Act 1972, and by sections 85(1), (3), (5)(a), (6) and (7) and 86(1) and (2) of the Merchant Shipping Act 1995, hereby makes the following Regulations:

## PART 1

### GENERAL

**Citation and commencement**

**1.** These Regulations may be cited as the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 and shall come into force on 16th August 2004.

**Interpretation**

**2.**—(1) In these Regulations–

"the Act" means the Merchant Shipping Act 1995;

---

(a) 1972 c.68.
(b) S.I. 1993/595.
(c) S.I. 1997/1174
(d) 1995 c.21; sections 85 and 86 were amended by the Merchant Shipping and Maritime Security Act 1997 (c.28), section 8.

[DfT 13338]

STATUTORY INSTRUMENTS

# 2004 No. 756

# CIVIL AVIATION

## The Civil Aviation (Working Time) Regulations 2004

| | |
|---|---|
| *Made - - - - -* | *11th March 2004* |
| *Laid before Parliament* | *19th March 2004* |
| *Coming into force - -* | *13th April 2004* |

The Secretary of State for Transport, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(**a**) in relation to measures relating to the organisation of working time(**b**), in exercise of the powers conferred by that section hereby makes the following Regulations:

**Citation and commencement**

**1.** These Regulations may be cited as the Civil Aviation (Working Time) Regulations 2004 and shall come into force on 13th April 2004.

**Scope**

**2.** These Regulations apply to persons employed to act as crew members on board a civil aircraft flying for the purposes of public transport.

**Interpretation**

**3.** In these Regulations—

"the 1974 Act" means the Health and Safety at Work Act 1974(**c**);

"block flying time" means the time between an aircraft first moving from its parking place for the purpose of taking off until it comes to rest on its designated parking position with all its engines stopped;

"the CAA" means the Civil Aviation Authority;

"cabin crew" means a person on board a civil aircraft, other than flight crew, who is carried for the purpose of performing in the interests of the safety of the passengers, duties that are assigned to him for that purpose by the operator or the commander of that aircraft;

"calendar year" means the period of 12 months beginning with 1st January in any year;

"collective agreement" means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992(**d**) the trade union parties to which are independent trade unions within the meaning of section 5 of that Act;

"the Commission" means the Health and Safety Commission referred to in section 10(2) of the 1974 Act;

"crew member" means a person employed to act as a member of the cabin crew or flight crew on board a civil aircraft by an undertaking established in the United Kingdom;

(**a**) 1972 c. 68.
(**b**) S.I. 1997/1174.
(**c**) 1974 c. 37.
(**d**) 1992 c. 52.

**[DfT 13254]**

# SECTION A: CONSTITUTIONAL MATERIALS

## TREATY ESTABLISHING THE EUROPEAN COMMUNITY (TREATY OF ROME)

[25 March 1957]

GENERAL NOTE

Only those Articles of particular relevance to Employment Law are printed here. These include those relating to the free movement of persons and the right of establishment; the legislative powers of the Community and the powers of the Court of Justice. Articles 100A, 118A and 118B were added, and Articles 100 and 235 amended, by the Single European Act 1986. Further amendments are made, prospectively, by the (Maastricht) Treaty on European Union of 7 February 1992.

The Community was originally the European Economic Community but was redesignated the European Community by the Single European Act.

References throughout the Treaty to the European Parliament were substituted for references to the former European Assembly by the Single European Act.

Article 119 prospectively amended by a Protocol to the Treaty of European Union. The Protocol on Social Policy and Agreement on Social Policy (the "Social Chapter Protocol" and "Social Chapter") adopted at Maastricht are printed below, paras [2064]-[2075]. For the coming into force of the Treaty and Protocols see the note to the Treaty, below.

### PART 1: PRINCIPLES

* * * * *

**Article 5**

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty. **[2001]**

* * * * *

### *PART 2: FOUNDATIONS OF THE COMMUNITY*

### [PART 3: COMMUNITY POLICIES]

NOTE

Title prospectively substituted by the Treaty on European Union.

### TITLE III—FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

#### CHAPTER 1—WORKERS

**Article 48**

1 Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.

2 Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3 It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

# A. CONSTITUTIONAL MATERIALS

## CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (THE TREATY OF ROME)

**NOTES**

Only those Articles of particular relevance to employment law are printed here. These include those relating to the free movement of persons and the right of establishment; social policy; the legislative powers of the Community; and the powers of the Court of Justice.

The Treaty is set out as consolidated by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997 (OJ C340, 10.11.97, p 1), and as subsequently amended by the Treaty of Nice in 2001 (OJ C80, 10.03.2001, p 1; these amendments came into force on 1 December 2002). The Treaty of Amsterdam and its consequential renumbering of, and amendments to, these provisions, came into force on 1 May 1999. Original numbers of Articles are given in brackets below the new Article number. The Treaty will be further extensively amended if the Treaty of Lisbon comes into effect. As this is dependent on ratification by all 27 member states, and following the rejection of the Treaty by a referendum in Ireland, the prospective amendments have not been included.

### PART ONE
### PRINCIPLES

**Article 1**
**(ex Article 1)**

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

[3501]

**Article 2**
**(ex Article 2)**

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

[3502]

**Article 3**
**(ex Article 3)**

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

   (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
   (b) a common commercial policy;
   (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
   (d) measures concerning the entry and movement of persons as provided for in Title IV;
   (e) a common policy in the sphere of agriculture and fisheries;
   (f) a common policy in the sphere of transport;
   (g) a system ensuring that competition in the internal market is not distorted;
   (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
   (i) the promotion of co-ordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a co-ordinated strategy for employment;
   (j) a policy in the social sphere comprising a European Social Fund;
   (k) the strengthening of economic and social cohesion;
   (l) a policy in the sphere of the environment;
   (m) the strengthening of the competitiveness of Community industry;
   (n) the promotion of research and technological development;
   (o) encouragement for the establishment and development of trans-European networks;
   (p) a contribution to the attainment of a high level of health protection;

**Avis juridique important**

# 31993L0104

**Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time**

*Official Journal L 307 , 13/12/1993 P. 0018 - 0024*

COUNCIL DIRECTIVE 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 118a thereof,

Having regard to the proposal from the Commission(1) ,

In cooperation with the European Parliament(2) ,

Having regard to the opinion of the Economic and Social Committee(3) ,

Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to ensure a better level of protection of the safety and health of workers;

Whereas, under the terms of that Article, those directives are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings;

Whereas the provisions of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work(4) are fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained therein;

Whereas the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 by the Heads of State or of Government of 11 Member States, and in particular points 7, first subparagraph, 8 and 19, first subparagraph, thereof, declared that:

'7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organization of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.

8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonized in accordance with national practices.

19. Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made.';

Whereas the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations;

Whereas this Directive is a practical contribution towards creating the social dimension of the internal market;

Whereas laying down minimum requirements with regard to the organization of working time is likely to improve the working conditions of workers in the Community;

Whereas, in order to ensure the safety and health of Community workers, the latter must be granted minimum daily, weekly and annual periods of rest and adequate breaks; whereas it is also necessary in this context to place a maximum limit on weekly working hours;

## COUNCIL DIRECTIVE 98/59/EC

### of 20 July 1998

### on the approximation of the laws of the Member States relating to collective redundancies

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the Economic and Social Committee [2],

(1) Whereas for reasons of clarity and rationality Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies [3] should be consolidated;

(2) Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community;

(3) Whereas, despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers;

(4) Whereas these differences can have a direct effect on the functioning of the internal market;

(5) Whereas the Council resolution of 21 January 1974 concerning a social action programme [4] made provision for a directive on the approximation of Member States' legislation on collective redundancies;

(6) Whereas the Community Charter of the fundamental social rights of workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989 by the Heads of State or Government of 11 Member States, states, *inter alia*, in point 7, first paragraph, first sentence, and second paragraph; in point 17, first paragraph; and in point 18, third indent:

'7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community (...).

The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.

(...)

17. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.

(...)

18. Such information, consultation and participation must be implemented in due time, particularly in the following cases:

(— ...)

(— ...)

— in cases of collective redundancy procedures;

(— ...)';

(7) Whereas this approximation must therefore be promoted while the improvement is being maintained within the meaning of Article 117 of the Treaty;

(8) Whereas, in order to calculate the number of redundancies provided for in the definition of collective redundancies within the meaning of this Directive, other forms of termination of employment contracts on the initiative of the employer should be equated to redundancies, provided that there are at least five redundancies;

(9) Whereas it should be stipulated that this Directive applies in principle also to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial decision;

(10) Whereas the Member States should be given the option of stipulating that workers' representatives may call on experts on grounds of the technical

[1] OJ C 210, 6. 7. 1998.
[2] OJ C 158, 26. 5. 1997, p. 11.
[3] OJ L 48, 22. 2. 1975, p. 29. Directive as amended by Directive 92/56/EEC (OJ L 245, 26. 8. 1992, p. 3).
[4] OJ C 13, 12. 2. 1974, p. 1.

