



Neutral Citation Number: [2009] EWCA Civ 281

Case No: A2/2008/0632

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**(Mr Justice Keith presiding)**  
**UKEAT/0377/07/MAA**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 03/04/2009

**Before :**

**LORD JUSTICE WARD**  
**LORD JUSTICE LLOYD**  
and  
**LORD JUSTICE RIMER**

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**Between :**

**BRITISH AIRWAYS PLC**  
**- and -**  
**MS S. WILLIAMS AND OTHERS**

**Appellant**

**Respondents**

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**Mr Christopher Jeans QC and Mr Andrew Short** (instructed by **Baker & McKenzie LLP**)  
for the **Appellant**

**Miss Jane McNeill QC, Mr Keith Bryant and Mr Michael Ford** (instructed by **Thompsons**)  
for the **Respondents**

Hearing dates: 26, 27 November 2008, 19 March 2009  
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**Approved Judgment**

**Lord Justice Rimer :**

*Introduction*

1. This appeal, by British Airways plc (“BA”), is against a decision of the Employment Appeal Tribunal (Keith J, Mr C. Edwards and Mr I. Ezekiel) dated 28 February 2008 upholding a decision of an Employment Tribunal (Ms M.E. Stacey, Ms B.C. Leverton and Mr J.R. Geleit) promulgated on 11 May 2007. There are some 2,750 respondents to the appeal, all pilots employed by BA. The issue is as to the level of holiday pay to which the pilots are entitled. The appeal is brought with the permission of the Employment Appeal Tribunal, whose decision is reported at [2008] ICR 779. The argument on the appeal has been protracted. We heard the appeal over two days at the end of November 2008 and, following a decision of the Court of Justice of the European Communities (“the ECJ”) in January 2009, had further written submissions followed by a further hearing on 19 March 2009.
2. BA’s pilots are remunerated under their service agreements by a salary structure entitling them to (i) basic pay; (ii) a “flying time” supplement of £10 per flying hour; and (iii) an allowance of £2.73 per hour of time spent away from their base airport (“TAFB”), of which 82% is treated as a repayment of expenses and 18% as taxable income. The amount of time a pilot spends flying varies according to routes allocated and roster patterns. The employment tribunal found that it could typically be about 15 days a month.
3. The pilots are also entitled under their service agreements to annual leave. Those based at Heathrow have 30 days plus two “duty free weeks”, and those at Gatwick have 42 days. Whatever their contractual leave, they are required to take all of it. They are also entitled to pay in respect of their periods of leave. That pay has for some years been fixed by their contracts at the level of their basic pay. That can be rationalised, as it is by BA, on the basis that whilst on leave they are not flying nor relevantly away from base and so are not doing anything to earn the flying time supplement or the TAFB allowance.
4. The pilots have brought claims before the employment tribunal asking for compensation from BA on the basis it has underpaid them their due in respect of holiday pay. They do not say that BA has breached their contracts. What they do say is that, in paying them holiday pay only at the level of basic pay, BA has failed to honour its obligations under regulation 4 of the Civil Aviation (Working Time) Regulations 2004 (SI 2004/756) (“the Aviation Regulations”), which came into force on 13 April 2004. That entitles them to “paid annual leave of at least four weeks”. They say that means that their holiday pay should be fixed at a level equivalent, or comparable, to that of the pay they receive when working and so should include -- in addition to basic rate pay -- an element of pay attributable to the flying time supplement and the taxable part of the TAFB allowance. Such a claim was first raised by the Transport and General Workers Union (now UNITE) on behalf of cabin crew. The British Airline Pilots Association (“BALPA”) later took the case up on behalf of the pilots and submitted a collective grievance on the topic which BA rejected at a hearing and on an appeal.
5. The lead claimant and respondent to this appeal is Ms S. Williams. In 2006 her basic pay ranged from £7,938.17 to £8,092.02 a month (averaging £8,037.70). In addition,

she received a gross flying pay supplement ranging from £551.66 to £864.17 a month (averaging £709.16) and a gross taxable TAFB allowance ranging from £56.39 to £126.86 a month (averaging £86.54). Her holiday pay in 2006 would have been at the rate of approximately £1,854.85 per week (£8,037.70 x 12/52). Her complaint is that it did not include an element of flying pay supplement and taxable TAFB allowance. There are no doubt several ways in which, if it had been intended to include this, the pay could have been calculated. They would, however, probably have produced different figures, although the differences might well not be very significant. But taking, for illustrative purposes, her average gross earnings over the year, her complaint can be identified as broadly to the effect that she ought to have received holiday pay of some £2,038.48 per week (£8,037.70 + £709.16 + £86.54 x 12/52). That is some £183.63 (9.9%) higher than the pay she would have received. In fact, the pilots' case is that the level of their holiday should be fixed by reference to an average week's pay over the 12-week period preceding the period of leave. If that were applied to Ms Williams's case for the purpose of calculating her pay entitlement for a week's leave in, say, the first week of August 2006, her pay for that week (adopting actual rather than average figures) would have been some £2,240.76, or £217.76 (10.8%) higher than the pay of some £2,023.00 she would have received.

6. The pilots' claims resulted in the following preliminary issue being referred to the employment tribunal:

“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.”

7. The suggestion that the holiday pay might be calculated in accordance with regulation 16 of the Working Time Regulations was an impossible one, as will appear. It was rightly rejected, but the employment tribunal did however accept the pilots' essential argument. They gave effect to it by declaring that their holiday pay for the purposes of regulation 4 of the Aviation Regulations is to be calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996 (“the ERA”), to which the Aviation Regulations make no reference. Since the employment tribunal did not also declare the “calculation date” for the purposes of those provisions, their declaration strictly omitted a piece of information necessary for their practical operation. But if, as I presume, their implicit intention was that that date was to be the first day of the leave period in question, the effect of their declaration was to require the calculation to be measured by reference to the average level of earnings during the preceding 12-week period. The appeal tribunal agreed with the employment tribunal.
8. BA challenges that conclusion. It asks us to declare that, in the relevant year, the pilots *have* been accorded four weeks' paid leave for the purposes of regulation 4. Its case is that holiday pay at the level of basic salary satisfied that regulation. Mr Christopher Jeans QC, for BA, opened and closed the appeal by saying that the question is whether the pilots have been given “paid annual leave” of at least four weeks; and he invited the answer “yes”. If BA is right, there is nothing in the claims, which must be dismissed. Miss Jane McNeill QC, for the pilots, whilst agreeing that the question is the right one, submitted that the answer so invited is wrong. “Paid annual leave” means, she said, leave for which the pay is calculated in accordance with sections 221 to 224 of the ERA. If that is wrong, her alternative argument is that

it is for the employment tribunal to fashion its own mechanism for determining a level of holiday pay comparable with the pilots' pay when working and then to order BA to compensate them for the shortfall in the payment actually made.

9. The appeal raises an issue of importance to the pilots. More widely, the outcome of the case may have an impact on some 10,600 claims being brought by cabin crew against BA. We were told that some 700 like claims have been brought against Virgin and some 500 such claims against EasyJet. The resolution of the appeal requires a consideration of the applicable legislative framework at Community and national level.

