JUDGMENT OF THE COURT (First Chamber)

16 March 2006 *

In Joined Cases C-131/04 and C-257/04,

REFERENCES for preliminary rulings under Article 234 EC from the Employment Tribunal, Leeds (United Kingdom) (C-131/04) and the Court of Appeal (England and Wales) (Civil Division) (C-257/04), made by decisions of 9 March and 15 June 2004, received at the Court on 11 March and 16 June 2004 respectively, in the proceedings

C.D. Robinson-Steele (C-131/04)

v

R.D. Retail Services Ltd,

Michael Jason Clarke (C-257/04)

v

Frank Staddon Ltd,

* Language of the case: English.

and

J.C. Caulfield,

C.F. Caulfield,

K.V. Barnes

v

Hanson Clay Products Ltd, formerly Marshalls Clay Products Ltd,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric (Rapporteur), K. Lenaerts and E. Juhász, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2005,

after considering the observations submitted on behalf of:

— R.D. Retail Services Ltd, by J. Eady, Solicitor,

— Messrs Clarke, J.C. Caulfield, C.F. Caulfield and Barnes, by A. Hogarth QC,

— Hanson Clay Products Ltd, formerly Marshalls Clay Products Ltd, by J. Eady, Solicitor,

— the United Kingdom of Great Britain and Northern Ireland, by R. Caudwell and C. White, acting as Agents, and T. Linden, Barrister,

— Ireland, by D.J. O'Hagan, acting as Agent, and N. Hyland and N. Travers BL,

— the Kingdom of the Netherlands, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by M.-J. Jonczy and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2005,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of 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; hereinafter 'the directive').

2 The references were made in the course of proceedings relating to payment for annual leave by including the remuneration for that leave in the hourly or daily remuneration, a regime known as 'rolled-up holiday pay'.

Legal context

Community legislation

3 The directive was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC). As stated in Article 1(1) of the directive, it lays down minimum safety and health requirements for the organisation of working time.

4 Section II of the directive lays down the measures to be taken by the Member States to ensure that every worker is entitled to minimum periods of daily rest, weekly rest and paid annual leave. It also lays down rules on breaks and maximum weekly working time.

5 As regards annual leave, Article 7 of the directive provides:

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

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

6 Article 15 of the directive provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

7 Article 17 of the directive provides for the power to derogate, under certain circumstances, from a number of its provisions, but not from Article 7 of the directive.

8 Article 18(3) of the directive provides:

'Without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions in the field of working time, as long as the minimum requirements provided for in this Directive are complied with, implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers.'

National legislation

9 The Working Time Regulations 1998, S.I. 1998, No 1833 ('the 1998 Regulations'), which were adopted in order to transpose the directive into the domestic law of the United Kingdom, entered into force on 1 October 1998.

10 Regulation 13 of the 1998 Regulations, entitled 'Entitlement to annual leave', provides:

'(1) ... [A] worker is entitled to four weeks' annual leave in each leave year.

...

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

...'

11 Regulation 16 of the 1998 Regulations, entitled 'Payment in respect of periods of leave', provides:

'(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.

...

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration").

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.'

12 Regulation 30 of the 1998 Regulations, entitled 'Remedies', provides that a worker may present a complaint to an employment tribunal where his employer has refused, inter alia, to permit him to exercise his right to take leave under regulation 13 (regulation 30(1)(a)) or has failed to pay him the whole or any part of any amount due to him under regulation 16(1) (regulation 30(1)(b)). In that respect, regulation 30(3) to (5) of the 1998 Regulations provides:

'(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal -

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

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

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation ... 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.'

The main proceedings and the questions referred for a preliminary ruling

Case C-131/04

13 Mr Robinson-Steele worked for R.D. Retail Services Ltd ('Retail Services') between 19 April 2002 and 19 December 2003. Retail Services provides the services of its workers to large undertakings in the retail sector. The workers perform the services of shop-fitting and stacking shelves.

14 Mr Robinson-Steele worked either day shifts of 12 hours each over five days or night shifts also of 12 hours each over four days, continuously throughout that period of employment except for one week of leave over the Christmas period in 2002, for which he was not separately paid.

15 His contractual terms varied during his period of employment. From 29 June 2003, he worked pursuant to a contract which had as its title 'Terms of Engagement for Temporary Workers'. The relevant term of the contract provides: 'Entitlement to payment for leave accrues in proportion to the amount of time worked continuously

by the Temporary Worker on Assignment during the leave year. The Temporary Worker agrees that payment in respect of the entitlement to paid leave shall be made together with and in addition to the Temporary Worker's hourly rate at 8.33% of his hourly rate.'

16 The referring court explains that, mathematically, an 8.33% leave pay element does produce the correct sum to reflect one week's pay after the worker has worked continuously for three months on the alternating day and night shift pattern in question.