# COUNCIL DIRECTIVE 1999/63/EC

## of 21 June 1999

## concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and, in particular Article 139(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) following the entry into force of the Treaty of Amsterdam, the provisions of the Agreement on social policy annexed to the Protocol 14 on social policy, annexed to the Treaty establishing the European Community, as amended by the Treaty of Maastricht, have been incorporated into Articles 136 to 139 of the Treaty establishing the European Community;

(2) management and labour ('the social partners'), may in accordance with Article 139(2) of the Treaty, request jointly that agreements at Community level be implemented by a Council decision on a proposal from the Commission;

(3) the Council adopted Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1]; whereas sea transport was one of the sectors of activity excluded from the scope of that Directive;

(4) account should be taken of the relevant Conventions of the International Labour Organisation with regard to the organisation of working time, including in particular those relating to the hours of work of seafarers;

(5) the Commission, in accordance with Article 3(2) of the Agreement on social policy, has consulted management and labour on the possible direction of Community action with regard to the sectors and activities excluded from Directive 93/104/EC;

(6) after that consultation the Commission considered that Community action was desirable in that area, and once again consulted management and labour at Community level on the substance of the envisaged proposal in accordance with Article 3(3) of the said Agreement;

(7) the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) informed the Commission of their desire to enter into negotiations in accordance with Article 4 of the Agreement on social policy;

(8) the said organisations concluded, on 30 September 1998, an Agreement on the working time of seafarers; this Agreement contains a joint request to the Commission to implement the Agreement by a Council decision on a proposal from the Commission, in accordance with Article 4(2) of the Agreement on social policy;

(9) the Council, in its resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union [2] asked management and labour to make use of the opportunities for concluding agreements, since they are close to social reality and to social problems;

(10) the Agreement applies to seafarers on board every seagoing ship, whether publicly or privately owned, which is registered in the territory of any Member State and is ordinarily engaged in commercial maritime operations;

(11) the proper instrument for implementing the Agreement is a Directive within the meaning of Article 249 of the Treaty; it therefore binds the Member States as to the result to be achieved, whilst leaving national authorities the choice of form and methods;

(12) in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; this Directive does not go beyond what is necessary for the attainment of those objectives;

(13) with regard to terms used in the Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that those definitions respect the content of the Agreement;

[1] OJ L 307, 13.12.1993, p. 18.

[2] OJ C 368, 23.12.1994, p. 6.

# DIRECTIVE 2000/34/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## of 22 June 2000

## amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive

THE EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3], in the light of the joint text approved by the Conciliation Committee on 3 April 2000,

Whereas:

(1) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

(2) Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [4] lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work. That Directive should be amended for the following reasons.

(3) Road, air, sea and rail transport, inland waterways, sea fishing, other work at sea and the activities of doctors in training are excluded from the scope of Council Directive 93/104/EC.

(4) The Commission, in its proposal of 20 September 1990, did not exclude any sectors and activities from Council Directive 93/104/EC, nor did the European Parliament in its Opinion of 20 February 1991 accept such exclusions.

(5) The health and safety of workers should be protected at the workplace not because they work in a particular sector or carry out a particular activity, but because they are workers.

(6) As regards sectoral legislation for mobile workers, a complementary and parallel approach is needed in the provisions on transport safety and the health and safety of the workers concerned.

(7) Account needs to be taken of the specific nature of activities at sea and of doctors in training.

(8) Protection of the health and safety of mobile workers in the excluded sectors and activities should also be guaranteed.

(9) The existing provisions concerning annual leave and health assessments for night work and shift work should be extended to include mobile workers in the excluded sectors and activities.

(10) The existing provisions on working time and rest need to be adapted for mobile workers in the excluded sectors and activities.

(11) All workers should have adequate rest periods. The concept of 'rest' must be expressed in units of time, i.e. in days, hours and/or fractions thereof.

(12) A European Agreement in respect of the working time of seafarers has been put into effect by means of a Council Directive [5], on a proposal from the Commission, in accordance with Article 139(2) of the Treaty. Accordingly, the provisions of this Directive should not apply to seafarers.

(13) In the case of those 'share-fishermen' who are employees, it is for Member States to determine, pursuant to Article 7 of Council Directive 93/104/EC, the conditions for entitlement to, and granting of, annual leave, including the arrangements for payments.

(14) Specific standards laid down in other Community instruments relating, for example, to rest periods, working time, annual leave and night work for certain categories of workers should take precedence over the provisions of Council Directive 93/104/EC as amended by this Directive.

[1] OJ C 43, 17.2.1999, p. 1.
[2] OJ C 138, 18.5.1999, p. 33.
[3] Opinion of the European Parliament of 14 April 1999 (OJ C 219, 30.7.1999, p. 231), Council Common Position of 12 July 1999 (OJ C 249, 1.9.1999, p. 17) and Decision of the European Parliament of 16 November 1999 (not yet published in the Official Journal). Decision of the European Parliament of 17 May 2000 and Council Decision of 18 May 2000.
[4] OJ L 307, 13.12.1993, p. 18.

[5] Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ L 167, 2.7.1999, p. 33).

# 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)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 139(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Management and labour may, in accordance with Article 139(2) of the Treaty, request jointly that agreements concluded at Community level be implemented by a Council decision on a proposal from the Commission.

(2) The Council adopted Directive 93/104/EC [1] concerning certain aspects of the organisation of working time. Civil aviation was one of the sectors and activities excluded from the scope of that Directive. The European Parliament and the Council adopted Directive 2000/34/EC amending Directive 93/104/EC in order to cover sectors and activities previously excluded.

(3) The Commission, in accordance with Article 138(2) of the Treaty, has consulted management and labour on the possible direction of Community action with regard to the sectors and activities excluded from Directive 93/104/EC.

(4) The Commission, considering after such consultation that Community action was desirable, once again consulted management and labour at Community level on the substance of the envisaged proposal in accordance with Article 138(3) of the Treaty.

(5) 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) have informed the Commission of their desire to enter into negotiations in accordance with Article 138(4) of the Treaty.

(6) The said organisations concluded, on 22 March 2000, a European Agreement on the Organisation of Working Time of Mobile Staff in Civil Aviation.

(7) This Agreement contains a joint request to the Commission to implement the Agreement by a Council decision on a proposal from the Commission, in accordance with Article 139(2) of the Treaty.

(8) This Directive and the Agreement lay down more specific requirements within the meaning of Article 14 of Directive 93/104/EC as regards the organisation of working time of mobile staff in civil aviation.

(9) Article 2(7) of Directive 93/104/EC defines mobile workers as any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway.

(10) The proper instrument for implementing the Agreement is a Directive within the meaning of Article 249 of the Treaty.

(11) In view of the highly integrated nature of the civil aviation sector and the conditions of competition prevailing in it, the objectives of this Directive to protect workers' health and safety cannot be sufficiently achieved by the Member States and Community action is therefore required in accordance with the subsidiarity principle laid down in Article 5 of the Treaty. This Directive does not go beyond what is necessary to achieve those objectives.

(12) With regard to terms used in the Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions are compatible with the Agreement.

(13) The Commission has drafted its proposal for a Directive, in accordance with its Communication of 20 May 1998 'Adapting and promoting the social dialogue at Community level', taking into account the representative status of the signatory parties and the legality of each clause of the Agreement. The signatory parties together have a sufficiently representative status for flying personnel employed by an undertaking which operates transport services for passengers or goods in civil aviation.

(14) The Commission has drafted its proposal for a Directive in compliance with Article 137(2) of the Treaty which provides that directives in the social policy domain 'shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'.

[1] OJ L 307, 13.12.1993, p. 18. Directive as amended by Directive 2000/34/EC (OJ L 195, 1.8.2000, p. 41).

# 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having consulted the Committee of the Regions,

Acting in accordance with the procedure referred to in Article 251 of the Treaty [2],

Whereas:

(1) Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time [3], which lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has been significantly amended. In order to clarify matters, a codification of the provisions in question should be drawn up.

(2) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

(3) The provisions of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [4] remain fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained herein.

(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

[1] OJ C 61, 14.3.2003, p. 123.
[2] Opinion of the European Parliament of 17 December 2002 (not yet published in the Official Journal) and Council Decision of 22 September 2003.
[3] OJ L 307, 13.12.1993, p. 18. Directive as amended by Directive 2000/34/EC of the European Parliament and of the Council (OJ L 195, 1.8.2000, p. 41).
[4] OJ L 183, 29.6.1989, p. 1.

(5) All workers should have adequate rest periods. The concept of 'rest' must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.

(7) Research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace.

(8) There is a need to limit the duration of periods of night work, including overtime, and to provide for employers who regularly use night workers to bring this information to the attention of the competent authorities if they so request.

(9) It is important that night workers should be entitled to a free health assessment prior to their assignment and thereafter at regular intervals and that whenever possible they should be transferred to day work for which they are suited if they suffer from health problems.

(10) The situation of night and shift workers requires that the level of safety and health protection should be adapted to the nature of their work and that the organisation and functioning of protection and prevention services and resources should be efficient.

(11) Specific working conditions may have detrimental effects on the safety and health of workers. The organisation of work according to a certain pattern must take account of the general principle of adapting work to the worker.

(12) A European Agreement in respect of the working time of seafarers has been put into effect by means of Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) [5] based on Article 139(2) of the Treaty. Accordingly, the provisions of this Directive should not apply to seafarers.

[5] OJ L 167, 2.7.1999, p. 33.

# COUNCIL DIRECTIVE 2009/13/EC

## of 16 February 2009

## implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 139(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Management and labour, hereinafter referred to as 'the social partners', may, in accordance with Article 139(2) of the Treaty, request jointly that agreements concluded by them at Community level be implemented by a Council decision on a proposal from the Commission.

(2) On 23 February 2006, the International Labour Organisation adopted the Maritime Labour Convention, 2006, desiring to create a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour conventions.

(3) The Commission has consulted management and labour, in accordance with Article 138(2) of the Treaty, on the advisability of developing the existing Community *acquis* by adapting, consolidating or supplementing it in view of the Maritime Labour Convention, 2006.

(4) On 29 September 2006 the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) informed the Commission of their wish to enter into negotiations in accordance with Article 138(4) of the Treaty.

(5) On 19 May 2008, the said organisations wishing to help create of a global level playing field throughout the maritime industry, concluded an Agreement on the Maritime Labour Convention, 2006, hereinafter referred to as 'the Agreement'. This Agreement and its Annex contain a joint request to the Commission to implement them by a Council decision on a proposal from the Commission, in accordance with Article 139(2) of the Treaty.

(6) The Agreement applies to seafarers on board ships registered in a Member State and/or flying flag of a Member State.

(7) The Agreement amends the European Agreement on the organisation of working time of seafarers concluded in Brussels on 30 September 1998 by the European Community Shipowners' Associations (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST).

(8) For the purpose of Article 249 of the Treaty, the appropriate instrument for implementing the Agreement is a directive.