*The Working Time Directive and Working Time Regulations*

10. The story starts with the Working Time Directive (93/104/EC) of 23 November 1993. Its purpose was to lay down minimum health and safety 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. One of its recitals was to the effect that account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, and we were referred to article 7.1 of the ILO Holidays with Pay Convention (Revised), 1970, which Miss McNeill said served to inform the correct interpretation of the phrase "paid annual leave" in the relevant provision in the Working Time Directive. I will therefore set out article 7.1 first:

"1. Every person taking the holiday envisaged in this Convention shall receive in respect of the full period of that holiday *at least his normal or average remuneration* (including the cash equivalent of any part of that remuneration which is paid in kind and which is not a permanent benefit continuing whether or not the person concerned is on holiday), *calculated in a manner to be determined by the competent authority or through the appropriate machinery in each country.*" (Emphasis supplied)

11. The relevant provision of the Working Time Directive for present purposes is article 7:

"Annual leave

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."

12. Although article 7, and the meaning of its phrase "paid annual leave", assumed importance in the argument, the Working Time Directive did not originally apply to air transport activities any more than to other expressly excepted activities listed in article 1.3, namely "air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and [not obviously *ejusdem generis*] the activities of doctors in training." Article 14 also provided that the Directive did not apply where other

Community instruments contain “more specific requirements” for particular occupations.

13. The domestic implementation in Great Britain of the Working Time Directive was effected by the Working Time Regulations 1998 (SI/1998/1833), which came into force on 1 October 1998. Regulation 13 specifies the minimum leave (four weeks) to which a worker is entitled in each leave year. Regulation 16(1) provides that the payment to which he is entitled in respect of such periods of leave is “a week’s pay in respect of each week of leave”. Regulations 16(2) and (3) provide that, subject to modifications, sections 221 to 224 of the ERA are to apply for the purpose of determining the amount of “a week’s pay” for the purpose of regulation 16. Regulations 16(4) and (5) provide that the worker’s right to payment under regulation 16(1) does not affect his right to contractual remuneration in respect of each week of leave; and that such remuneration goes towards the discharge of the payment obligations provided for by the regulation.
14. Just as the Working Time Directive did not apply to air transport, nor in material respects did the Working Time Regulations: regulation 18 expressly excluded the application of (inter alia) regulations 13 and 16 to the same sectors of activity as were excluded by article 1.3 from the provisions of the Working Time Directive. It is therefore obvious that the Working Time Regulations did not enable recourse by airline pilots to sections 221 to 224 of the ERA for the purpose of determining the level of their holiday pay. Since, however, the view of both tribunals below is that these provisions *do* determine its level, I must refer to them. Sections 221 to 224 are in a group of sections (220 to 229) comprising Chapter II of Part XIV of the ERA. Part XIV is the “Interpretation” part of the ERA and Chapter II is headed “A week’s pay”. Section 220 explains that the “amount of a week’s pay of an employee shall be calculated *for the purposes of this Act* in accordance with this Chapter” (emphasis supplied). It is, however, no part of the purposes of the ERA to fix the holiday pay to which an airline pilot or anyone else is entitled. The purposes of the ERA for which it is relevant to calculate “a week’s pay” are identified in sections 225 to 227 and are many and various; but they are also irrelevant and so there is no need to list them. I add only that sections 221 to 223 provide guidance for the determination of a week’s pay in employment with normal working hours; and section 224 covers the case of employment with no normal working hours (and, if these provisions do apply to pilots, section 224 would be the applicable section). Both alternatives determine the relevant “week’s pay” by an averaging exercise in relation to the earnings of the preceding 12 weeks.

*The Civil Aviation sector: the Aviation Agreement and Directive*

15. On 22 March 2000 there was concluded the European Agreement on the Organisation of Working Time of Mobile Staff in Civil Aviation (“the Aviation Agreement”). The parties were the Association of European Airlines, the European Transport Workers’ Federation, the European Cockpit Association (of which BALPA is a member), the European Regions Airline Association and the International Air Carrier Association. They represented both the employer and employee sides of the civil aviation industry. The Aviation Agreement was the type of agreement between management and labour provided for by articles 138 and 139 of the EC Treaty. The recitals recorded that the signatories regarded its provisions as providing “more specific requirements” within the meaning of article 14 of the Working Time Directive and that the provisions of

that Directive should not apply. Clause 1.1 provided that the Aviation Agreement applied “to the working time of mobile staff in civil aviation” and clause 1.2 repeated that it laid down “more specific requirements” within the meaning of article 14. Clause 2 contained some definitions, and clauses 3 to 9 outlined the health and safety matters covered by the Aviation Agreement. Clause 3, of direct present relevance, provided:

“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.

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

That replicated the language of article 7 of the Working Time Directive; and Miss McNeill said that the meaning of “paid annual leave” is, like the same phrase in article 7, informed by article 7.1 of the ILO Convention.

16. Two material events at European level followed the signing of the Aviation Agreement. First, on 22 June 2000, Council Directive 2000/34/EC amended the Working Time Directive. In particular, article 1 amended article 1.3 of that Directive so as to take out its wide range of original exclusions (including that of air transport activities) whilst still excluding non-fishing seafarers (to whose position I shall return). The effect of that amendment was that air transport workers now formally came within the Working Time Directive, although the amended article 1.3 continued to provide that the application of the Directive to workers in all sectors was without prejudice to the provisions of article 14.
17. That meant that in practice air transport workers still did not receive the benefit of the provisions of the Working Time Directive since the second material Community event was that the amending 2000 Directive was followed on 27 November 2000 by Council Directive 2000/79/EC, (“the Aviation Directive”), whose purpose was to implement the Aviation Agreement. The Aviation Directive applied specifically to air transport and was just the type of “more specific requirements” covered by article 14 of the Working Time Directive. Recital (8) said that the Aviation Agreement and Aviation Directive “lay down more specific requirements within the meaning of Article 14 of [the Working Time Directive] as regards the organisation of working time of mobile staff in civil aviation.” Recital (10) recognised that the Aviation Agreement needed to be implemented and that the proper instrument for doing so was by way of a Directive. The Aviation Directive was that Directive. It was no part of Miss McNeill’s argument that the Working Time Directive or Working Time Regulations so far as they concern entitlement to “paid annual leave” had or have any application to the pilots.
18. Recitals (11) and (12) of the Aviation Directive provided that:

“(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.”

Article 1 of the Aviation Directive provided that its purpose was to implement the Aviation Agreement. Article 2.1 permitted Member States to introduce more favourable provisions than those laid down in the Directive. Article 3 provided that:

“Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 December 2003 or shall ensure that, by that date at the latest, management and labour have introduced the necessary measures by agreement. The Member States shall take any necessary measure to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof. ...”

