

SUMMARY

2013/12 Average bonus and employer's contribution to pension scheme count towards calculating compensation for unused paid leave (NL)

Upon termination of his employment in 2011, the plaintiff was compensated for unused paid leave by multiplying the number of unused days of leave by his daily base salary. This was incompatible with the ECJ's ruling in Williams. The plaintiff's former employer was ordered to pay him additional compensation because it should have included his average bonus for the years from 2005 to 2010 as well as the employer's contribution to his pension scheme in its calculation of paid leave.

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Facts

The plaintiff in this case, Mr Rietdijk, was employed by a company called Compuware. His

employment lasted from 1 February 2005 until 1 May 2011. On top of his base salary and statutory 8% vacation bonus, he was paid the following bonuses:

2005

€

29,725

2006

€

55,200

2007

€

117,900

2008

€

146,246

2009

€

105,159

2010

€

176,128

In addition, Compuware paid € 9,578.84 per year into the pension scheme in which the plaintiff was enrolled.

Upon termination of the plaintiff's employment on 1 May 2011, Compuware paid him approximately € 36,000 gross as compensation for the balance of 78.58 days of paid leave that the plaintiff had not taken. This sum was calculated by multiplying 78.58 by the plaintiff's daily base salary plus 8%. The plaintiff argued that he should have been paid approximately € 59,000 more because the 78.58 days should have been multiplied by the total of his base salary + 8% + the 2010 bonus + the employer's pension contribution. This argument rested on Dutch law as construed (i) by the Supreme Court in a 1990 decision and

(ii) Directive 2003/88 as interpreted by the ECJ in 2011 in the *Williams - v - British Airways* case (C-155/10). The plaintiff brought a claim in which he demanded, *inter alia*, payment of approximately € 59,000 gross in respect of unpaid compensation for unused paid leave plus the statutory 50% penalty for late payment plus statutory interest for late payment.

Judgment

The court began by referring to paragraphs 21 and 26 of the ECJ's judgment in *Williams*, where that court had held, "*that remuneration* paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker", and that "it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative".

Based on these findings of the ECJ, the court held that the plaintiff's bonuses and Compuware's contribution to his pension scheme constituted "normal remuneration" as provided in *Williams* and that, therefore, Compuware should have included the plaintiff's average bonus and said contribution in its calculation.

The court rejected Compuware's argument that if the plaintiff had remained in its employment for the full year 2011, his bonus for that year would have been nil and that, therefore, there was no need to take the bonuses paid in previous years into account.

Given that the plaintiff's bonuses fluctuated quite strongly from year to year, the court rejected his argument that the compensation for unused paid leave should be based on his 2010 bonus. The court took the average of the bonuses paid in respect of the six years 2005-2010, namely € 105,059. Added to the said pension contribution, a total of

€114,637.64 had wrongly not been taken into account. Compuware was therefore ordered to pay the plaintiff € 114,637.64, i.e. 261 days per year = € 439.22 per day x 78.38 days = €

34,514.27 gross (plus a 10% penalty plus statutory interest).

The judgment has not been appealed.

Commentary

This judgment is not ground-breaking inasmuch as it tells us that all elements of remuneration count towards calculating the value of paid leave. The Supreme Court had already decided this in 1990 (NJ 1990, 499). Nevertheless, the judgment is worth reporting, for a number of reasons. The first is that many Dutch employers (still) believe that the value of paid leave is based exclusively on base salary plus 8%. In fact, some collective agreements still seem to proceed from this erroneous assumption. The judgment is also interesting because it raises some technical questions.

Article 7(1) of Directive 2003/86 entitles workers to “paid” annual leave without defining the concept of pay. It is logical to look to the definition provided in Article 157(2) TFEU - as the Advocate-General does in §69 of her opinion in *Williams*. This defines ‘pay’ (in the context of equal treatment of men and women) as “the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer”. The ECJ follows the Advocate-General’s reasoning but uses slightly different wording. According to the ECJ, payment in respect of annual leave must correspond to the worker’s ‘normal remuneration’. As the ECJ had already held in *Robinson-Steele* (C- 131/04) and *Schultz-Hoff* (C-350/06), the purpose of the requirement of payment for leave is “to put the worker, during his or her leave, in a position which is, as regards remuneration, comparable to periods of work” (*Williams* § 19). In other words, the basis for Mr Rietdijk’s compensation for unused paid leave should have been what he would ‘normally’ have earned had his employment not terminated. Given this fact, it strikes me as not illogical that *Compucare* advanced the argument that Mr Rietdijk would not have received any bonus at all for the year 2011, had he continued to be employed for the remainder of that year. On the other hand, as the Advocate-General noted in *Williams*, the expression “normal remuneration” implies that remuneration which fluctuates at regular intervals should be levelled out to an amount representing average earnings.

Personally, if it is true that Mr Rietdijk would not have been eligible for any bonus for 2011 had he continued to be employed for the remainder of that year - a fact that the court found it unnecessary to establish - I find it somewhat unfair that he was awarded, through the back door, compensation for bonus he would not have earned. On the other hand, Mr Rietdijk could have asked the court to include all elements of his normal remuneration in the calculation of his claim, including, for example, the value of the use of a company car and the

value of accrual of paid leave during paid leave (which may sound like perpetual motion, but is not).

Another issue that was not addressed in the judgment reported above was that it is most likely Mr Rietdijk's entitlement to paid leave included leave over and above the statutory minimum (also the minimum under Directive 2003/88) of 20 days per year. The rules set out in Williams do not apply to such additional leave. It is debatable whether, if an employee's contract fails to provide rules on additional leave, the statutory rules, as construed in Williams, apply to the additional leave.

Subject: Paid leave

Parties: Rietdijk - v - Compuware

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