(9) The Agreement will enter into force simultaneously with the Maritime Labour Convention, 2006, and the social partners wish the national measures implementing this Directive to enter into force not earlier than on the date of entry into force of the said Convention.

(10) For any terms used in the Agreement and which are not specifically defined therein, this Directive leaves Member States free to define them in accordance with national law and practice, as is the case for other social policy Directives using similar terms, provided that those definitions respect the content of the Agreement.

(11) The Commission has drafted its proposal for a Directive, in accordance with its Communication of 20 May 1998 on adapting and promoting the social dialogue at Community level, taking into account the representative status of the signatory parties and the legality of each clause of the Agreement.

(12) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive, as long as the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

(13) The provisions of this Directive should apply without prejudice to any existing Community provisions being more specific and/or granting a higher level of protection to seafarers, and in particular those included in Community legislation.

# C52 Holidays with Pay Convention, 1936

Convention concerning Annual Holidays with Pay (Note: Date of coming into force: 22:09:1939. The Convention was revised in 1970 by Convention No. 132. Following the coming into force of this Convention, Convention No. 52 is no longer open to ratification.)
Convention:C052
Place:Geneva
Session of the Conference:20
Date of adoption:24:06:1936
Subject classification: Paid Leave
Subject: **Working Time**
See the ratifications for this Convention

Display the document in: French Spanish
Status: Outdated instrument

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Twentieth Session on 4 June 1936, and

Having decided upon the adoption of certain proposals with regard to annual holidays with pay, which is the second item on the agenda of the Session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this twenty-fourth day of June of the year one thousand nine hundred and thirty-six the following Convention, which may be cited as the Holidays with Pay Convention, 1936:

Article 1

1. This Convention applies to all persons employed in any of the following undertakings or establishments, whether public or private:

(a) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including undertakings engaged in shipbuilding or in the generation, transformation or transmission of electricity or motive power of any kind;

(b) undertakings engaged wholly or mainly in the construction, reconstruction, maintenance, repair, alteration or demolition of any one or more of the following:

buildings,

railways,

tramways,

airports,

harbours,

docks,

piers,

# C132 Holidays with Pay Convention (Revised), 1970

Convention concerning Annual Holidays with Pay (Revised), 1970 (Note: Date of coming into force: 30:06:1973.)
Convention:C132
Place:Geneva
Session of the Conference:54
Date of adoption:24:06:1970
Subject classification: Paid Leave
Subject: Working Time
See the ratifications for this Convention

Display the document in: French Spanish
Status: Other instrument

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fifty-fourth Session on 3 June 1970, and

Having decided upon the adoption of certain proposals with regard to holidays with pay, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this twenty-fourth day of June of the year one thousand nine hundred and seventy the following Convention, which may be cited as the Holidays with Pay Convention (Revised), 1970:

Article 1

The provisions of this Convention, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards, court decisions, statutory wage fixing machinery, or in such other manner consistent with national practice as may be appropriate under national conditions, shall be given effect by national laws or regulations.

Article 2

1. This Convention applies to all employed persons, with the exception of seafarers.

2. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention limited categories of employed persons in respect of whose employment special problems of a substantial nature, relating to enforcement or to legislative or constitutional matters, arise.

3. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraph 2 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice in respect of the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

A Court of Appeal

# Bamsey and others *v* Albon Engineering and Manufacturing plc

[2004] EWCA Civ 359

2003 Nov 13, 18; Auld, May and Jacob LJJ
B 2004 March 25

*Employment — Working time provisions — Annual leave — Employee contracted to work 39-hour week with overtime if required — Employee's hours averaging 58 per week — Payment for annual leave based on 39-hour week — Whether payment at "rate of a week's pay" — Employment Rights Act 1996, s 234 — Working Time Regulations 1998 (SI 1998/1833), reg 16 — Council Directive* C *93/104/EC, art 7*

The applicant was contractually required to work 39 hours a week with overtime of up to nine hours if required. Between 24 December 1999 and 4 January 2000, while he was on annual leave, the applicant was paid an amount calculated at the rate of a 39-hour week, although during the 12-week period prior to that he had actually worked an average of 60 hours a week and generally averaged 58 hours. He claimed D compensation, alleging breach of regulation 16 of the Working Time Regulations 1998[1] and article 7 of the Working Time Directive 93/104/EC[2], on the ground that the employers had failed to pay him "at the rate of a week's pay" in respect of each week of leave. The employment tribunal, dismissing the claim, held that, applying the definition in section 234 of the Employment Rights Act 1996[3], the applicant's "normal working hours" were those fixed by the contract of employment, namely 39 hours a week, and that, accordingly, the amount of "a week's pay" for the E purposes of regulation 16(1) was the amount payable for those hours. The Employment Appeal Tribunal dismissed the applicant's appeal.

On appeal by the applicant—

*Held*, dismissing the appeal, that the purpose of the Working Time Directive was to encourage a climate of protection for the working environment and the health of workers, and, while it laid down, in article 7, the principle of entitlement to four weeks' annual leave, it did not require member states to ensure that workers received F more pay during their period of annual leave than they were contractually entitled to earn; that regulation 16 of the Working Time Regulations 1998 incorporated, for the purpose of determining "a week's pay", not only sections 221 to 224 of the Employment Rights Act 1996, but also the interpretation of "normal working hours" in section 234, and, on analysis of sections 221 to 224 and 234, where overtime was worked, only that which the contract of employment required the employer to provide and the employee to do counted as "normal working hours" for the purpose G of calculating "a week's pay"; and that, accordingly, the applicant's leave pay was to be calculated by reference to his contractual hours only for the purposes of regulation 16(1) (post, paras 32, 34, 35, 37).

*Gibson v East Riding of Yorkshire Council* [2000] ICR 890, CA considered.

Decision of the Employment Appeal Tribunal [2003] ICR 1224 affirmed.

The following cases are referred to in the judgment:

H *Carver v Saudi Arabian Airlines* [1999] ICR 991, CA
*Fox v C Wright (Farmers) Ltd* [1978] ICR 98, EAT

[1] Working Time Regulations 1998, reg 16: see post, para 15.
[2] Council Directive 93/104/EC, art 7: see post, para 17.
[3] Employment Rights Act 1996, s 234: see post, para 7.

Employment Appeal Tribunal

# Bleuse *v* MBT Transport Ltd and another

UKEAT/632/06

UKEAT/339/07

2007 Dec 11; 21 Elias J (President)

*Employment — Unfair dismissal — Excluded classes — Work outside Great Britain — German national working exclusively abroad for UK company — Contract providing for resolution of disputes by English law and courts — Whether employment tribunal having jurisdiction to hear claims for unfair dismissal and holiday pay — Claim for breach of contract — Whether time limit to be extended — Employment Rights Act 1996, ss 94(1), 204(1) — Working Time Regulations 1998 (SI 1998/1833), reg 1(2) — Parliament and Council Directive 2003/88/EC, art 7 — Council Regulation (EC) No 44/2001, art 19*

The claimant, a German national living in Germany, was employed by a company registered in the United Kingdom. He worked solely in mainland Europe and never in Great Britain. Clause 17 of his contract provided that it was governed by English law and that English courts had exclusive jurisdiction over any disputes. He resigned and made claims of unfair constructive dismissal, breach of contract, unlawful deduction of wages and for holiday pay. His advisers presented the claims a month outside the prescribed three-month time limit, and at a pre-hearing review of the breach of contract claim, which the claimant did not attend and in respect of which the jurisdiction of the employment tribunal was otherwise conceded, a tribunal chairman dismissed the claim, deciding that without an explanation for the delay she was bound to conclude that it would have been reasonably practicable for the claim to have been presented in time. A different chairman dismissed the claims of unfair dismissal and unlawful deduction of wages, on the ground that the territorial scope of the relevant provisions of the Employment Rights Act 1996[1] did not extend to the claimant since he was not based in Great Britain, and the claim for holiday pay, on the ground that under regulation 1(2) of the Working Time Regulations 1998[2] they extended to Great Britain only.

On appeals by the claimant, relying, inter alia, on Council Regulation (EC) No 44/2001[3] giving the English courts exclusive jurisdiction, and on article 7 of Parliament and Council Directive 2003/88/EC[4] providing a right to holiday pay—

*Held*, (1) allowing the appeal against the dismissal of the breach of contract claim, that the cost to the claimant of appearing before the tribunal to give what was apparently uncontested evidence would have been disproportionate to the matter at issue, and the tribunal chairman ought not to have held it against him that he did not give oral evidence; that, given the difficulties facing the claimant, who did not speak English and was away from home much of the time, he had not acted unreasonably in relying on his advisers and had acted speedily when initiating the claim; but that there was an issue as to whether his advisers might have acted unreasonably and whether he was bound by their actions, and that issue would be remitted to a different tribunal for consideration (post, paras 17–19).

[1] Employment Rights Act 1996, s 94(1): see post, para 36.
S 204(1): see post, para 37.
[2] Working Time Regulations 1998, reg 1(2): see post, para 28.
[3] Council Regulation (EC) No 44/2001, arts 18, 19: see post, para 48.
[4] Parliament and Council Directive 2003/88/EC, art 7(1): "Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave . . .".

