Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

22 May 2014*

(Social policy — Organisation of working time — Directive 2003/88/EC — Right to paid annual leave — Composition of remuneration — Basic salary and commission according to turnover realised)

In Case C-539/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Employment Tribunal, Leicester (United Kingdom), made by decision of 16 November 2012, received at the Court on 26 November 2012, in the proceedings

**Z.J.R. Lock**

v

**British Gas Trading Limited,**

THE COURT (First Chamber),

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

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 November 2013,

after considering the observations submitted on behalf of:

— Mr Lock, by M. Ford and S. Cheetham, Barristers, instructed by C. Belich, Solicitor,

— British Gas Trading Limited, by J. Cavanagh, Barrister, and S. Rice-Birchall, Advocate,

— the United Kingdom Government, by L. Christie, acting as Agent, assisted by S. Lee, Barrister,

— the European Commission, by M. van Beek, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2013,

gives the following

* Language of the case: English.

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between Mr Lock and his employer, British Gas Trading Limited ('British Gas') concerning remuneration received during his paid annual leave.

## Legal context

### *European Union law*

3 Article 7 of Directive 2003/88, headed 'Annual leave', is worded as follows:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

### *United Kingdom law*

4 Regulation 16 of the Working Time Regulations 1998 provides:

'Payment in respect of periods of leave

1. A worker is entitled to be paid in respect of any period of annual leave to which he is entitled …, at the rate of a week's pay in respect of each week of leave.

2. Sections 221 to 224 of the 1996 Act [(Employment Rights Act 1996)] shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation …'

5 The Employment Rights Act 1996 provides, in section 221:

'221 — General

(1) This section … [applies] where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) …, if the employee's remuneration for employment in normal working hours … does not vary with the amount of work done in the period, …

(3) ..., if the employee's remuneration for employment in normal working hours … does vary with the amount of work done in the period, 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 period of twelve weeks ...

(4) 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 dispute in the main proceedings and the questions referred for a preliminary ruling

6 Since 2010 Mr Lock has been, and continues to be, employed by British Gas as an Internal Energy Sales Consultant. His task is to persuade business clients to buy his employer's energy products.

7 His remuneration consists of two main components. The first is a basic salary and the second commission. During the period at issue, the basic salary was a fixed amount of 1 222,50 sterling pounds (GBP) per month.

8 The commission, also payable on a monthly basis, is variable. It is calculated by reference to the sales achieved and therefore depends not on the amount of time worked but on the outcome of that work, namely the number and type of new contracts concluded by British Gas. Commission is paid not at the time that the work which generated the commission was done, but several weeks or months following the conclusion of the sales contract with British Gas.

9 Mr Lock was on paid annual leave from 19 December 2011 to 3 January 2012.

10 For December 2011, his remuneration was composed of the basic pay of GBP 1 222.50 and commission which he had earned over previous weeks amounting to GBP 2 350,31. In 2011, Mr Lock earned on average monthly commission of GBP 1 912,67.

11 Given that Mr Lock did not carry out any work during his period of annual leave, he was not able to make any new sales or follow up on potential sales during that period. Accordingly, he was not able to generate commission during that period. Since this had adverse effects on the salary Mr Lock received during the months following his annual leave, he decided to bring an action before the referring tribunal for outstanding holiday pay in respect of the period from 19 December 2011 to 3 January 2012.

12 In those circumstances, the Employment Tribunal, Leicester, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Where:

— a worker's annual pay comprises … basic pay and commission payments made under a contractual right to commission;

— the commission is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's work;

— commission is paid in arrears and the amount of commission received in a given reference period fluctuates according to the value of sales achieved and contracts entered into and the time of such sales;

— during periods of annual leave, the worker does not undertake any work that would entitle him to those commission payments and accordingly does not generate commission in respect of such periods;

— during the pay period which includes a period of annual leave, the worker is entitled to basic pay and will continue to receive commission payments based on commission earned earlier; and

— his average commission earnings over the course of the year will be lower than they would be if the worker had not taken leave, because, during the leave period, he will not have undertaken any work that would entitle him to commission payments,

does Article 7 of [Council] Directive 93/104/EC [of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18)], as amended by Directive 2003/88 …, require that Member States take measures to ensure that a worker is paid in respect of periods of annual leave by reference to the commission payments he would have earned during that period, had he not taken leave, as well as his basic pay?

(2) What are the principles which inform the answer to Question 1?

(3) If the answer to Question 1 is "Yes", what principles (if any) are required to be adopted by Member States in calculating the sum that is payable to the worker by reference to the commission that the worker would or might have earned if he had not taken annual leave?'

## Consideration of the questions referred

*Questions 1 and 2*

13 By Questions 1 and 2, which can be examined together, the referring tribunal asks, in essence, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, only to remuneration composed exclusively of his basic salary.

14 According to the Court's settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104 itself, a directive now codified by Directive 2003/88 (see Case C-214/10 *KHS* EU:C:2011:761, paragraph 23 and the case-law cited). That right is, moreover, expressly guaranteed by Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties.

15 In that context, Article 7 of Directive 2003/88 must be interpreted in the light of its wording and of the objective pursued by it.

16 Although the wording of Article 7 of Directive 2003/88 does not give any express indication as regards the remuneration to which a worker is entitled during his annual leave, the Court has already stated that the term 'paid annual leave' in Article 7(1) means that, for the duration of 'annual leave' within the meaning of that directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest (see Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* EU:C:2006:177, paragraph 50, and Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* EU:C:2009:18, paragraph 58).