*The amendment to the Working Time Regulations*

19. With effect from 1 August 2003, the Working Time Regulations 1998 applicable in Great Britain were amended by the Working Time (Amendment) Regulations 2003 (SI 2003/1684) so as to implement at national level the amendments to the Working Time Directive. The original version of regulation 18 had excluded the application of (inter alia) regulations 13 and 16 to the sectors of activity (including air transport) excluded by the original article 1.3 of the Working Time Directive. The amendment, by regulation 18(2)(b), still excluded the application of (inter alia) the same regulations to workers to whom the Aviation Agreement (as implemented by the Aviation Directive) applied. Air transport workers thus still remained outside those provisions of the Working Time Regulations; and so the continued adoption by the Working Time Regulations of sections 221 to 224 of the ERA for the purpose of determining the amount of “a week’s [holiday] pay” for those workers to which the Working Time Regulations *did* apply continued to have no application to air transport workers. In addition, and I shall explain how this is relevant to Mr Jeans’ argument, regulations 18(1)(a), (b) and (c) respectively excluded the application of the entirety of the Working Time Regulations to (a) workers whom I will call “non-fishing seafarers”, (b) workers to whom the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 (SI 2004/1713) (“the Sea-fishermen Regulations”) apply, and (c) workers to whom the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 (SI 2003/3049) (“the Inland Waterways Regulations”) apply.
20. Since part of the argument turned on it, I should set out the material provisions of regulation 30 of the Working Time Regulations, headed “Remedies”:

“30.—(1) A worker may present a complaint to an employment tribunal that his employer –

- (a) has refused to permit him to exercise any right he has under –

(i) regulation ... 13 [which entitles the employee to four weeks' annual leave] ....

(b) has failed to pay the whole or any part of any amount due to him under regulation ... 16(1) [which entitles him to a week's pay for each week of leave calculated in accordance with sections 221 to 224 of the ERA]

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented –

(a) before the end of the period of three months ... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three ... months.

...

(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.”

21. To indicate the relevance that Mr Jeans attached to regulation 30, I point out that: (i) regulation 30(1)(a)(i) entitles the employee to complain to an employment tribunal if he is not given at least four weeks' annual leave; (ii) regulation 30(1)(b) entitles him to complain if he has not been given any or all of the holiday pay to which he is entitled under regulation 16; (iii) regulation 30(3) shows that the monetary remedy for the former breach is one of compensation; and (iv) regulation 30(5) shows that the remedy for the latter breach is an order for payment of the money due. Mr Jeans contrasted these provisions with the “Remedies” provision of the Aviation

Regulations applying to crew members of civil aviation aircraft, including pilots. These are the all-important Regulations for the purposes of the appeal, but before coming to them I must return to the Sea-fishermen Regulations and to the Inland Waterways Regulations mentioned in paragraph [18].

*Inland waterway shipping and sea fishermen*

22. The Inland Waterways Regulations came into force on 24 December 2003. They apply to inland waterway shipping and implemented the Working Time Directive as amended by Council Directive 2000/34/EC. The Sea-fishermen Regulations are identical. Regulation 11 of the former set, headed “Entitlement to annual leave and payment for leave”, contains provisions modelled on the combined effect of regulations 13 and 16 of the Working Time Regulations. Regulation 11(1) provides not just that the worker is entitled to four weeks’ annual leave but also that he is to be paid in respect of such leave at the rate of a week’s pay for each week of leave; and regulations 11(4) and (5) incorporate sections 221 to 224 of the ERA for the purpose of ascertaining the amount of “a week’s pay”. The “Remedies” provision in regulation 18 follows, and is (*mutatis mutandis*) essentially identical to, regulation 30 of the Working Time Regulations.
23. Since these Regulations are essentially similar to the Working Time Regulations, it may be wondered what point there is in referring to them. Mr Jeans’ point was that both sets of Regulations (and also the Sea-fishermen Regulations) show that Parliament is well capable of spelling out the precise measure of a week’s holiday pay when it wants to, as well as expressly providing a remedy in an employment tribunal for any claimed shortfall in payment. But the Aviation Regulations relating to the leave entitlements of crew members of civil aviation aircraft are in this respect different and reflect the enactment of a different statutory scheme. I come at last to these Regulations.

*The Civil Aviation (Working Time) Regulations 2004*

24. The Aviation Directive was implemented in the United Kingdom so as to provide for workers in the air transport industry by the Aviation Regulations. They apply to “persons employed as crew members on board a civil aircraft for the purposes of public transport”, including of course the pilots. The key regulation is regulation 4, headed “Entitlement to annual leave”. It provides:
  - “4.—(1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in respect of a period of employment of less than one year.
  - (2) Leave to which a crew member is entitled under this regulation –
    - (a) may be taken in instalments;
    - (b) may not be replaced by a payment in lieu, except where the crew member’s employment has terminated.”
25. There is no provision in regulation 4 or elsewhere in the Aviation Regulations specifying how the pay element of the “paid annual leave” is to be calculated; or even

that it must be paid at any minimum level. They are wholly silent as to the level of holiday pay. In particular, there is no incorporation of sections 221 to 224 of the ERA. I need refer to just one other provision of the Regulations, regulation 18, headed “Remedies”, which provides so far as material:

“18.--(1) A crew member may present a complaint to an employment tribunal that his employer has refused to permit him to exercise any right he has under regulation 4 ....

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented –

(a) before the end of the period of three months beginning with the date on which it is alleged –

(i) that the exercise of the right should have been permitted (or in the case of a rest period or annual leave extending over more than one day, the date on which it should have been permitted to begin), or

(ii) the payment under regulation 4(2)(b) should have been made;

as the case may be; or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where an employment tribunal finds a complaint under regulation 4 ... 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 crew member.

(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 crew member to exercise his right; and

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

26. Mr Jeans’ point about regulation 18 was that, consistently with the lack of anything in the Aviation Regulations providing for a minimum level of holiday pay, there is no provision in it directed at entitling the crew member to present a complaint to an employment tribunal that he has been paid holiday pay at less than a particular level. This is to be contrasted with regulation 30(1)(b) of the Working Time Regulations, regulation 18(1)(b) of the Inland Waterways Regulations and the equivalent provision in the Sea-fishermen Regulations. Mr Jeans disclaimed a submission that an air transport crew member who was, for example, paid *no* holiday pay would have no

remedy under regulation 18 and he conceded that he would. But his point was that the Aviation Regulations impose no minimum level of holiday pay that an employer must pay. The pilots' claims are for "compensation in respect of unpaid holiday pay pursuant to Regulation 18" of the Aviation Regulations.

*Non-fishing seafarers*

27. The omission of the Aviation Regulations to include any express provision for the determination of the amount of the holiday pay to be paid to air crew was obviously not an oversight. The Regulations followed in this respect the like form of The Merchant Shipping (Hours of Work) Regulations 2002 (SI 2002/2125) ("the non-fishing seafarer Regulations"), the relevant provisions of regulation 12 of which are identical to those of regulation 4 of the Aviation Regulations. The story behind those Regulations, which relate to workers in the non-fishing seafaring industry (and who were excluded from the Working Time Regulations by regulation 18(1)(a)), is similar to that of the Aviation Regulations. In the case of non-fishing seafarers, there was also a Community-wide European Agreement (dated 30 September 1998) on the organisation of their working time. That agreement was implemented by Council Directive 1999/63/EC dated 21 June 1999, article 3 of which was in the like form as article 3 of the later Aviation Directive. The June 2000 Directive amending the Working Time Directive provided, for obvious reasons, that the Working Time Directive did not apply to non-fishing seafarers: they were already catered for by their own Directive.
28. The non-fishing seafarer Regulations include no provision akin to the "Remedies" provision in regulation 30 of the Working Time Regulations, regulation 18 of the Inland Waterways Regulations or even to regulation 18 of the Aviation Regulations. Instead, regulation 20 provides, so far as material:

"(4) Where there is a contravention of regulation 12 the employer of the seafarer shall be guilty of an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale.