A

Court of Appeal

# British Airways plc *v* Noble and another

[2006] EWCA Civ 537

2006 March 8, 9; May 9 — Mummery, Scott Baker LJJ and Sir Charles Mantell

B

*Employment — Working time provisions — Paid annual leave — Employees contracted to work shifts of varying length within six-monthly roster — Shift pay calculated in accordance with collective agreements — Calculation of weekly amount involving payment for 48 working weeks being spread over 52 weeks — Resulting sum paid whether employee working or on holiday — Whether underpayment of shift element of pay for statutory holiday period — Employment Rights Act 1996, s 222 — Working Time Regulations 1998 (SI 1998/1833), reg 16(1)*

C

The claimants brought complaints, in specimen cases, alleging that they were underpaid in respect of their four-week statutory period of holiday, because the employer's method of calculating shift payments produced a figure inconsistent with regulation 16 of the Working Time Regulations 1998[1] and section 222 of the Employment Rights Act 1996[2]. The claimants worked a variety of shifts on a six-monthly roster and, in addition to their basic pay, received a sum for shift work which varied depending on the shift worked. Such arrangements had been negotiated in collective agreements and incorporated in employees' contracts of employment. Calculation of shift pay involved taking the appropriate weekly figure for the relevant shift, multiplying it by 48, being the number of weeks in a working year, and dividing by 52, resulting in a weekly figure which was paid for each week covered by the roster whether the employee worked or was on holiday that particular week. The employment tribunal found that the employer had failed to pay the claimants within the terms of regulation 16 at the rate of "a week's pay in respect of" their annual holiday weeks. An appeal by the employer was dismissed by the Employment Appeal Tribunal on the basis that the application of the 48/52 multiplier resulted in an underpayment in respect of holiday pay in breach of regulation 16, since payment throughout the year had been secured by reducing the rate otherwise payable.

D

E

F

On the employer's appeal—

*Held*, allowing the appeal, that the use of the multiplier, which resulted in the payments for shift work in 48 weeks being spread over the 52 weeks of the year, was part of the formula for calculating shift pay contained in the collective agreements and incorporated into employees' contracts of employment and did not involve the employer, in calculating "a week's pay", misapplying the statutory provisions or the collective agreements; and that, in paying employees the same amount for shift pay both when they were at work and when they were on holiday, the employer had complied with the requirements of the Working Time Regulations 1998 and with the policy of the legislation whereby employees should be encouraged to take their holiday entitlement (post, paras 36, 37, 47, 49, 52, 53).

G

Decision of the Employment Appeal Tribunal reversed.

The following cases are referred to in the judgment of Mummery LJ:

H

*MPB Structures Ltd v Munro* [2004] ICR 430, Ct of Sess

*Marshalls Clay Products Ltd v Caulfield* [2004] EWCA Civ 422; [2004] ICR 1502, CA

[1] Working Time Regulations 1998, reg 16(1): see post, para 16(2).

[2] Employment Rights Act 1996, s 222(2): see post, para 16(4).

Neutral Citation Number: [2009] EWCA Civ 1355

Case No: A2/2008/1078, 1657 & 2508

**IN THE HIGH COURT OF JUSTICE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**
**HHJ PETER CLARK (1078 & 1657)**
**HHJ McMULLEN QC (2508)**
**UKEAT/0095/08/RN & UKEAT/0433/07/dm**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2009

**Before :**

**LORD JUSTICE MUMMERY**
**LORD JUSTICE MAURICE KAY**
and
**LORD JUSTICE JACOB**

- - - - - - - - - - - - - - - - - - - -

**Between :**

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|---|---|
| **(1) MR KP DUNCOMBE & ORS**<br>**(2) MR JR FLETCHER** | **Appellant** |
| **- and -** | |
| **SECRETARY OF STATE FOR CHILDREN, SCHOOLS & FAMILIES** | **Respondent** |

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**MR NIGEL G0IFFIN QC and MR SIMON HENTHORN Solicitor Advocate** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellants**
**MR JONATHAN CROW QC, MR BRUCE CARR QC and MS MAYA LESTER** (instructed by **the Treasury Solicitor** ) for the **Respondent**

Hearing dates : 1st, 2nd & 3rd April 2009

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# Judgment

## EVANS (applicant/respondent) v. MALLEY ORGANISATION LTD t/a First Business Support (respondents/appellants)

### [2002] EWCA Civ 1834

| | |
|---|---|
| **100** | *Contracts of employment* |
| **124.4** | *Terms of employment – pay – commission* |
| **128** | *Terms of employment – holidays and holiday pay* |
| **3000** | *Health and safety* |
| **3826** | *Working Time Regulations – rights and obligations – annual leave* |
| **4100** | *Employment Appeal Tribunal* |

Employment Rights Act 1996 sections: 13, 221(1), 221(2), 221(3), 221(4)
Working Time Regulations 1998: regs. 13, 14, 16, 35

**The facts:**

Mr Evans was employed by the appellants as a sales representative. His contract of employment provided for a basic annual salary plus commission on contracts he was successful in obtaining for his employers. Although entitlement to commission was earned with the achievement of a successful sale, it was not payable until the new client had paid 25% of the contractual sum due to the employers. Usually that occurred nine months after the contract had been achieved. The contract of employment further provided for holiday pay at the normal basic rate.

In March 2000, Mr Evans was suspended for allegedly being part of a conspiracy between several members of staff to leave at the same time to work for a competitor. Whilst suspended, he was paid his basic salary. His employment terminated on 24 March.

Mr Evans presented an application to an employment tribunal claiming that the holiday pay due to him under the Working Time Regulations during his employment had been calculated on the wrong basis. It was also alleged that the payment made to him during the period of his suspension had been calculated on the same erroneous basis. Both payments had been made at the rate of his basic annual salary of £10,000, whereas Mr Evans contended that they should have been based on his basic salary plus commission which, he claimed, averaged £1,098 a week.

The Working Time Regulations provide that a worker is entitled to be paid at the rate of a "week's pay" in respect of each week of leave to which he is entitled under the Regulations, the amount of a "week's pay" being determined in accordance with the provisions of ss.221 to 224 of the Employment Rights Act.

Section 221(2) provides that "if an employee's remuneration for employment in normal working hours ... does not vary with the amount of work done, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week."

Section 221(3) applies "if the employee's remuneration for employment in normal working hours ... does vary with the amount of work done in the period", and provides that "the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee" in respect of the last 12 weeks.

Section 221(4) provides that: "In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount."

The employment tribunal found that Mr Evans's remuneration did not vary with the amount of work done and that the amount of a week's pay therefore fell to be determined in accordance with s.221(2). On that basis, his holiday pay had been correctly calculated. The tribunal also found that there was no evidence to support Mr Evans's complaint that he should receive more than the basic rate of pay during the period of his suspension.

The EAT allowed Mr Evans's appeal. On the issue of holiday pay, the EAT held that: "The amount of work done in the period of normal working hours did not vary in the sense that payment was not based on the amount of work done. Rather payment of commission was based on the outcome of that work." Having expressed that view, however, the EAT concluded that s.221(4) has the effect of overriding the normal meaning of s.221(3) so that "somebody who receives payment by way of commission which is not payment by reference to the amount of work done but payment by reference to the varying result of work done, is provided for by s.221(3) rather than s.221(2)." Accordingly, Mr Evans's holiday pay should have been calculated on his remuneration, including commission, over the relevant 12-week period.

On the issue of pay during the period when Mr Evans was suspended, the EAT concluded that the employment tribunal had failed to address the question as to what the word "pay" meant in respect of the disciplinary procedure which provided for suspension on pay. The EAT therefore remitted the matter to the tribunal to hear evidence of the true meaning of "suspension with pay".

**The Court of Appeal (Lord Justice Pill, Lord Justice Judge, Lady Justice Hale) on 27 November 2002 allowed the appeal and reinstated the order of the employment tribunal.**

**The Court of Appeal held:**

124.4, 128, 3826

**The employment tribunal had correctly concluded that the applicant's remuneration did not vary with the amount of work done in normal working hours and that, therefore, the amount of a week's pay for the purposes of holiday entitlement under the Working Time Regulations fell to be calculated in accordance with s.221(2) of the Employment Rights Act and, on that basis, did not include commission payments. In allowing the applicant's appeal against that decision, the EAT had erred in holding that s.221(4), which provides that: "In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount", has the effect of overriding the normal meaning of s.221(3), so that although the applicant's commission was not payment by reference to the amount of work done, his case came within s.221(3) rather than s.221(2) and, accordingly, his week's pay fell to be calculated on the basis of his average earnings, including commission, over the relevant 12-week period.**

**The reference to commission in s.221(4) does not require or permit all contracts in which commission is a part of the remuneration to be placed within s.221(3). The distinction between subsection (2) of s.221 and subsection (3) turns on whether or not the employee's remuneration does or does not vary with the amount of work done in normal working hours. Section 221(4) does not bear upon the issue of whether a contract falls within subsection (2) or (3). What s.221(4) achieves is to make clear that where remuneration does in fact vary with the amount of work done, commission, bonuses and similar payments are included in the calculation of an employee's week's pay.**

**Section 221(4) had no impact on the present case. The applicant's remuneration varied not with the amount of work which he did during his working week but with the results of that work in the sense of contracts obtained. The expression "amount of work done" could not be read as meaning that amount of work and that part of the work which achieved a contract. The amount of work resulting in a contract may vary but the result achieved by the work was a different concept from the act of working. Time spent attempting unsuccessfully to persuade a client to sign a contract was as much work as a successful encounter with the client. The employment tribunal had correctly concluded, therefore, that the present case fell squarely within the provisions of s.221(2) and that the applicant's holiday pay had been cor-**

[COURT OF APPEAL] A

# GIBSON v. EAST RIDING OF YORKSHIRE COUNCIL

2000 April 19; June 21 — Pill, Brooke and Mummery L.JJ.

*Employment—Working time provisions—Local authority employer—No contractual entitlement to paid annual leave—Failure to implement Community law to provide entitlement—Whether Community law provision having direct effect—Council Directive (93/104/E.C.), arts. 2, 7* B

The applicant, a swimming instructor employed by a local authority, was paid an hourly rate and had no contractual entitlement to paid annual leave. In June 1997, after the date by C which member states were required to implement the Working Time Directive (93/104/E.C.)[1] but before the United Kingdom had done so, the applicant made a complaint to an industrial tribunal that by not paying her for annual leave, contrary to article 7 of the Directive, her employers were making unlawful deductions from her wages. The tribunal found that, although, as the employers were an emanation of the state, the applicant could prima facie enforce a right against them under the Directive, its D terms were not sufficiently precise and unconditional to have direct effect, and it dismissed her claim. The appeal tribunal allowed the applicant's appeal holding that, on a necessary examination of the Directive as a whole, its structure was consistent with its having direct effect in that it was designed to require member states to confer minimum rights on workers in a way which could be said to be unconditional, that article 7 was E clear and precise and gave effect to the Directive's purpose, and that the article had direct effect and varied the applicant's contractual rights in that, had the Directive been implemented timeously, she would have been entitled to paid annual leave at the date of her complaint.