17 Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of providing payment for that leave is to put the worker, during such leave, in a position which is, as regards his salary, comparable to periods of work (see *Robinson-Steele and Others* EU:C:2006:177, paragraph 58, and *Schultz-Hoff and Others* EU:C:2009:18, paragraph 60).

18 Having regard to that case-law, British Gas and the United Kingdom Government submit that, under national legislation and practice, the objective of Article 7 of Directive 2003/88, as interpreted by the Court, is achieved, given that the applicant in the main proceedings received, during his period of

paid annual leave, a salary comparable to that earned during periods of work, since he received, during that period, not only his basic salary but also commission resulting from sales which he had achieved during the weeks preceding that period of annual leave.

19 That argument cannot be accepted.

20 Admittedly, the conditions laid down in Article 7 of Directive 2003/88, as interpreted by the Court, appear to be observed by the national legislation and practice in so far as, during the period of his annual leave, the worker receives a total amount comparable to that earned during periods of work. The amount paid in respect of both his annual leave and the sales achieved by him during the weeks preceding the period of his annual leave enables the worker to take the leave to which he is entitled (see, to that effect, *Robinson-Steele and Others* EU:C:2006:177, paragraph 49).

21 However, it must be noted that, notwithstanding the remuneration received by the worker during the period in which he actually takes his annual leave, he may be deterred from exercising his right to annual leave, given the financial disadvantage which, although deferred, is nonetheless genuinely suffered by him during the period following that of his annual leave.

22 As British Gas conceded at the hearing, the worker does not generate any commission during the period of his annual leave. Consequently, as is apparent from paragraph 8 above, in the period following that of his annual leave the worker is paid only reduced remuneration comprising his basic salary. That adverse financial impact may deter the worker from actually taking that leave, which, as the Advocate General stated at point 34 of his Opinion, is all the more likely in a situation such as that in the main proceedings in which commission represents on average over 60% of the remuneration received by the worker.

23 Such a reduction in a worker's remuneration in respect of his paid annual leave, liable to deter him from actually exercising his right to take that leave, is contrary to the objective pursued by Article 7 of Directive 2003/88 (see, to that effect, inter alia, Case C-155/10 *Williams and Others* EU:C:2011:588, paragraph 21). In that regard, the fact that that reduction in remuneration occurs, as is the case in the main proceedings, after the period of annual leave, is irrelevant.

24 Having regard to the foregoing considerations, the answer to the first and second questions is that Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary.

*Question 3*

25 By Question 3, the referring court asks, in essence, whether, having regard to the answer given to Question 1, there are any indications in Article 7 of Directive 2003/88 concerning the methods of calculating the commission to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave, and if so, what are those indications.

26 In this respect, it should be observed at the outset that remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker (see *Williams and Others* EU:C:2011:588, paragraph 21).

27 Where the remuneration received by the worker is composed of several components, the determination of the normal remuneration to which the worker in question is entitled during his annual leave requires a specific analysis (see *Williams and Others* EU:C:2011:588, paragraph 22).

28 As stated at paragraph 7 above, that is the case regarding Mr Lock's remuneration. As a sales consultant employed by a commercial company, he receives remuneration composed of a fixed monthly salary and variable commission linked to the contracts entered into by the employer resulting from sales he achieves.

29 In any specific analysis, for the purpose of the case-law cited above, it is established that any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided and included in the calculation of the worker's total remuneration must necessarily be taken into account for the purposes of calculating the amount to which the worker is entitled during his annual leave (see *Williams and Others* EU:C:2011:588, paragraph 24).

30 In addition, the Court has stated that all components of total remuneration relating to the professional and personal status of the worker must continue to be paid during his paid annual leave. Thus, any allowances relating to seniority, length of service and to professional qualifications must be maintained (see, to that effect, Case C-471/08 *Parviainen* EU:C:2010:391, paragraph 73, and *Williams and Others* EU:C:2011:588, paragraph 27).

31 By contrast, according to that same line of case-law, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment need not be taken into account in the calculation of the payment to be made during annual leave (see *Williams and Others* EU:C:2011:588, paragraph 25).

32 In the case in the main proceedings, as the Advocate General observed at points 31 to 33 of his Opinion, the commission received by Mr Lock is directly linked to his work within the company. Consequently, there is an intrinsic link between the commission received each month by Mr Lock and the performance of the tasks he is required to carry out under his contract of employment.

33 It follows that such commission must be taken into account in the calculation of the total remuneration to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave.

34 Accordingly, it is for the national court or tribunal to assess, in the light of the principles identified in the Court's case-law, as referred to above, whether, on the basis of an average over a reference period which is considered to be representative, under national law, the methods of calculating the commission payable to a worker, such as the applicant in the main proceedings, in respect of his annual leave, achieve the objective pursued by Article 7 of Directive 2003/88.

35 Consequently, the answer to Question 3 is that the methods of calculating the commission to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave must be assessed by the national court or tribunal on the basis of the rules and criteria set out by the Court's case-law and in the light of the objective pursued by Article 7 of Directive 2003/88.

## Costs

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

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

1. **Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary.**

2. **The methods of calculating the commission to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave must be assessed by the national court or tribunal on the basis of the rules and criteria set out by the case-law of the Court of Justice of the European Union and in the light of the objective pursued by Article 7 of Directive 2003/88.**

[Signatures]