(5) In any proceedings for an offence under these Regulations it shall be a defence for the defendant to show that all reasonable steps had been taken by him to ensure compliance with the Regulations."

Whilst I can see how a non-fishing seafarer's employer might expect prosecution for refusing to allow an employee to take his minimum "paid annual leave of at least four weeks" in any leave year, it is more difficult to recognise that the Regulations have in mind that it could be a separate criminal offence for him to give the employee four weeks paid leave per year but at a level of pay that was, say, 10% lower than the level of pay he receives when at work. The Regulations do not spell out what level of holiday pay is to be paid: they merely require that the leave shall be *paid* leave. The criminal law is required to be certain and employers are entitled to know what they must or must not do to avoid prosecution. We are not concerned with the non-fishing seafarer Regulations. But the Aviation Regulations tell us as much as they do – which is nothing – about how much holiday pay is required to be paid.

*National implementation of the Aviation Directive: preliminary observations*

29. The pilots enjoy a *contractual* right under their service agreements to a more generous annual leave allowance than the minimum prescribed by the Aviation Regulations and to pay for each week of leave at the level of their basic pay. These arrangements were the subject of collective agreements between their union and BA. They are set out in a Memorandum of Agreement and in a so-called Bidline scheduling system, from the details of which both counsel (with what appeared to be some relief) chose to spare us.
30. I have cited: (i) the provisions of clause 3 of the Aviation Agreement, providing for the right of mobile staff in civil aviation 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”; (ii) recital (12) of the Aviation Directive, leaving member states free “in accordance with national law and practice” to define those terms that are not specifically defined in the Aviation Agreement -- and “paid annual leave” in its clause 3 was *not* so defined; and (iii) article 3 of the Aviation Directive, providing that, in order to implement it, member states “must bring into force laws, regulations and administrative provisions not later than 1 December 2003 or shall ensure that by that date at the latest, management and labour have introduced the necessary measures by agreement.”
31. The only implementation measure taken by the United Kingdom has been the enactment of the Aviation Regulations. Mr Jeans did not contend that the collective agreements under which BA’s pilots enjoy their leave and holiday pay arrangements amount to the type of agreements between management and labour referred to in article 3 of the Aviation Directive. The employment tribunal’s findings as to that were that in the United Kingdom there is no applicable industry wide collective agreement covering such matters. They found that, whilst BA and many other major airlines recognise trade unions and conduct collective bargaining with the recognised unions, not all airlines do: “of some 50 to 60 UK civil aviation employers 28 recognise pilots unions for collective bargaining purposes” (paragraph 34). They did, however, also find that whilst the elements of pilots’ pay packages are structured differently from airline to airline, “it would appear that” (which I read as a finding) “where Flying Pay and remuneration based on time away from base are separate to basic pay, such elements are not included in computation for holiday pay at any UK airlines.” They found that the calculation of pilots’ holiday pay was “not high on the agenda of the European Cockpit Association” in the negotiation of the Aviation Agreement. They found there was no discussion as to the calculation of holiday pay in the consultation process leading to the promulgation of the Aviation Regulations. They found that there was no evidence that BA’s pilots were failing to take their holidays, “and the consensus was that they did.”

*The decision of the Employment Tribunal*

32. The employment tribunal expressed their conclusions on the preliminary issue in paragraphs 56 to 75 of their judgment. They said the United Kingdom had implemented the Aviation Directive not by ensuring the making of agreements between management and labour, but by the Aviation Regulations. The Regulations were, however, silent as to the measure of the pay element of “paid annual leave.” There was, they said, no national practice governing the matter. They were clear (nor was the contrary argued) that regulation 16 of the Working Time Regulations did not fill the gap left by the Aviation Regulations so as to enable the pilots to have recourse

to sections 221 to 224 of the ERA. That was because regulation 18(2)(b) of the same Regulations provided expressly that regulation 16 did not apply to pilots.

33. Nevertheless the employment tribunal accepted the pilots' submission that the "paid" in "paid annual leave" in regulation 4 of the Aviation Regulations carried the ordinary, natural meaning of "an amount comparable to the contractual pay received when working". They found that interpretation to be in line with the Community law interpretation of "paid annual leave" by the ECJ in a trio of referred cases (*Robinson-Steele v. R.D. Retail Services Ltd* [2006] ICR 932). They held that, although the pilots could place no reliance on regulation 16 of the Working Time Regulations, that inability presented no obstacle to their invocation of sections 221 to 224 of the ERA for the purposes of determining their holiday pay. Those sections represented national legislation defining "a week's pay" for a myriad of purposes; and:

"74 ... the national legislation and practice of determining a week's pay, and therefore 4 weeks' pay during periods of annual leave is that set out in sections 221 – 224 ERA 1996 which entitles the [pilots] to receive during such periods of leave remuneration comparable to periods of work."

34. Their decision appears, therefore, to have been that sections 221 to 224 of the ERA amount to: (i) "national legislation and/or practice" for the purposes of clause 3 of the Aviation Agreement; alternatively, (ii) "national law and practice" for the purposes of recital (12) to the Aviation Directive; alternatively, (iii) "laws, regulations and administrative provisions" for the purposes of article 3 of that Directive.

#### *The decision of the Employment Appeal Tribunal*

35. The reasoning of the Employment Appeal Tribunal, in a judgment written by Keith J, was as follows. The starting point in the consideration of the meaning of "paid annual leave" in regulation 4 of the Aviation Regulations was clause 3 of the Aviation Agreement. That provided that the conditions for the grant of paid annual leave -- which they considered must include the calculation of holiday pay -- were to be laid down by "national legislation and/or practice", with "national" qualifying both "legislation" and "practice". There was no applicable "national practice". What had happened was that the Aviation Agreement and Directive were implemented by the Aviation Regulations, which included no formula for calculating the holiday pay. It therefore fell to the employment tribunal to decide what "paid annual leave" in regulation 4 of the Aviation Regulations meant. That interpretation must be in accordance with the meaning of "paid annual leave" in article 7 of the Working Time Directive because clause 3 of the Aviation Agreement reproduced the same language. Whilst the tribunal accepted that the reason why article 7 required workers to be paid when on leave was to ensure that they took the leave to which they were entitled, that did not mean that their holiday pay should simply be at a level no lower than the amount necessary to avoid discouraging them from taking their annual leave at all. That would be an impossible measure to apply. The ECJ in *Robinson-Steele* held that the holiday pay to which workers were entitled under article 7 of the Working Time Directive had to be such as to put workers, during leave, in a position as regards remuneration that was comparable to the way they were remunerated when at work. The only way in which BA's pilots could be put in such a position would be if their holiday pay is calculated by reference to the flying pay and TAFB supplements they receive when working, in addition to basic rate salary. The conclusion was that the

formula in sections 221 to 224 (in particular 224) of the ERA was applicable for calculating the pilots' holiday pay. That was not because it was directly applicable: in the light of regulation 18 of the Working Time Regulations, it was not. But:

“51 ... It is nevertheless applicable because it is a formula used throughout industry in the United Kingdom (even if it does not directly apply to mobile staff in civil aviation) and represents a convenient and well-recognised method of calculating annual leave pay in a way which does not infringe the principle of Community law which requires annual leave pay to be comparable, in terms of remuneration, with what such staff are paid when they are working normally.”