On the local authority's appeal:—

*Held*, allowing the appeal, that, notwithstanding that article 7 of the Working Time Directive (93/104/E.C.) provided that the F length of the minimum period of paid annual leave was four weeks, on an examination of the wider context of the nature, general scheme and wording of the Directive in respect of the organisation of working time, the article left unanswered key questions affecting individual entitlement to annual leave; that the concept of "working time" in article 2 was not defined precisely enough to enable a court to determine the period an employee had to have worked before he was entitled to the specified period G of annual leave; that, in the absence of sufficient precision in article 7 or by reference to other provisions in the Directive, it was impermissible to interpret the article as having direct effect by reference to national practice or custom in the workplace; and that, accordingly, the provisions of article 7 of Directive 93/104 did not have direct effect so as to be enforceable by a national court at the instance of an individual employee (post, pp. 895C–D, H 896E–G, 897D–G, 898B–E).

[1] Council Directive (93/104/E.C.), art. 2: see post, pp. 895H–896A.
Art. 7: see post, p. 893C–D.

[HOUSE OF LORDS]

HAYWARD . . . . . . . . . . . APPELLANT

AND

CAMMELL LAIRD SHIPBUILDERS LTD. . . . . RESPONDENTS

[On appeal from HAYWARD v. CAMMELL LAIRD SHIPBUILDERS LTD. (No. 2)]

1988 Feb. 15, 16, 17; May 5

Lord Mackay of Clashfern L.C., Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths and Lord Goff of Chieveley

*Discrimination, Sex—Equal pay—Work of equal value—Work of applicant and male comparators of equal value—Applicant's basic pay less than comparators—Other conditions more favourable to applicant—Whether entitlement to complain of inequality in relation to specific term irrespective of benefits under contract as a whole—Equal Pay Act 1970 (c. 41), s. 1(2)(c) (as amended by Sex Discrimination Act 1975 (c. 65), s. 8 and Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794), reg. 2(1))*

The applicant, a woman, was employed at a shipyard canteen as a cook and was classified as unskilled for the purposes of pay. She claimed under section 1(2)(*c*) of the Equal Pay Act 1970[1] that she was doing work of equal value to male comparators who were shipyard workers paid at the higher rate for skilled tradesmen in the yard. Following an evaluation by an independent expert under section 2A(1)(*b*) of the Act, an industrial tribunal held that the applicant's work was of equal value to that of the men. The industrial tribunal, at a further hearing, rejected the applicant's contention that, in considering whether her contract of employment should be modified, it was sufficient to compare her basic pay and overtime rates with that of the male comparators and held that without a comparison of all terms and conditions of employment she was not entitled to a declaration that she should receive a higher rate of pay. The Employment Appeal Tribunal dismissed the applicant's appeal and, on her appeal, the Court of Appeal upheld that decision. The Court of Appeal dismissed the applicant's appeal.

On appeal by the applicant:—

*Held*, allowing the appeal, that on its true construction section 1(2) of the Act of 1970 referred to the specific term or terms of the contract of which complaint had been made notwithstanding that, when looked at as a whole, the complainant's contract may have been no less favourable than the comparators because she was entitled to other benefits to which they were not entitled; that the expression "term" was to be given its natural meaning as a distinct provision or part of the contract which had sufficient content for it to be compared with a similar provision or part in other contracts; and that, accordingly, the applicant's contract contained a term as to her basic pay in respect of which she was entitled to relief under the section and the case would be remitted to the industrial tribunal for determination (post, pp. 900D–G, 901C–D, 903A–B, 904B–H, 907H—908B).

[1] Equal Pay Act 1970, as amended, s. 1(2)(*c*): see post, p. 899C–E.

Court of Appeal A

# Marshalls Clay Products Ltd *v* Caulfield and others

# Clarke *v* Frank Staddon Ltd

[2004] EWCA Civ 422 B

2004 Jan 27; April 28 Judge, Laws LJJ and Charles J

*Employment — Working time provisions — Paid annual leave — Employee's hourly rate of pay including element of holiday pay — Whether void — Whether Employment Appeal Tribunal bound by Court of Session decision — Working Time Regulations 1998 (SI 1998/1833), reg 16(1)(5)*[1] *— Council Directive 93/104/EC, art 7*[2] C

In two unrelated cases employees made claims for payment in respect of their annual leave entitlement pursuant to regulation 16(1) of the Working Time Regulations 1998. In the first case the employees' contracts of employment provided for the payment of an hourly rate increased by a specified amount to include paid holidays both for normal working and overtime. An employment tribunal held that D the arrangement was a payment which replaced entitlement to take paid leave, in breach of regulation 13(9)(b), and was therefore void under regulation 35(1). The employment tribunal in the second case held that the hourly rates of pay in the applicant's contract of employment included an element in respect of holiday pay which was not unlawful and which the employer was entitled to set off under regulation 16(5). On appeal by the employer in the first case and by the employee in the second case the Employment Appeal Tribunal held that such rolled-up holiday E entitlement was permitted under the Working Time Regulations 1998 if the contract provided for a basic wage or rate topped up by a specific sum or percentage in respect of holiday pay, and it allowed the employer's appeal in the first case and remitted the second case to the employment tribunal to determine whether the contract satisfied that condition.

On appeal by the employees in the first case and by the employer in the second case— F

*Held*, that article 7 of the Working Time Directive 93/104/EC by its language imposed no obligation to pay the worker in respect of his leave at the time the leave was taken, and the position could be no different under any provision contained in the Working Time Regulations 1998, which had no vires beyond the implementation of the Directive; that any other view depended on an implicit conclusion that a contractual provision for "rolled-up" holiday pay made its enjoyment sufficiently difficult or problematic that it would fall to be treated as repugnant to article 7, G whereas there was no reason why workers generally should not manage rolled-up holiday pay perfectly sensibly; but that, given that the Court of Session had taken an opposite view, it could not be said that the point was acte clair, and, accordingly, the question would be referred to the Court of Justice for a preliminary ruling (post paras 19, 40, 43–47, 50, 51).

*R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152, ECJ H distinguished.

[1] Working Time Regulations 1998, reg 13(9): see post, para 19.
Reg 16(1)(5): see post, para 19.
Reg 35(1): see post, para 19.
[2] Council Directive 93/104/EC, art 7: see post, para 18.

Court of Session A

# MPB Structures Ltd *v* Munro

[2003] ScotCS 90

2003 April 1 Lord Cullen (Lord President), Lady Cosgrove and Lord Carloway B

*Employment — Working time provisions — Paid annual leave — Employee's hourly rate of pay including element of holiday pay — Whether void — Whether employer entitled to set-off — Working Time Regulations 1998 (SI 1998/1833), regs 13(9)(b), 16(1)(5), 35(1)*[1] *— Council Directive 93/104/EC, art 7*[2]

An employment tribunal held that a provision in the applicant employee's contract of employment, which provided that within the stipulated rate of pay there was an 8% allowance for holiday pay, was contrary to regulation 13(9)(b) of the Working Time Regulations 1998 and rendered void by regulation 35(1). The employment tribunal held that it followed that it was not open to the employer to rely on regulation 16(5) so as to set off the allowance against the applicant's statutory entitlement. Dismissing an appeal by the employer, the Employment Appeal Tribunal held that, although the employment tribunal had erred in deciding that regulation 13(9)(b) applied, the relevant provision of the contract did have the effect of limiting the effect of the 1998 Regulations and the only way that the provisions of the Regulations could be met was for holiday pay to be paid as and when the holiday was taken at the appropriate rate. C D

On appeal by the employer—

*Held*, dismissing the appeal, that the intention of the Working Time Regulations 1998 and Directive 93/104/EC was that payment for annual leave should be in association with the taking of that leave; that the arrangement of "rolling up" the applicant's holiday pay was not in accordance with the requirements of the Regulations and the objects of the Directive, since it tended to discourage workers from taking their holidays when they would otherwise have sought to do so; that such an arrangement purported to exclude the operation of regulation 16(1), and was, accordingly, void under regulation 35(1); and that it followed that the applicant's rate of pay did not to any extent qualify as discharging, pursuant to regulation 16(4), any liability of the employer in respect of holiday pay under regulation 16(1) and the applicant's claim in respect of holiday pay remained unsatisfied (post, paras 13–16). E F

Decision of the Employment Appeal Tribunal [2002] IRLR 601 affirmed.

G

The following cases are referred to in the judgment:

*Gridquest Ltd (trading as Select Employment) v Blackburn* [2002] EWCA Civ 1037; [2002] ICR 1206, CA

*R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152; [2001] 1 WLR 2313; [2001] All ER (EC) 647; [2001] ECR I-4881, ECJ

*Sutherland v Network Appliance Ltd* [2001] IRLR 12, EAT(Sc) H

[1] Working Time Regulations 1998, reg 13(9): see post, para 6.
Reg 16(5): see post, para 7.
Reg 35(1): see post, para 8.
[2] Directive 93/104/EC, art 7: see post, para 13.