17 Mr Robinson-Steele received his wages on a weekly basis. His rate of remuneration was GBP 6.25 per hour for day shift working and GBP 7.75 per hour for night shift working. His pay slips bore these words:

'Pay rate includes compensation for hols [holidays] & sick days'.

18 On 14 January 2004, he made an application to the Employment Tribunal, Leeds, in which he stated that he had worked for Retail Services for 20 months and that, as regards annual holiday pay, it had paid him only 'rolled-up holiday pay'. That meant in most cases that no leave was taken because it was not paid for immediately before or after it was taken or while it was being taken.

19 The Employment Tribunal explains that if Mr Robinson-Steele is correct that the contractual provision for rolled-up holiday pay is unlawful, the terms of its decision will depend on the answer to the question whether the effect of the breach has been a refusal on the part of the employer to permit Mr Robinson-Steele to exercise his right to annual leave or whether the effect is that the employer has not paid the whole or any part of any amount due in respect of pay for annual leave.

20 That tribunal observes that the national regulations designed to give effect to the obligations under the directive have been interpreted in different ways by the national courts. In a decision by which the tribunal is bound, the Employment Appeal Tribunal held that a contractual provision for 'rolled-up leave pay' which identified an express amount or percentage by way of an addition to basic pay was not unlawful in terms of the directive and the 1998 Regulations. The Inner House of the Court of Session (Scotland), in *MPS Structure Ltd* v *Munro* (2003) IRLR 350, took a contrary view. According to the Employment Tribunal, it is essential not only that payment should be made for annual leave, but also that it should be made in association with the taking of that leave. The arrangement of 'rolled-up holiday pay' would tend, contrary to the directive's objectives, to discourage workers from taking the holidays which they would otherwise have taken.

21 Those were the circumstances in which the Leeds Employment Tribunal decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 7 of the ... directive ... consistent with provisions of national law which allow pay for annual leave to be included in a worker's hourly remuneration and paid as part of remuneration for working time but not paid in respect of a period of leave actually taken by the worker?

(2) Does Article 7(2) [of the directive] preclude the national tribunal from giving credit to an employer for such payments when it seeks to give to the applicant an effective remedy according to powers contained in national regulations?'

22 The company Frank Staddon Ltd ('Frank Staddon') carries on its business in the construction industry. Mr Clarke worked for it as a hod carrier/brick cutter.

23 According to the referring court, it seems that Mr Clarke worked for Frank Staddon from 2 April to 23 June 2001. He was then on holiday until 24 July 2001 when he went back to work with the company. He was not paid between 23 June 2001 and 24 July 2001.

24 Mr Clarke's contract stipulated: 'All Holiday and Bank Holiday pay is included within the daily rate.' The same document contains a manuscript annotation against the words 'Rate of pay': 'Basic 8.689 Holiday 0.756 = £85 per day'. A pay slip apparently dated August 2001 showed the same breakdown.

25 The rate of GBP 85 per day relates only to the period commencing on 24 July 2001. The daily rate in effect on 2 April 2001 was GBP 80 and increased to GBP 82.50 in June. It seems that Frank Staddon did not provide the breakdown relating to the amount of holiday pay included in the daily rate before August 2001.

26 By application lodged at the Employment Tribunal on 20 November 2001, Mr Clarke sought an order that Frank Staddon pay him for the annual leave which had accrued to him during the period from 2 April to 16 November 2001.

27 By decision of 19 April 2002, the Employment Tribunal dismissed that application. Mr Clarke appealed against that decision to the Employment Appeal Tribunal which, on 25 July 2003, substantially dismissed that appeal. He then appealed to the Court of Appeal (England and Wales) (Civil Division) against the latter decision.

28 According to the Court of Appeal, the Employment Tribunal found that there was a break in the continuity of the appellant's contract by reason of the period during which he had been on holiday, that is from 23 June to 24 July 2001. The parties entered into a new contract on 24 July of that year. Those circumstances affect the amount of any recovery that Mr Clarke might obtain if he established an infringement of the directive and the 1998 Regulations, but do not affect the issue of principle relating to 'rolled-up holiday pay'.

29 According to the Court of Appeal, the Employment Appeal Tribunal had ordered that the case be referred back to the Employment Tribunal in order to determine whether, before August 2001, there had been any contractual attribution to holiday pay of a percentage or proportion of the daily rate and whether there had been a break in Mr Clarke's employment.

30 The company Marshalls Clay Products Ltd (hereinafter 'Marshalls Clay') carried on its business in the field of manufacturing clay products for the building trade. Messrs J.C. Caulfield, C.F. Caulfield and Barnes (hereinafter 'Mr Caulfield and Others') were employed by that undertaking as general operators.