*The submissions on this appeal*

36. Mr Jeans submitted that the question is whether or not BA's pilots have received “paid annual leave of at least four weeks”. Those are the critical words in regulation 4 of the Aviation Regulations upon which the claims depend. There is no dispute that they have received annual leave of at least four weeks. There is no dispute that they have been paid during that leave at a weekly rate at the level of their basic pay. Ms Williams would, in 2006, have received approximately £2,000 a week. That is pay at a real level and so it cannot be said that the pilots have not received the requisite “paid annual leave”.
37. As to whether the pay should be at a level reflecting the flying supplement and TAFB allowance the pilots receive when at work, Mr Jeans said there is no warrant for it. By contrast with the Working Time Regulations and (for example) the Inland Waterways Regulations, the Aviation Regulations provide for no minimum level of holiday pay, nor do they require it to be calculated by reference to the measure of pay received by the pilots when at work. A comparison of the Aviation Regulations and the non-fishing seafarer Regulations on the one hand with the Working Time Regulations on the other shows that the focus of the first two sets of regulations, unlike that of the third, is not on the amount of holiday pay at all. The omission of any such provision in both sets of Regulations was obviously deliberate. The leave is required to be *paid* leave so that the employees will be able to afford to take it; and it is no doubt a proper inference that the pay must not be so nugatory as to frustrate the health and well-being objective of requiring it to be taken. The explanation as to why (in contrast with the provisions of the Working Time Regulations) no provisions as to the level of pay were included is that the working time provisions for air transport workers and non-fishing seafarers were both the subject of Community-wide collective agreements, leading in turn to separate Directives respectively applying to them and thence to their implementation nationally by the Aviation Regulations and the non-fishing seafarer Regulations. The inference is that when it implemented the Directives by national regulations, Parliament chose to leave it to the industries themselves, both unionised, to negotiate matters such as holiday pay. That is what happened in relation to the pilots. BALPA was content with the arrangements so negotiated following the Aviation Agreement: it only supported the pilots' case after UNITE had identified the point.
38. All this, said Mr Jeans, is apparent from the terms of regulation 4 of the Aviation Regulations. The remedies provision in regulation 18 is not designed to cater for a claim in respect of a shortfall in the amount of holiday pay. Mr Jeans accepted that if either no, or only token or derisory, holiday pay were paid, the employee would have

a claim for compensation under regulation 18. That was because his composite right to “paid annual leave” could fairly be regarded as having been denied. But the regulation did not confer any right to complain of the underpayment of a specific amount of holiday pay.

39. The situation applying to the air transport and non-fishing seafarer industries is, Mr Jeans said, in this respect in contrast with that applying to workers in other fields to which the Working Time Regulations apply. Those Regulations incorporate express provisions as to the level of holiday pay to which a worker is entitled and include an express provision entitling him to complain to an employment tribunal if he does not receive his entitlement. The calculation of his entitlement is achieved by the express adoption of sections 221 to 224 of the ERA. But regulation 18(2) provides expressly that they do not apply to civil aviation workers to which the Aviation Agreement and Directive apply. The conclusions of the employment tribunal and the appeal tribunal that those provisions do apply to the Aviation Regulations were wrong.
40. Does Community law require a different interpretation of “paid annual leave” in regulation 4? Mr Jeans said no. Central to this issue were the decisions of the ECJ in *Robinson-Steele v. R.D. Retail Services Ltd* [2006] ICR 932; and, recently, in *Stringer and others v. HM Revenue and Customs* [2009] IRLR 214. Mr Jeans disputed that they show that “paid annual leave” in article 7.1 of the Working Time Directive and clause 3 of the Aviation Agreement means pay that is comparable to pay received during periods of work or, therefore, that the decisions inform the interpretation of the same phrase in regulation 4.
41. But even if those decisions *do* support that meaning of article 7.1 and clause 3, Mr Jeans submitted that it takes the pilots nowhere. That is because both article 7.1 and clause 3 leave it to the member states to determine the method of calculation of leave pay by “national legislation and/or practice”; and article 3 of the Aviation Directive talks about doing so by “laws, regulations and administrative provisions ... or [by agreement between] management and labour....” As regards airline pilots, however, nothing to that end has been done beyond the enactment of the Aviation Regulations. There is thus no available formula by reference to which the pilots can say that the obligation under regulation 4 of those Regulations has been breached and so they cannot make their case. Mr Jeans submitted that this interpretation of article 7.1 – and the like aviation provisions – finds support in this court’s decision in *Bamsey and others v. Albon Engineering & Manufacturing plc* [2004] IRLR 457, which concerned an issue as to the level of holiday pay to which an employee was entitled under the Working Time Regulations. Mr Jeans’ point is made in Auld LJ’s judgment, with which May and Jacob L.JJ agreed:

“35. The clear purpose of the [Working Time] Directive, as I have said more than once, is to encourage a climate of protection for the working environment and health of workers. So much is clear from its Recitals, some of which I have mentioned. And Article 7, in its provision for Member States to ensure that workers are entitled to at least four weeks’ annual leave, clearly has their health in mind. But I do not see upon what basis, it can be said that it requires Member States, in its implementation, to ensure that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn, and did earn, while at work.

36. First, Article 7 expressly qualifies its declaration of workers' entitlement to at least four weeks' paid annual leave to the qualification that such paid leave is to be 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'. *Such conditions necessarily include definition for the basis upon which payment is calculated for such period of leave.*

37. Second, and consistently with that qualification, Article 7 is silent as to the level of payment for annual leave to which a worker is entitled. It does not, for example, provide that payment during such leave should equate with a normal week's pay when the worker was at work, or that it should be calculated by reference to 'working time' as defined in Article 2.1. Thus, the European Union has laid down the principle of an entitlement of four weeks' paid annual leave, but has left the conditions of entitlement for implementation by Member states. In leaving Member States that margin of appreciation, it is not for domestic courts to venture a means of calculation that would be contrary to the clear terms of such implementation effected within the margin of discretion allowed by the Directive." (Emphasis supplied)