A

House of Lords

# Revenue and Customs Comrs v Stringer

[2009] UKHL 31

[On appeal from Inland Revenue Comrs v Ainsworth]

B

2009 April 30; June 10

Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Neuberger of Abbotsbury

C *Employment — Working time provisions — Paid annual leave — Employees absent from work through sickness — Whether entitled to paid annual leave during period of absence — Whether payment for annual leave recoverable as unlawful deduction from wages — Whether "wages" — Employment Rights Act 1996 (c 18), ss 13, 23, 27(1)(a) — Working Time Regulations 1998 (SI 1998/1833), regs 13, 14 (as amended by Working Time (Amendment) Regulations 2001 (SI 2001/3256), reg 2), 16, 30*

D Five employees who had been absent from work over a long period during which their entitlement to any pay had been exhausted presented claims under regulation 30 of the Working Time Regulations 1998[1] for payment of statutory holiday pay in respect of an entitlement under regulation 13 or, where the employees' employment had terminated, regulation 14. One employee also claimed the non-payment of holiday pay as an unlawful deduction of wages pursuant to sections 13 and 23 of the Employment Rights Act 1996[2]. The claims were upheld by employment tribunals, E and the Employment Appeal Tribunal dismissed appeals by the employer. The Court of Appeal allowed an appeal by the employer, and, on an appeal by the employees, the House of Lords referred two questions to the European Court of Justice. The Grand Chamber having answered those questions in terms favourable to the employees, the appeals were restored for hearing. It was agreed between the parties that the appeals should be allowed, the only remaining issue in dispute being, in the case of the one employee, whether a claim based on an alleged failure to make payments in respect of F annual leave due under the 1998 Regulations could be brought by way of a claim for unauthorised deduction from wages under section 23 of the 1996 Act.

On that issue—

*Held*, allowing the appeal, that the definition of "wages" in section 27(1) of the Employment Rights Act 1996 was sufficiently wide to be capable of referring to a payment due under Regulations made after the passing of the Act; that claims for payment in respect of periods of annual leave under regulation 16 of the Working Time G Regulations 1998 and claims for payment in lieu of leave on termination of employment under regulation 14 were claims for "holiday pay" within section 27(1)(a) of the 1996 Act; that, accordingly, the employee had been entitled to complain under section 23 of the Act of unlawful deduction from wages in contravention of section 13; and that that conclusion was supported by the Community law principle of

[1] Working Time Regulations 1998, reg 13(1), as substituted: ". . . a worker is entitled to four weeks' annual leave in each leave year."

H Reg 14: see post, para 13.

Reg 16(1): "A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave."

Reg 30: see post, paras 14, 15.

[2] Employment Rights Act 1996, s 13: see post, para 4.

S 23: see post, para 5.

S 27: see post, para 7.

A [NATIONAL INDUSTRIAL RELATIONS COURT]

# S. & U. STORES LTD. v. WILKES

1974 July 24 — Sir John Donaldson (President), Mr. R. Boyfield and Mr. H. Roberts

B *Master and Servant—Redundancy—Payment, calculation of—Weekly remuneration plus expenses—Whether expenses part of "week's pay"—Contracts of Employment Act* 1972 (c. 53), *Sch.* 2, *para.* 3 (2)—*Redundancy Payments Act* 1965 (c. 62), *Sch.* 1, *para.* 5 (1)

The employee, who was a manager earning £31 a week plus £7 expenses, was made redundant by his employers. On C his application for a redundancy payment an industrial tribunal included the employee's weekly expenses in calculating his week's pay in accordance with paragraph 5 (1) of Schedule 1 to the Redundancy Payments Act 1965 [1] and paragraph 3 (2) of Schedule 2 to the Contracts of Employment Act 1972 [2] and awarded him £399.

On appeal by the employers on the ground that the tribunal had erred in including an amount paid by way of expenses in D the employee's weekly wage:—

*Held*, allowing the appeal, that in determining the average weekly rate of remuneration within paragraph 3 (2) of Schedule 2 to the Contracts of Employment Act 1972 a tribunal ought to consider whether any sum paid to an employee as expenses represented a profit for the employee and that any such sum ought to be deemed part of the employee's remuneration, but that, since in the present case the tribunal had indicated that E the £7 was a genuine estimate of the expenses incurred, it was not part of the employee's remuneration and that, accordingly, the redundancy award ought to be reduced to £324·50.

*S. & U. Stores Ltd.* v. *Lee* [1969] 1 W.L.R. 626, D.C. not followed.

*N. G. Bailey & Co. Ltd.* v. *Preddy* [1971] 1 W.L.R. 796, D.C. followed.

F The following cases are referred to in the judgment of the court:

*Bailey (N. G.) & Co. Ltd.* v. *Preddy* [1971] 1 W.L.R. 796; [1971] 3 All E.R. 225, D.C.

*Batham* v. *Torbay Corporation*, The Times, April 25, 1974; Bar Library Transcript No. 127 of 1974, C.A.

*Chapman* v. *Goonvean and Rostowrack China Clay Co. Ltd.* [1973] I.C.R. 50; [1973] 1 W.L.R. 1634; [1973] 1 All E.R. 218, N.I.R.C.

G *S. & U. Stores Ltd.* v. *Lee* [1969] 1 W.L.R. 626; [1969] 2 All E.R. 417, D.C.

The following additional case was cited in argument:

*Skillen* v. *Eastwoods Froy* (1966) 2 K.I.R. 183.

APPEAL from an industrial tribunal sitting at Birmingham.

H The employers, S. & U. Stores Ltd., appealed against a decision of the industrial tribunal awarding the employee, Michael Wilkes, a redundancy

[1] Redundancy Payments Act 1965, Sch. 1, para. 5 (1): see post, pp. 646H—647A.
[2] Contracts of Employment Act 1972, Sch. 2, para. 3 (2): see post, p. 647C–D.

A do not find it necessary to repeat) that it had not been shown that one or more relevant employees had not been dismissed.

*Appeal dismissed.*

Solicitors: *Brian Thompson & Partners; Solicitor, Thompson Organisation.*

B J. W.

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[EMPLOYMENT APPEAL TRIBUNAL]

C SECRETARY OF STATE FOR EMPLOYMENT *v.* HAYNES

1980 Feb. 12, 13 Slynn J., Mrs. D. Ewing and Mr. R. J. Hooker

*Employment—Employer's insolvency—Debt due to employee—Dismissal without notice—Holiday credits due to employee* D *during notice period—Whether holiday credits part of week's pay—Whether sum payable from redundancy fund equivalent to that recoverable as common law damages—Employment Protection Act* 1975 (*c.* 71), *s.* 64 (1) (3) (*b*), *Schs.* 4, 5

Under an agreement incorporated into national working rules for the building industry, employers purchased annual holiday credit stamps from a management company with which they paid employees during their holiday periods. If an E employee failed to claim his holiday credit at the appropriate time he lost the value of the stamps. The employee was dismissed without notice when the employers went into liquidation. He applied to an industrial tribunal for a declaration that he was entitled to the value of holiday stamps which ought to have been purchased during the period of notice to which he was entitled under the Contracts of Employment Act 1972, as a debt owed by the Secretary of State in accord- F ance with section 64 (1) of the Employment Protection Act 1975.[1] The tribunal found that the amount of money for which the Secretary of State was liable under section 64 (3) (*b*) was the amount an employer would be liable for in damages at common law if he dismissed an employee without giving the appropriate period of notice and, since the amount included fringe benefits such as holiday pay, the employee's application succeeded.

G

[1] Employment Protection Act 1975, s. 64: see post, p. 373B–E.
Sch. 4, para. 3: "(2) . . . if an employee's remuneration for employment in normal working hours . . . does not vary with the amount of work done in the period, the amount of a week's pay shall be the amount which is payable by the employer under the contract of employment in force on the calculation date . . ."
Sch. 5, para. 2: "(1) If an employee has normal working hours . . . and if during any part of those normal working hours—(*a*) the employee is ready and willing to H work but no work is provided for him by his employer . . . then the employer shall be liable to pay the employee . . . a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours."

A

[COURT OF APPEAL]

# TARMAC ROADSTONE HOLDINGS LTD. v. PEACOCK AND OTHERS

1973 Feb. 26, 27 Lord Denning M.R., Stamp and James L.JJ.

B

*Master and Servant—Redundancy—Redundancy payments—Calculation of overtime—Contract of employment for 40 hour week—National conditions requiring employee to work overtime—No obligation on employer to provide overtime—Employee working 57 hours—Whether overtime to be disregarded in calculating " normal working hours"—Contracts of Employment Act* 1963 *(c.* 49), *Sch.* 2, *para.* 1 (1) (2)[1]

C

The applicants were employed in the slag industry under contracts incorporating the national agreement conditions for that industry. The conditions provided for a normal working week of 40 hours actual work but that all workers " shall work overtime in accordance with the demands of the industry during the normal week and/or at weekends." They regularly worked at least 57 hours and a seven day week. In 1957 they were made redundant. On their applications to the industrial tribunal for redundancy payments calculated in accordance with Schedule 2, paragraph 1, of the Contracts of Employment Act 1963,[1] the industrial tribunal inferred from the facts that when they were engaged the national 40 hour week agreement was consensually varied so that they were bound as a matter of contract to work a seven day week of 57 hours; and the tribunal awarded them redundancy payments on that basis. The National Industrial Relations Court upheld the award.

D

E

On appeal by the employers:—

*Held*, allowing the appeal, that on the proper construction of paragraph 1 (1) and (2) of Schedule 2 to the Act of 1963, the employees could not have their overtime counted in for the purpose of redundancy payments unless a fixed amount of overtime had been agreed obligatory on both sides and made a term of the contract of employment. Accordingly, the " normal working hours " were the 40 hours in the national agreement and fell within subparagraph (1) of paragraph 1.

F

*Redpath Dorman Long (Contracting) Ltd.* v. *Sutton* [1972] I.C.R. 477, N.I.R.C. approved.

*Armstrong Whitworth Rolls Ltd.* v. *Mustard* [1971] 1 All E.R. 598, D.C. explained.

*Per curiam.* Paragraph 1 (2) applies only where the overtime requirement is obligatory on both worker and employer.

G

[1] Contracts of Employment Act 1963, Sch. 2, para. 1: "(1) For the purposes of this Schedule the cases where there are normal working hours include cases where the employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, and, subject to the following subparagraph, in those cases that fixed number of hours (in this paragraph referred to as 'the number of hours without overtime') shall be the normal working hours. (2) If in such a case—(a) the contract of employment fixes the number, or the minimum number, of hours of employment in the said week or other period (whether or not it also provides for the reduction of that number or minimum number of hours in certain circumstances), and (b) that number or minimum number of hours exceeds the number of hours without overtime, that number or minimum number of hours (and not the number of hours without overtime) shall be the normal working hours."