31 In 1984, Marshalls Clay introduced a 'continental' system of shift work, which meant that each employee worked four days on and then four days off. During the period under consideration the factory where Mr Caulfield and Others worked, at Accrington, operated seven days a week except for Christmas Day and Boxing Day.

32 The employees were paid only on the four days when they worked and not therefore on the four days when they did not work.

33 A local collective agreement which was entered into on 9 July 1984 following a meeting between Marshalls Clay and the GMB Union and incorporated into the contract of employment of each employee provides:

'3. HOLIDAYS

Holiday pay is incorporated in the hourly rate of pay, so there is no accumulation of holiday pay. Holidays are taken during the rest day periods in the rota system. In order that extended periods of leave can be accommodated, each person will be entitled to:

Two 8 consecutive day periods

And

one 16 consecutive day period.

These periods will be agreed locally. (This means that when one shift takes a period of leave, whether 8 days or 16 days consecutively, the other shift will be working.)'

34 That collective agreement also states:

'Presently Accrington operatives enjoy 31 days' holiday pay per annum (for 29 days' holiday). As a proportion of the other days worked (232) this is 13.36%. Hourly rates include 13.36% holiday pay.'

35 The hourly rates apply to overtime also, so that in fact if and when employees work overtime, they receive, depending on the precise time or times worked, which also forms part of the collective agreement, rates of 30%, 50% or 100% extra, in respect of both basic rates and holiday pay.

36 According to the Employment Appeal Tribunal, under those contractual arrangements employees can, but do not have to, take two periods of leave of eight consecutive days or one period of leave of 16 consecutive days, but only by pooling or collecting their rest days and, by a mutually agreed series of exchanges, working other people's shifts.

37 Each of the appellants in the main proceedings in *Caulfield and Others* took a holiday in June 2001. The periods varied, the longest being 16 days. The appellants also took rest days. Under Marshalls Clay's shift work arrangements, Mr Caulfield and Others were each rostered to work 182 days per year. Pursuant to the collectively agreed terms relating to holiday pay, 13.36% of the appellants' pay was in respect of holiday. In other words, for working 182 days per year, each appellant received 24.32 days' holiday pay: within each GBP 7.515 paid per hour worked, GBP 6.629 related to the time actually worked and 88.6p constituted the addition to take account of holiday pay.

38 By applications dated 3 September 2001, Mr Caulfield and Others issued proceedings before the Manchester Employment Tribunal to obtain an order that Marshalls Clay pay them each for annual leave relating to the period from 1 October 1998 to 3 September 2001.

39 By a decision of 12 December 2002, that tribunal granted the applications of Mr Caulfield and Others and made an order in their favour for compensation to be assessed at a later date.

40 Marshalls Clay appealed to the Employment Appeal Tribunal, which allowed the appeal. Mr Caulfield and Others then appealed to the Court of Appeal.

41 In that court, Mr Caulfield and Others argued that the contractual arrangements in that case are a flagrant breach of the directive because they do not allow for annual leave at all. A worker who in any year takes advantage of the contract's provision for an extended period of leave of eight or sixteen days does just as much work, not a day less, than his fellow worker who takes no such leave but merely adheres, all through the year, to the four days on/four days off regime. A day can be described as a day of leave only if it is a day on which the worker would otherwise be working.

42 The Court of Appeal considers, first, that the 'rolled-up holiday pay' provisions are far from being ones which would discourage the workers from taking their holidays at all. Secondly, there is no reason why workers generally should not manage 'rolled-up holiday pay' perfectly sensibly. It cannot be right to suppose or conclude that workers are not really capable of planning their holidays to their liking against a background of pay arrangements such as those in this case.

43 In addition, that court notes that the 'rolled-up holiday pay' arrangements in question are the fruit of full and proper negotiations between the employers and trade unions, leading to a collective agreement. That fact points strongly towards their legitimacy.

44 The Court of Appeal takes the view that the contracts in question in the cases before it (subject to the order in *Clarke* for remission to the Employment Tribunal) are not incompatible either with the directive or with the 1998 Regulations.

45 It is in those circumstances that the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does a contractually binding arrangement between an employer and a worker, which provides that a specific part of the wages paid to the worker represents that worker's "holiday pay" (an arrangement known as "rolled-up holiday pay"), involve a violation of the worker's right to be paid for his annual leave under Article 7 of the ... directive [concerning certain aspects of the organisation of working time]?

(2) Would the answer to question 1 be different if the worker was paid the same before and after the binding arrangement in question coming into force so that the effect of the arrangement was not to provide for additional pay, but, rather, to attribute part of the wages payable to the worker to holiday pay?

(3) If the answer to question 1 is yes is it a violation of the right to paid annual leave under Article 7 [of the directive] for credit to be given for that payment so as to set this off against the entitlement afforded under the directive?