42. Miss McNeill made six submissions in response. First, that the natural meaning of the words in regulation 4 of the Aviation Regulations entitling crew members to "paid annual leave" is that their pay on leave must be comparable to their pay at work. She referred to the structure of the pilots' remuneration package as explained in the Memorandum of Agreement and said that they can expect each month when working to receive flying pay supplements as well as a TAFB allowance. These are payments to which they are contractually entitled in the ordinary course of their jobs and are paid on a regular basis. She said the simple point is this. Looking objectively at the expression "paid annual leave" in regulation 4, how would an ordinary crew member be expected to answer the question as to what it meant? She said his answer would be that it means pay equivalent to what he is paid when at work. It involves putting him when on holiday in a position, as regards pay, comparable or equivalent to his position when working.
43. Miss McNeill referred in support to *S & U Stores Ltd v. Wilkes* [1974] IRLR 283. The issue there was as to the determination of an employee's "average weekly rate of remuneration" in a particular period of 12 weeks for the purpose of calculating a redundancy payment. Sir John Donaldson, giving the judgment of the National Industrial Relations Court, identified at paragraph 20 two categories of payment (categories (1) and (3)) that would ordinarily be regarded as part of an employee's weekly remuneration; and one type of benefit (category (2)) that would not. Flying pay, Miss McNeill said, would fall within category (1) and the TAFB allowance would fall within category (3). Miss McNeill cited this case as a good guide as to what "pay" means at the domestic level. I accept that it is and do not question that the flying pay supplement and the taxable TAFB allowance are part of a pilot's pay. I do not, however, follow what help the case gives us as to the meaning of "paid annual leave" in regulation 4. Miss McNeill also referred us to *British Airways (European Operations at Gatwick) Ltd v. Moore and Botterill* [2000] IRLR 296, which she said provided a helpful analogy for present purposes. With respect, I regard it as concerning issues so remote as to afford us no help. More generally, Miss McNeill said that Mr Jeans' submission that the words "paid annual leave" are met so long as

*some* payment is made pays no regard to the ordinary interpretation of what “pay” the pilots receive for their work; and that his submission that any payment will do so long as it is not so modest as to destroy the worker’s right to take his leave – because he will not be able to afford it -- is potentially unworkable.

44. Miss McNeill’s second submission was that the suggested ordinary meaning of “paid annual leave” in regulation 4 is in line with the Community law meaning of that phrase in article 7.1 of the Working Time Directive. It followed, therefore, that the domestic law must be interpreted accordingly. For this she relied on the decisions of the ECJ in *Robinson-Steele* and *Stringer*.
45. The issue in *Robinson-Steele* arose under regulation 16 of the Working Time Regulations. The three joined cases were ones in which the employees’ service agreements provided that their holiday pay was, or was deemed to be, incorporated into their hourly or daily rates of pay. The issue for the ECJ was whether such so-called “rolled-up holiday pay” was consistent with the requirement of article 7.1 of the Working Time Directive that all workers were entitled to paid annual leave of at least four weeks. The issue was not as to the computation of holiday pay. The issue in *Stringer* was whether article 7.2 of the Working Time Directive precluded national legislation or practices providing that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken was to be paid where the worker had been on sick leave for the whole or part of the leave year. Again, the issue was not as to whether holiday pay must be at a level comparable to pay during periods of work. Mr Jeans’ submission was that because of the different nature of the issues each case was deciding, neither was authority for the proposition for which Miss McNeill cited them.
46. I agree, however, with Miss McNeill that these decisions do support the proposition that the pay element of “paid annual leave” in article 7.1 of the Working Time Directive means “normal” pay, or pay at a level “comparable” to that which a worker earns when working. Mr Jeans is right that neither case directly raised that issue for determination. But the ECJ painted its principles with a broad brush and in *Stringer* it adopted for the purposes of deciding the issue there before it the like principles it had earlier explained in *Robinson-Steele* for deciding the different issue which was then before it. I need cite no more than three paragraphs from the judgment in *Stringer*:

“58. ... according to the case law of the Court, the expression ‘paid annual leave’ in Article 7(1) of [the Working Time Directive] 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 *Robinson-Steele*, paragraph 50). ...

60. According to the case law of the Court, [the Working Time 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 (see *Robinson-Steele*, paragraph 58).

61. It follows that, with regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be

calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship. It follows that *the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave*, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship.” (Emphasis supplied)

In my view those passages support Miss McNeill’s submission as to the Community law interpretation of “paid annual leave” in article 7.1. I shall have to return to the question of whether it follows that “paid annual leave” in regulation 4 of the Aviation Regulations must be interpreted in the like way.

47. Miss McNeill’s third submission was that the scope of this Community law concept of “paid annual leave” – requiring normality and comparability -- was a single and autonomous composite concept which may not be unilaterally determined or re-defined by member states. It is at most open to member states to determine how such normality and comparability is to be achieved. That might mean that, on identical facts, different states will arrive at different pay figures, but such differences would be within the margin of appreciation. If, however, only basic pay is paid to pilots by way of holiday pay, two key elements of their normal remuneration are not being paid.
48. In support of the principle underlying this submission Miss McNeill relied on the decisions of the ECJ in *Landeshauptstadt Kiel v. Jaeger* [2004] ICR 1528, at paragraphs 58 to 63; and *Dellas and others v. Premier Ministre and another* [2006] IRLR 225, at paragraphs 44 to 45. Those decisions were to the effect that “working time” and “rest period” were Community concepts that it is not open to domestic law to re-interpret. If Miss McNeill is right that the payment element of the composite concept of “paid annual leave” is a like Community concept, it may be that a like principle applies. The contrary argument, as this court held in *Bamsey*, is that the level of such payment is left to member states. Miss McNeill’s submission was that *Bamsey* may need to be reconsidered in the light of *Robinson-Steele* and *Stringer*.
49. Ms McNeill’s fourth and fifth submissions were closely linked. The fourth was that the United Kingdom was obliged by the Aviation Agreement and Directive to provide paid annual leave for crew members on the basis of conditions for entitlement laid down by “national legislation and/or practice” (clause 3 of the Aviation Agreement, matching article 7.1 of the Working Time Directive). The fifth submission was that the relevant national legislation and/or practice for present purposes is the formula in sections 221 to 224 of the ERA; alternatively, it is the national legislation and/or practice permitting tribunals to assess compensation so as to ensure that the right to paid annual leave reflecting the requirements of normality and comparability is respected.
50. In developing these points, Miss McNeill said the United Kingdom was not permitted to leave the quantum of holiday pay to employer specific individual contracts, whether or not they were collectively agreed. There had been no industry wide collective agreement in the present case and so it cannot be said that the BA holiday pay arrangements reflect national practice. On the other hand, by the time of the Aviation Agreement and Directive the role played by sections 221 to 224 in the operation of the Working Time Regulations was well-known and so those sections could legitimately be regarded as just the type of national legislation or national

practice contemplated by clause 3 of the Aviation Agreement. Alternatively, if those sections do not provide the answer, it is necessary to find some other method sufficient to achieve normality or comparability. To that end, an employment tribunal must be free to fashion its own method of determining comparability when faced with a claim of the present sort under regulation 18 of the Aviation Regulations. This last point was the subject of the pilots' cross-appeal, for which Miss McNeill sought permission and which we gave.