H

# Case 326/88

## Anklagemyndigheden
## v
## Hansen & Søn I/S

(Reference for a preliminary ruling
from the Vestre Landsret)

(Penalties for infringement of Community law —
Strict criminal liability —
Regulation (EEC) No 543/69)


Report for the Hearing ........ 2912

Opinion of Mr Advocate General Van Gerven delivered on 5 December 1989 ..... 2919

Judgment of the Court, 10 July 1990 ........ 2930


Summary of the Judgment

1. *Member States — Obligations — Obligation to penalize infringements of Community law — Scope*
   *(EEC Treaty, Art. 5)*

2. *Transport — Road transport — Social provisions — Application by the Member States — Introduction of strict criminal liability of the employer for infringements committed by his employees — Whether permissible — Conditions*
   *(Regulation No 543/69 of the Council, Arts 7(2) and 11)*

1. Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

## Case C-14/04

## Abdelkader Dellas and Others

## v

## Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité

(Reference for a preliminary ruling from the Conseil d'État (France))

(Social policy — Protection of the safety and health of workers — Directive 93/104/EC — Concept of 'working time' — Scope — National legislation providing for a ceiling more favourable to workers, in particular as regards maximum weekly working time — Determination of working time in certain social establishments — On-call duty where the worker is required to be present at the workplace — Periods of inactivity on the part of the worker in the context of such duty — National system of calculation of hours of presence differentiated according to the intensity of the activity)


Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 12 July 2005 I - 10256

Judgment of the Court (Second Chamber), 1 December 2005 . . . . . . . I - 10279

continue to employ him, but provided no effective help. In so doing it was, in my judgment, acting unreasonably and therefore in breach of its duty of care. A

I understand it to be accepted that, if there was breach of duty, damage was caused by that breach. However, in view of the fact that I have decided this case on the second breakdown alone, it is right to add that I am satisfied on the evidence that, had the further assistance been provided to Mr. Walker, his second breakdown would probably not have occurred. In the event, there will be judgment for the plaintiff on liability with damages yet to be assessed. B

*Judgment for plaintiff with costs.*
*Leave to appeal.*

*Solicitors: Brian Thompson & Partners, Leeds; Crutes, Newcastle upon Tyne.* C

[Reported by MISS SIMONE GREAVES, Barrister]

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D

[COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES]

## FRANCOVICH v. ITALIAN REPUBLIC
(Case C-6/90)

## BONIFACI AND OTHERS v. SAME
(Case C-9/90)

E

1991 Feb. 27;
May 28;
Nov. 19

President O. Due
Presidents of Chambers Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn
Judges G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg
Advocate General J. Mischo

F

*European Economic Community—Council Directive—Implementation—Enforcement against member state—Member state in breach of obligation to implement Directive by prescribed date—Directive conferring rights on employees—Whether rights enforceable by employee before national court—Whether state liable to compensate employee for loss caused by failure to implement Directive—Council Directive (80/987/E.E.C.), art. 5[1]—E.E.C. Treaty (Cmnd. 5179–II), art. 189[2]* G

Member states were required to implement, by 23 October 1983, Council Directive (80/987/E.E.C.) on the approximation of the laws of member states relating to the protection of employees

H

[1] Council Directive (80/987/E.E.C.), art. 5: see post, p. 742A–B.
[2] E.E.C. Treaty, art. 189: "... A Directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods. ..."

Court of Justice of the European Communities A

# Landeshauptstadt Kiel *v* Jaeger

(Case C-151/02)

2003 Feb 25; April 8; Sept 9

President G C Rodríguez Iglesias, Presidents of Chambers M Wathelet, R Schintgen and C W A Timmermans B
Judges C Gulmann, D A O Edward, P Jann, V Skouris, F Macken, N Colneric, S von Bahr, J N Cunha Rodrigues and A Rosas
Advocate General D Ruiz-Jarabo Colomer

*Employment — Working time provisions — Maximum weekly hours — On-call duty by hospital doctors — Doctors permitted to sleep at hospital during periods of inactivity — Whether totality of on-call time "working time" — Derogations from minimum daily rest periods — Requirements to be met by compensatory rest periods — Council Directive 93/104/EC, arts 2(1), 3, 17(2)* C

Part of the work of the claimant, a doctor employed at a hospital in Germany, comprised on-call duty, when the claimant was required to stay at the hospital and be ready to carry out professional tasks as the need arose, with liberty to occupy himself D as he wished, including resting or sleeping in a room at the hospital, at times when he was not performing professional services. It was provided in German law that employees were to have a minimum rest time of 11 consecutive hours after the end of their daily working time, but with derogations; paragraph 5(3) of the Law on working time provided that "reductions in rest time" resulting from time spent by doctors on medical tasks during, inter alia, on-call duty at hospitals was to be made up at other times. In proceedings in which the claimant maintained that, contrary to E the implication in paragraph 5(3), the entirety of time spent on call was working time, a preliminary ruling was sought from the Court of Justice on whether legislation which counted periods of inactivity during on-call duty, when the employee was permitted to rest at the workplace, as "rest time" rather than "working time" was compatible with Directive 93/104/EC[1], and on issues of compensatory rest.

On the reference— F

*Held*, (1) that on-call duty performed by a doctor where he was required to be physically present at the hospital was to be regarded as, in its totality, "working time" for the purposes of Directive 93/104, even where the doctor was permitted to rest at the workplace during periods when his services were not required; and that, consequently, the Directive precluded national legislation which classified periods of inactivity during on-call duty as rest periods or which made provision for compensatory rest only in respect of periods during on-call duty when the doctor was G attending to professional tasks (post, judgment, paras 68, 69, 71, 75, operative part, paras 1 and 2(i)).

*Sindicato de Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generelidad Valenciana* (Case C-303/98) [2001] ICR 1116, ECJ applied.

(2) That to constitute "equivalent compensating rest periods" within article 17 of Directive 93/104, rest periods had to be periods of time when the worker was not H subject to any obligation vis-à-vis his employer which could prevent him from pursuing his own interests freely and without interruption; that, to come within the derogating provisions in article 17(2)(2.2)(c)(i), a reduction in a daily rest period of

[1] Council Directive 93/104/EC, arts 2, 3, 6, 17: see post, opinion, para 14.

## Case C-106/89

# Marleasing SA

v

# La Comercial Internacional de Alimentación SA

(Reference for a preliminary ruling
from the Juzgado di Primera Instancia
e Instrucción No 1, Oviedo (Spain))

(Directive 68/151/EEC — Article 11 —
Consistent interpretation of national law)


Report for the Hearing ........ 4136

Opinion of Mr Advocate General Van Gerven delivered on 12 July 1900 ........ 4144

Judgment of the Court (Sixth Chamber), 13 November 1990 ........ 4156


## Summary of the Judgment

1. *Measures adopted by the Community institutions — Directives — Implementation by Member States — Need to ensure the effectiveness of directives — Obligations of the national courts*
   *(EEC Treaty, Art. 5 and Art. 189, third paragraph)*

2. *Freedom of movement for persons — Freedom of establishment — Companies — Directive 68/151 — Rules on nullity — Exhaustive list of cases in which nullity can arise — Obligation on the part of the national court not to allow nullity in other cases — Nullity on account of the illegality of a company's objects — Concept of the objects of a company*
   *(Council Directive 68/151, Art. 11)*

1. The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the

A

Court of Justice of the European Communities

# Pfeiffer and others *v* Deutsches Rotes Kreuz, Kreisverband Waldshut eV

(Cases C-397–403/01)

B

2003 May 6; 2004 March 9; April 24; Oct 5

President V Skouris, Presidents of Chamber P Jann, C W A Timmermans, C Gulmann, J-P Puissochet and J N Cunha Rodrigues, Judges R Schintgen, F Macken, N Colneric, S von Bahr and K Lenaerts
Advocate General D Ruiz-Jarabo Colomer

C *Employment — Working time provisions — Exclusion — Emergency ambulance workers — Whether excluded by exemption for "public service activities" or "road . . . transport" — Collective agreement providing for average working week in excess of maximum weekly hours — Whether consent by workers to work more than maximum — Council Directive 89/391/EEC, art 2(2) — Council Directive 93/104/EC, arts 1(3), 6, 18(1)(b)(i)*

*European Community — Council Directive — Implementation — Directive* D *incorrectly transposed into national law — Provision of Directive sufficiently precise and unconditional to have direct effect against state — Whether capable of being relied on against individual — Duty of national court in applying national law if possible to attain objective of provision — Council Directive 93/104/EC, art 6(2)*

The claimants, who were qualified to provide emergency medical assistance and patient transport, were or had been employed by the defendant, a section of the E German Red Cross which provided emergency medical rescue services. When an alert was received, the defendant's staff went in an ambulance to the place where the sick or injured person was, gave medical assistance, and then usually transported the patient to hospital. A clause in the claimants' contracts of employment stipulated that the collective agreement for Red Cross workers, which, inter alia, provided for an average working week of 49 hours, was applicable. In a dispute over the lawfulness of the 49-hour working week, in the light of the maximum working week F of 48 hours laid down by article 6(2) of Council Directive 93/104/EC[1] on the organisation of working time, a number of questions were referred to the Court of Justice of the European Communities for preliminary ruling. The questions were (1) whether the claimants were excluded from the scope of Directive 93/104 by article 2(2) of Council Directive 89/391/EEC[2], whereby the Directive did not apply "where characteristics peculiar to . . . certain specific activities in the civil protection services inevitably conflict with it", or by article 1(3) of Directive 93/104, under G which "road . . . transport" activities were excluded; (2) whether, for the purposes of article 18(1)(b)(i) of Directive 93/104, which permitted derogation from article 6(2) provided, inter alia, that the employee's agreement to work more than a 48-hour week had been obtained, a reference in the contract of employment to a collective agreement which agreed to a longer working week could constitute the necessary consent; and (3) whether article 6 of Directive 93/104 could be relied on by individuals before national courts where the state had not properly transposed the H Directive into national law.

