



Legal update — December 2017

Employment and pensions

Workers can carry over leave when they are unable to take it for reasons beyond their control



The issue of what happens if an individual has been prevented from taking holiday because they are mistakenly regarded as being self-employed rather than a worker has been considered by the European Court of Justice (ECJ) in *The Sash Window Workshop Ltd and anor v King*. In a decision which will potentially have serious ramifications for employers (particularly those in the gig economy) the ECJ has concluded that workers are entitled to carry over leave when they are unable to take it for reasons beyond their control.

The facts and on-going litigation

Mr King worked for the Sash Window Workshop Ltd as a commission-only salesman for thirteen years. In 2008 he was offered a contract of employment but he turned it down. During the time he worked he was never paid for holidays and, on termination of his contract aged 65, he submitted a claim for age discrimination and unpaid holiday pay.

At first instance the tribunal held that Mr King was a worker and was therefore entitled to bring a complaint for unpaid holiday pay, including pay for holiday not taken in previous years, claimed as a series of unlawful deductions from wages. It considered the Court of Appeal's decision in *NHS Leeds v Larner* where it was held that, where a worker's employment has terminated and he has accrued holiday from the previous leave year which he was unable to take due to sickness, then the employer must pay in lieu of the untaken leave. The tribunal concluded that as Mr King would have been refused paid leave had he asked for it, there was no difference between this and being unable to take leave due to sickness. He succeeded in his claim for unpaid holiday.

On appeal the Employment Appeal Tribunal (EAT) agreed that Mr King could claim that holiday was carried over in circumstances where he was prevented by reasons beyond his control from taking annual leave.

However, it held that the tribunal had made no findings on whether Mr King had been restricted by reasons beyond his control from taking annual leave and remitted the question back to the tribunal.

Referral to the European Court of Justice

Earlier this year the Court of Appeal referred the case to the European Court of Justice (ECJ). It asked whether an individual has to take unpaid leave before being able to prove they are entitled to pay for it under the Working Time Regulations. It also asked whether a worker who doesn't take the leave they are entitled to can carry it over when they are prevented from exercising their right to such leave. Finally it asked, if there is a right to carry over leave, was this right an indefinite right or just for a limited period (as in sickness absence cases).



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The Court's decision

The Court found that the purpose of the right to annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure. Any practice or omission of an employer that might contravene this will be incompatible with the purpose behind the right to paid annual leave.

The Court held that EU law precludes a situation in which the worker has to take his leave before establishing whether he has the right to be paid in respect of that leave. It concluded that where a worker has been unable to take leave for reasons beyond their control (namely because their employer has refused to pay for it), this right is an indefinite right. The case was

Published by
Trowers & Hamlin

Trowers & Hamlin LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

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distinguished from one in which an employee is unfit for work due to sickness with the Court concluding that "an employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences".

Implications

Employers who find that those they have always regarded as self-employed contractors actually have worker status will now potentially be faced with a significant financial liability for unpaid holiday pay. The ECJ's decision is of particular significance to the gig economy where, on a number of different occasions, the label of self-employed contractor has been found to conceal an individual's true status as a worker.

Under the Deduction from Wages (Limitation) Regulations 2014 there is a two year backstop on claims for holiday pay. However, following the decision in Sash Window Workshop where workers have been unable to take holiday the entitlement to pay in lieu arises all at once on termination so the two-year back pay limit will have no relevance. As a result employers who have failed to provide their workers with adequate facility to take paid leave may be looking at a liability for many years of untaken holiday.

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For more information please contact

Emma Burrows
Partner
t +44 (0)20 7423 8347
e eburrows@trowers.com

Nicola Ichnatowicz
Partner
t +44 (0)20 7423 8565
e nihnatowicz@trowers.com

Rebecca McGuirk
Partner
t +44 (0)121 214 8821
e rmcguirk@trowers.com

John Turnbull
Partner
t +44 (0)1392 612370
e jturnbull@trowers.com

Helen Cookson
Senior Associate
t +44 (0)161 838 2081
e hcookson@trowers.com