51. Miss McNeill's sixth submission was that the reliance placed on the alleged inadequacy of regulation 18 of the Aviation Regulations to meet a claim for an underpayment of holiday pay was misplaced. She said that its language was sufficient to found such a claim. The remedy is for not being given "paid annual leave", which must include a claim for underpayment in respect of such leave. Regulation 18 entitles the tribunal to award compensation for a breach of the obligation to allow the worker his "paid annual leave". To say that it does not enable a claim to be made in an underpayment case is to ignore a central element of the right that it is there to protect.

#### *Discussion and conclusion*

52. Mr Jeans and Miss McNeill both opened their submissions by focusing on the meaning of "paid annual leave" in regulation 4 of the Aviation Regulations. They were right to do so because that is the provision upon which the pilots have brought their claims. The rival submissions were, from Mr Jeans, that the phrase carries no implied meaning that the pay element of "paid annual leave" is required to be of a defined minimum level, let alone intended, by some undefined formula, to approximate to the level of pay ordinarily earned by pilots when working. He said that it is implicit in regulation 4 that the level of holiday pay is intended to be determined by the pilots' service agreements, the industry being a unionised one in which it could be and was presumed that such a matter would be covered by collective agreements. Miss McNeill's submission was that the ordinary meaning of "paid annual leave" in regulation 4 requires pay at a level comparable to that which a pilot earns when working. That, she said, is how any pilot would interpret it.
53. The interpretation of regulation 4 is a question of law for the court. It does not fall to be answered by reference to the suggested views of crew members on the flight deck of a 747. If it were otherwise, a modest number of the 2,750 respondents might have been called as witnesses to give the employment tribunal the benefit of their thoughts. I respectfully regard Miss McNeill's suggested approach to the question as misplaced. I anyway do not share her confidence as to how such crew members would answer it. Some might agree with her. Others might say it would depend on their service agreements. Others would give unpredictable answers. Others would be "don't knows".
54. Leaving aside for the moment the extent to which the interpretation of "paid annual leave" in regulation 4 might be informed by the teaching of the ECJ, I am unconvinced that the ordinary meaning of the pay element in "paid annual leave" in regulation 4 is pay measured in some way by reference to the pay that a pilot can expect to earn whilst working. If this *were* the intention of regulation 4, it is obvious that the Aviation Regulations would have gone the further distance of explaining the required calculation since there is plainly a variety of ways in which it might be done, all of which would be likely to produce different results. The legislation giving

domestic effect to Community requirements as to “paid annual leave” knows perfectly well how to spell out the calculation of holiday pay when it wants to: see the Working Time Regulations, the Inland Waterways Regulations and the Sea-fishermen Regulations. They all adopt and adapt sections 221 to 224 of the ERA for that purpose. Regulation 18(2)(b) of the Working Time Regulations, however, provides expressly that sections 221 to 224 are to have no application to the calculation of the holiday pay of workers to whom the Aviation Agreement and Directive apply: and, consistently with that, the Aviation Regulations do not incorporate them. That rules out a reference to them for an explanation of how regulation 4 is supposed to work in practice. Nor did Miss McNeill suggest that they were impliedly incorporated into the Aviation Regulations.

55. If, as I consider, any thought that sections 221 to 224 are somehow impliedly incorporated into regulation 4 must be rejected, the proposition that regulation 4 impliedly requires the pay element of “paid annual leave” to be calculated by reference to pay earned by the pilots when working appears to me to collapse. No other formula for so calculating their holiday pay has been suggested; and, absent some such formula, the notion that this is the measure impliedly intended by regulation 4 becomes hopeless. In my judgment, approaching regulation 4 as a matter of domestic interpretation, Miss McNeill’s submission is wrong and I would reject it.
56. Miss McNeill says, however, that her suggested interpretation of regulation 4 is in line with Community law teaching on what “paid annual leave” means. She said, and I agree, that the decisions in *Robinson-Steele* and *Stringer* show that the pay element in “paid annual leave” in article 7.1 of the Working Time Directive means pay that is “normal” or “comparable” in relation to pay earned when working. Clause 3 of the Aviation Agreement uses the same phrase – “paid annual leave”. That must bear the like meaning (and I again agree) and the function of regulation 4 is to implement at national level the Aviation Directive, which implemented the Aviation Agreement. Miss McNeill (in agreement with Mr Jeans) disclaimed any suggestion that article 7 or its equivalent in the Aviation Agreement and/or Directive is directly effective. But she said that “paid annual leave” – bearing the meaning aforesaid -- is an autonomous Community concept from which it is not open to member states to depart. It follows that regulation 4 must be interpreted in line with that concept. There may, she accepts, be different ways of giving practical effect to the concept. But no member state may purport to change it: and any conclusion that the pilots’ regulation 4 rights will be satisfied by holiday pay measured merely by reference to the level of their basic pay necessitates an interpretation of regulation 4 reflecting that the United Kingdom has unlawfully changed the Community concept. This court must, therefore, interpret “paid annual leave” in regulation 4 in line with its meaning according to Community law.
57. Whilst I agree with Miss McNeill that the ECJ decisions in *Robinson-Steele* and *Stringer* show that “paid annual leave” in article 7.1 of the Working Time Directive (and in article 3 of the Aviation Agreement) requires pay which is “normal” pay or which is “comparable” to pay earned during periods of work, I do not agree with the conclusion that Miss McNeill seeks to draw from this. In particular, I do not accept that the ECJ decisions relevantly inform the interpretation of regulation 4 in a way sufficient for the pilots’ purposes.

58. The problem with Miss McNeill's contrary argument is this. First, neither article 7.1 nor clause 3 is directly effective. Secondly, in saying what it did in the two decisions about the level of holiday pay, the ECJ was doing no more than stating a broad, general principle. It was not attempting to explain how the principle is intended to work in practice throughout the Community. That would have been to usurp the independent right of each member state so to decide by the adoption of its own "national legislation and/or practice". In making such decisions, the member states must have regard to the principles of "normality" and "comparability" espoused by the ECJ. But there is no one way to implement them; and the member states enjoy a margin of appreciation as to how they do so. This is what Auld LJ explained in paragraph 36 in his judgment in *Bamsey*. Miss McNeill suggested that *Bamsey* may have to be reconsidered in the light of *Robinson-Steele* and *Stringer*. I do not understand why. *Bamsey* reflected an orthodox interpretation of article 7.1 of the Working Time Directive; and nothing in the two ECJ cases undermines it.
59. If, therefore, regulation 4 is to be interpreted in the light of the guidance of "paid annual leave" provided in *Robinson-Steele* and *Stringer*, it must be so interpreted in line with the full sense of that guidance. Spelling it out, the ECJ was saying no more than that "paid annual leave" means pay calculated at the level of "normal" pay, or at a level "comparable" to "normal" pay, with the precise calculation applicable in any case being exclusively a matter for the determination of the individual member states by "national legislation and/or practice". If one so interprets "paid annual leave" in regulation 4, the pilots' case collapses: because no national legislation or practice has determined the level of their holiday pay. There is thus no logical basis on which the pilots can demonstrate a breach of the statutory obligation imposed by regulation 4.
60. Miss McNeill did not of course accept this consequence. Her submission was that the domestic implementation of the Aviation Agreement and Directive by the Aviation Regulations *has* provided a formula for fixing the level of pay to which pilots are entitled under regulation 4: it has done so by "national legislation and/or practice." She says that that legislation and/or practice -- and she put it both ways -- is to be found in sections 221 to 224 of the ERA. That, she said, is longstanding legislation (going back to the Contracts of Employment Act 1963) which is well-recognised as meeting the need to which the pilots seek to put it. Accordingly, whilst Miss McNeill specifically did not say that sections 221 to 224 are impliedly incorporated by regulation 4, she did submit that they provide the first of two suggested alternatives for filling what she would otherwise regard as a void in the domestic implementation of the Aviation Agreement and Directive.
61. Had Miss McNeill not successfully advanced that submission to both tribunals below, I think I would have regarded it as unarguable. As far as I am concerned, the magic of her advocacy in advancing this point has run its course. In my judgment the argument is wrong and, with respect, obviously so. As I have said, sections 221 to 224 have nothing to do with fixing the level of pilots' holiday pay. They have plenty to do with other employment law exercises requiring the determination of "a week's pay", but not that one. There is therefore no foundation for regarding them as serving the purpose for which the pilots invoke them. They can only serve to fix the level of holiday pay of a worker if they have been expressly adopted and adapted for that purpose. The Working Time Regulations *did* choose so to adopt and adapt them. So did the Inland Waterways and Sea-fishing Regulations. But Regulation 18(2)(b) of the