[1] Council Directive 93/104/EC, art 1: see post, judgment, para 6.
Art 6: see post, judgment, para 9.
Art 18(1): see post, judgment, para 13.
[2] Council Directive 89/391/EEC, art 2: see post, judgment, para 5.

Court of Justice of the European Communities A

# Regina (Broadcasting, Entertainment, Cinematographic and Theatre Union) *v* Secretary of State for Trade and Industry

(Case C-173/99)

2000 Dec 7;
2001 Feb 8;
June 26

President of Chamber C Gulmann B
Judges V Skouris, R Schintgen,
N Colneric and J N Cunha Rodrigues
Advocate General A Tizzano

*Employment — Working time provisions — Paid annual leave — Entitlement to paid annual leave conditional on minimum period of continuous employment — Whether contrary to Community law — Working Time Regulations 1998 (SI 1998/1833), reg 13(7) — Council Directive 93/104/EC, art 7(1)* C

In judicial review proceedings the applicant trade union, whose members worked in the broadcasting, theatrical and related sectors, challenged the validity of regulation 13(7) of the Working Time Regulations 1998[1], whereby the entitlement to paid annual leave conferred by the Regulations did not arise until a worker had been continuously employed for 13 weeks. The union maintained that, since most of its D members were engaged on short-term contracts, they were deprived of the annual leave entitlement even though they were in regular employment, albeit with successive employers. The union contended that regulation 13(7) constituted an incorrect transposition of article 7(1) of Directive 93/104/EC[2], which required member states to ensure that all workers were entitled to at least four weeks' paid annual leave "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". E

On a reference to the Court of Justice for a preliminary ruling on the question whether regulation 13(7) was compatible with article 7 of Directive 93/104—

*Held*, that, in the light of the purpose and scheme of Directive 93/104, the "conditions" in article 7(1) referred only to the details of arrangements made for the implementation of the article, and the phrase "in accordance with" those conditions did not allow member states to make the existence of the right to paid annual leave, which was a particularly important principle of Community law, subject to F preconditions; and that, accordingly, a rule that workers were not entitled to paid annual leave until they had been in 13 weeks' continuous employment was not permitted by article 7 (post, pp 1172A, E, 1173A–C, 1174H–1175A).

The following cases are referred to in the judgment:

*Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-146/89) [1991] ECR I-3533, ECJ G
*United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (Case C-84/94) [1997] ICR 443; [1996] ECR I-5755, ECJ

The following additional cases are referred to in the opinion of the Advocate General:

*Kirsammer-Hack v Sidal* (Case C-189/91) [1993] ECR I-6185, ECJ
*Sindicato de Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (Case C-303/98) [2001] ICR 1116; [2000] ECR I-7963, ECJ H

[1] Working Time Regulations 1998, reg 13(7): see post, p 1156A–B.
Reg 16(1): "A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 . . ."
[2] Council Directive 93/104/EC, art 7: see post, p 1154F.

Court of Justice of the European Communities A

# Robinson-Steele *v* RD Retail Services Ltd

# Clarke *v* Frank Staddon Ltd

# Caulfield and others *v* Hanson Clay Products Ltd B

## (Cases C-131 and 257/04)

2005 Sept 15; Oct 27;
2006 March 16

President of Chamber P Jann, Judges K Schiemann, N Colneric, K Lenaerts and E Juhász
Advocate General C Stix-Hackl

C

*Employment — Working time provisions — Paid annual leave — Rolled-up holiday pay — Whether compatible with Community law — Working Time Regulations 1998 (SI 1998/1833), reg 16 — Council Directive 93/104/EC, art 7*

The hourly or daily pay of the applicant employees in three separate sets of proceedings was stated to include or incorporate an amount for holiday pay. On applications, pursuant to regulation 16 of the Working Time Regulations 1998[1], for payment for periods of annual leave, references were made to the Court of Justice of the European Communities for a preliminary ruling on the question whether "rolled-up holiday pay" such as that in issue was consistent with the requirement in article 7 of the Working Time Directive 93/104/EC[2] that all workers were entitled to paid annual leave of at least four weeks, and related questions. D

On the references—

*Held*, that article 7(1) of Directive 93/104 precluded part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done, and it was not permissible for a worker's entitlement in that respect to be derogated from by contractual arrangement; that article 7 precluded the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually took leave; and that, while member states were required to ensure that practices incompatible with article 7 were not continued, that article did not generally preclude sums for annual leave that, contrary to the Directive, had already been paid in the form of staggered part payments from being set off against payment for specific leave, provided that the sums had been paid transparently and comprehensibly, the burden of proving which was on employers (post, judgment, paras 51, 52, 63, 65–69, operative part). E F G

The following cases are referred to in the judgment:

*MPB Structures Ltd v Munro* [2004] ICR 430, Ct of Sess

*Merino Gómez v Continental Industrias del Caucho SA* (Case C-342/01) [2005] ICR 1040; [2004] ECR I-2605, ECJ

*R (Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152; [2001] 1 WLR 2313; [2001] ECR I-4881; [2001] All ER (EC) 647, ECJ H

[1] Working Time Regulations 1998, reg 16: see post, opinion, para 5.
[2] Council Directive 93/104/EC, art 7: see post, opinion, para 2.

Court of Justice of the European Communities

# Stringer and others *v* Revenue and Customs Comrs

## Case C-520/06

[On a reference in Inland Revenue Comrs *v* Ainsworth]

# Schultz-Hoff *v* Deutsche Rentenversicherung Bund

## Case C-350/06

2007 Nov 20;
2008 Jan 24;
2009 Jan 20

President V Skouris, Presidents of Chamber P Jann, CWA Timmermans, A Rosas, K Lenaerts, A Ó Caoimh, Judges K Schiemann, J Makarczyk, P Kūris, E Juhász, G Arestis, E Levits, L Bay Larsen

Advocate General V Trstenjak

*Employment — Working time provisions — Paid annual leave — Employee refused paid annual leave during period of absence through sickness — Whether contrary to Community law — Leave not taken in leave year by reason of illness — Whether continuing entitlement to later paid leave or allowance in lieu in event of dismissal — Working Time Regulations 1998 (SI 1998/1833), regs 13, 14, 16 (as amended by Working Time (Amendment) Regulations 2001 (SI 2001/3256), reg 2) — Parliament and Council Directive 2003/88/EC, art 7(1)(2)*

In the first case, one of five claimant employees, while absent from work on indefinite sick leave, and in receipt of sick pay, informed her employer that she wished to take a period of paid annual leave. On the refusal of her request, she brought proceedings claiming entitlement to paid leave under regulations 13 and 16 of the Working Time Regulations 1998[1], which transposed article 7(1) of the Working Time Directive 2003/88/EC[2]. Four other employees who were absent on long-term sick leave throughout the leave year in the course of which they were dismissed, not having taken paid annual leave in that year, applied for payments in lieu. Their requests were refused, and they claimed entitlement to the payments in lieu under regulation 14 of the 1998 Regulations, enacted pursuant to article 7(2) of the Directive. In the course of the proceedings, the House of Lords referred to the Court of Justice for a preliminary ruling the questions whether article 7(1) of Directive 2003/88 entitled employees to take paid annual leave during a period that would otherwise be sick leave, and whether article 7(2) imposed any requirements as to entitlement to or the amount of an allowance in lieu of paid annual leave where the employment relationship was terminated during the leave year during which the employee was wholly or partially absent on sick leave.

In the second case, the claimant employee was on sick leave from September 2004 until September 2005, when his employment ceased. On his employer's refusal of his request to take paid annual leave for the year 2004 as from June 2005, the claimant brought proceedings for a sum in lieu of paid leave not taken in 2004 and 2005. Under German law and the applicable collective agreement, leave that was not taken by the end of the leave year or a further carry-over period provided for in certain circumstances, was lost, and the employer contended that the claimant's entitlement to paid annual leave had been extinguished and consequently his right to

[1] Working Time Regulations 1998, arts 13, 14, 16: see post, opinion in Case C-520/06, paras 6, 9.
[2] Parliament and Council Directive 2003/88/EC, art 7: see post, judgment, para 4.

A fetter in any way the discretion of those who may have to exercise it, we only suggest that the procedural history here might be thought to provide powerful grounds for an exercise sympathetic to the position in which, through no apparent fault of theirs, the applicants now find themselves.

If we are correct in our conclusion that P. & O. cannot be the right respondent, there is no point in sending the matter back to the industrial tribunal. We thus allow the appeal and declare that the complaint is not B to proceed further against P. & O.

*Appeal allowed.*

*Solicitors: Speechly Bircham; Brian Lewis & Co., Crawley.*

C C. N.

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D

[COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND v. COUNCIL OF THE EUROPEAN UNION (SUPPORTED BY KINGDOM OF SPAIN, COMMISSION OF THE EUROPEAN COMMUNITIES AND E KINGDOM OF BELGIUM, INTERVENERS)

(Case C-84/94)

1996 Jan. 16; March 12; Nov. 12

President G. C. Rodríguez Iglesias
Presidents of Chambers G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón
F Judges C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and H. Ragnemalm
Advocate General P. Léger

*European Community—Council Directive—Validity—Directive on organisation of working time—Whether for protection of workers' G health and safety—Proper basis for adoption of Directive—Whether Directive to be annulled wholly or in part—E.C. Treaty, art. 118a—Council Directive (93/104/E.C.), art. 5*

In November 1993 the Council of the European Union adopted, under article 118a[1] of the E.C. Treaty, Council Directive

[1] E.C. Treaty, art. 118a: see post, p. 446F–H.
H Art. 100: "The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue Directives for the approximation of such laws, regulations or administrative provisions of the member states as directly affect the establishment or functioning of the common market."
Art. 100a: see post, p. 474F–G.