(4) In order to comply with the obligation under Article 7 of the ... directive ... to ensure that a worker is entitled to paid annual leave of at least four weeks, is it necessary for the payment to be made to the worker in the pay period in which he takes his annual leave, or is it sufficient to comply with Article 7 that the payment is made throughout the year in instalments?'

46 By order of the President of the Court of 7 September 2004, the present cases were joined.

The questions referred for a preliminary ruling

The second question in Case C-257/04

47 By its second question, which it is convenient to examine first, the Court of Appeal is asking, in essence, whether Article 7 of the directive precludes 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.

48 In that regard, it must be recalled that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community 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 the directive itself (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 43).

49 The holiday pay required by Article 7(1) of the directive is intended to enable the worker actually to take the leave to which he is entitled.

50 The term 'paid annual leave' in that provision means that, for the duration of annual leave within the meaning of the directive, remuneration must be maintained. In other words, workers must receive their normal remuneration for that period of rest.

51 In those circumstances, it must be held that an agreement under which the amount payable to the worker, as both remuneration for work done and part payment for minimum annual leave, would be identical to the amount payable, prior to the entry into force of that agreement, as remuneration solely for work done, effectively negates, by means of a reduction in the amount of that remuneration, the worker's entitlement to paid annual leave under Article 7 of the directive. Such a result would run counter to what is required by Article 18(3) of the directive.

52 Consequently, the answer to the second question referred in Case C-257/04 must be that Article 7(1) of the directive precludes 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. There can be no derogation from that entitlement by contractual arrangement.

The first question referred in each of Cases C-131/04 and C-257/04 and the fourth question referred in Case C-257/04

53 By those questions the referring courts are asking, in essence, whether Article 7 of the directive precludes 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 takes leave.

54 In that regard, it must be stated that there is no provision in the directive which lays down expressly the point at which the payment for annual leave must be made.

55 Under Article 7(1) of the directive, the Member States are to 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.

56 The fixing of the point at which the payment for annual leave must be made comes within those conditions.

57 In that regard, the Member States must ensure that the detailed national implementing rules take account of the limits flowing from the directive itself.

58 The directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work.

59 Accordingly, without prejudice to more favourable provisions under Article 15 of the directive, the point at which the payment for annual leave is made must be fixed in such a way that, during that leave, the worker is, as regards remuneration, put in a position comparable to periods of work.

60 Furthermore, account must be taken of the fact that, under Article 7(2) of the directive, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. That prohibition is intended to ensure that a worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety (see, to that effect, *BECTU*, cited above, paragraph 44, and Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 30).

61 A regime such as that referred to by the questions at issue may lead to situations in which, without the conditions laid down in Article 7(2) of the directive being met,

the minimum period of paid annual leave is, in effect, replaced by an allowance in lieu.

62 It is appropriate to add that Article 7 of the directive is not one of the provisions from which the directive expressly allows derogations (see *BECTU*, paragraph 41). Therefore, it does not matter whether such a regime of paid annual leave is or is not based on a contractual arrangement.

63 It follows from all the foregoing considerations that the reply to the first question referred in each of Cases C-131/04 and C-257/04 and to the fourth question referred in Case C-257/04 must be that Article 7 of the directive precludes 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 takes leave.

The second question referred in Case C-131/04 and the third question referred in Case C-257/04

64 By those questions, the referring courts are asking, in essence, whether Article 7 of the directive precludes amounts paid to a worker as holiday pay under a regime such as that described in the preceding paragraph of this judgment from being set off against the entitlement to paid annual leave under that article.

65 The question is therefore whether payments in respect of minimum annual leave, within the meaning of that provision, already made within the framework of such a regime contrary to the directive, may be set off against the entitlement to payment for a specific period during which the worker actually takes leave.

66 In that situation, Article 7 of the directive does not preclude, as a rule, sums additional to remuneration payable for work done which have been paid, transparently and comprehensibly, as holiday pay, from being set off against the payment for specific leave.

67 However, the Member States are required to take the measures appropriate to ensure that practices incompatible with Article 7 of the directive are not continued.

68 In any event, in the light of the mandatory nature of the entitlement to annual leave and in order to ensure the practical effect of Article 7 of the directive, such set-off is excluded where there is no transparency or comprehensibility. The burden of proof in that respect is on the employer.

69 The answer, therefore, to the second question referred in Case C-131/04 and the third question referred in Case C-257/04 must be that Article 7 of the directive does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together

with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings 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 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time precludes 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. There can be no derogation from that entitlement by contractual arrangement.**

2. **Article 7 of Directive 93/104 precludes 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 takes leave.

3. **Article 7 of Directive 93/104 does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker.**

[Signatures]