Working Time Regulations provided expressly that they have no application to workers to whom the Aviation Agreement and Directive apply; and the Aviation Regulations (like the non-fishing seafarer Regulations) studiously declined to adopt them. In those circumstances it is impossible to conclude that they nevertheless do apply for the purpose of fixing the level of pilots' holiday pay.

62. As for the tribunals below, the employment tribunal's invocation of sections 221 to 224 rested upon the consideration that they represented national legislation defining "a week's pay" for a myriad of purposes; and therefore it followed that they applied for fixing pilots' holiday pay. The purposes so referred to were, however, unrelated and irrelevant and did not include such fixing. The tribunal's conclusion that they could or should be regarded as doing so was, with respect, an unreasoned *non sequitur*. The appeal tribunal's conclusion to the same effect was flawed by a like error. They held sections 221 to 224 of the ERA to be applicable because, even though they did not apply to mobile staff in civil aviation, they provided a convenient way of determining their holiday pay in a way that did not infringe the Community principle of normality and comparability. The essence of the reasoning of both tribunals amounted to no more than that sections 221 to 224 apply because they are there. In my judgment, their conclusions were wrong.
63. Miss McNeill's last proposition was that, if she was wrong on sections 221 to 224, then it must be for the employment tribunal to fashion a mechanism for determining the level of pilots' holiday pay, by reference to the Community-wide principle of normality and comparability. I respectfully regard this as mistaken as well. The pilots cannot succeed in their claims unless they can point to some "national law and/or practice" providing for the claimed level of their holiday pay, which is the extent of their entitlement under Community law. For reasons given, they cannot. Their arguments having in these respects failed, there is no residual jurisprudential basis upon which an employment tribunal can set about determining that they have been entitled to holiday pay at a level exceeding that provided by their service agreements. It is no part of an employment tribunal's function to fill any gap in the domestic implementation of the Aviation Agreement and Directive.
64. In my judgment, it follows that the pilots are unable to prove that there has been any breach of regulation 4. I also agree with Mr Jeans that, consistently with this conclusion, regulation 18 is anyway inapt to cater for a claim that the pilot has not been paid as much holiday pay as he claims he should have been. It was plainly not drafted with the thought that the Aviation Regulations could give rise to such claims. I am not, of course, suggesting that, were BA to underpay its pilots their contractual holiday pay, they would have no remedy.
65. I add this. The statutory obligation under regulation 4 is to provide "paid annual leave". Whilst I have said what I have about that, I do not say, nor did Mr Jeans suggest, that it imposes no payment obligation on an airline at all. An airline employer which, for example, offered an employee pilot either unpaid annual leave or annual leave paid at only a token or derisory amount could, I consider, properly be the subject of complaint that it had failed to meet the statutory purpose of regulation 4, which must at least be to provide annual leave at a level of pay which will enable the worker actually to take the leave. In a case in which it could be shown that the employer had failed to discharge this obligation, I consider that the employee would have a claim under regulation 18(1); and, were the claim to succeed, he would be

entitled to compensation under regulation 18(3). There is no question of any such claim in the present case.

66. I further add this. On the basis, as I have held, that (subject to the qualification just mentioned) regulation 4 of the Aviation Regulations imposes no measurable level of holiday pay, but tacitly leaves it to employer and employee to agree such level, it can be said that the United Kingdom's method of implementation of the Aviation Agreement and Directive by the Aviation Regulations left a partial void in what was required of it under Community law. Mr Jeans did not submit that there is, although he accepted that there might be. His primary case was that it was legitimate for the domestic implementation of the Aviation Agreement and Directive to proceed on the assumption that matters such as the level of holiday pay were or would be the subject of collective agreements. But if there is a void, the pilots' claims simply disappear into it. Miss McNeill did not suggest that there is a void. That is not surprising, since it would have meant the end of the pilots' case. In that event perhaps their only alternative might be a claim against the United Kingdom government for breach of its obligation properly to implement the Aviation Agreement and Directive (cf *Francovich and Bonfazi v. Italy* [1991] ECR I-5357; [1993] 2 CMLR 66).
67. I propose to say no more about whether there is a void, not least because the United Kingdom government was not represented before us. It is sufficient to say that, for reasons given, I conclude that the pilots are unable to make good their case that they are entitled to compensation under regulation 18 of the Aviation Regulations in respect of unpaid holiday pay. They cannot prove that, under regulation 4, BA owed them a statutory obligation to pay them more holiday pay than is provided for by their service agreements.
68. Miss McNeill submitted that, were we to conclude that there is a lack of clarity in the requirements of clause 3 of the Aviation Agreement as implemented by the Aviation Directive, we should make a reference on the question to the ECJ. I do not consider that a reference is necessary. The appeal turns on the interpretation of regulation 4 of the Aviation Regulations. That is a matter for the domestic court and in my judgment its interpretation is clear and means that the appeal must succeed.

#### *Disposition*

69. I would allow BA's appeal, dismiss the pilots' cross-appeal, set aside the decisions of the employment tribunal and appeal tribunal and dismiss the pilots' claims. BA asks us, in answer to the preliminary issue that was before the employment tribunal, to declare that, in the relevant year, the pilots were accorded four weeks' paid holiday for the purposes of regulation 4. In the light of my observations in paragraphs [66] and [67], I would not make that declaration, since it might be regarded as amounting to a determination of an issue that this court has not had to decide. I would only make a declaration to the effect that, in the events that have happened, the claimant pilots are unable to prove a breach by BA of its obligation under regulation 4.

#### **Lord Justice Lloyd :**

70. I agree.

#### **Lord Justice Ward :**

71. I also agree.