



Holiday pay back in the ECJ: the extent of the payment in lieu of untaken leave on termination of employment

By James Williams

Can a worker who was not being paid for his holiday during his employment recover a payment in lieu on termination for his accrued but untaken leave? On 29 March 2017 the ECJ is to hear oral submissions on this issue in *King v The Sash Window Workshop*, referred to it by the Court of Appeal. The case is likely to be particularly significant for businesses operating in the gig economy whose staff are labelled as self-employed.

Background

1. Mr King worked for The Sash Window Workshop Ltd (SWWL) from 1999 until 2012 as a salesman. He was paid entirely on commission and his contract described him as self-employed. He worked for nobody else and although he could in theory decline “leads” that were offered to him, in practice he almost never did.
2. During his engagement, Mr King took varying amounts of unpaid holiday each year but kept this to a minimum where possible given the detrimental impact on his earnings. SWWL considered him to be self-employed and not entitled to paid holiday.

3. When Mr King's contract was terminated upon his reaching 65, he made a claim in the Employment Tribunal (ET) for age discrimination. He also claimed holiday pay under three headings:
 - "Holiday Pay 1", for £518.40 relating to paid leave accrued but untaken during Mr King's final (incomplete) leave year from 1 June – 6 October 2012;
 - "Holiday Pay 2", for £17,402.83 relating to (unpaid) holiday which Mr King actually took during his previous 13 years with SWWL; and
 - "Holiday Pay 3", for £9,336.73 relating to leave to which Mr King was entitled whilst working for SWWL but did not in fact take.
4. Mr King argued that he was a "worker" for the purposes of the Employment Rights Act 1996 and the Working Time Regulations 1998.

The Employment Tribunal

5. The ET found that Mr King was a worker. Whilst he had been asked to sign a "self-employment agreement", he was providing a personal service and was sufficiently integrated into the business. Although the finding was not directly related to his entitlement to bring his claims, the ET found that Mr King was not also an employee.
6. Mr King won on his claim for age discrimination in relation to his dismissal. He also won on all three elements of his holiday pay claim. His claims for Holiday Pay 1 and 2 were treated by the ET as straightforward (since there was no factual dispute about the leave taken or sums due).
7. As regards Holiday Pay 3, the ET considered in particular the Court of Appeal decision in *NHS Leeds v Larner* [2012] IRLR 825. That case held that an employee was entitled to a payment on termination for annual leave

accrued but not taken during a period of long-term sick leave leading up to her dismissal.

8. In upholding Mr King's claim to Holiday Pay 3, the ET commented that it could see "no difference in principle" between a worker being permitted to carry over leave if unable to take paid leave due to long-term sickness, as in *Larner*, and a worker being denied paid leave by his employer.

The Employment Appeal Tribunal

9. SWWL appealed to the EAT. It did not challenge the ET finding that Mr King was a "worker", nor that he had been discriminated against on the grounds of age. It did challenge the ET decision on "Holiday Pay 3" – payment in lieu of accrued but untaken leave throughout the whole period of Mr King's engagement.
10. Mr King also brought a cross-appeal in relation to the calculation of the Vento award. This raised some points of interest (including the question of whether or not the 10% uplift in personal injury damages applies in the ET). However, these are no longer in issue and are not considered further in this summary.
11. The EAT hearing considered the ET decision in the light of two further CJEU cases decided since the ET hearing: *Lock v British Gas C-539/12*, which involved a salesman paid partly on a commission basis who had been deterred from taking leave because of the detrimental impact on earnings; and *Bollacke v K&K Klaas & Kock BV C-118/13*, which consider whether a payment in lieu should be made to the widow of a worker whose employment had ended with his death (at which point he had a large amount of untaken holiday).

12. The EAT (Simler P) indicated that a worker could claim that holiday entitlement is carried over into the next year of annual leave and/or until termination (for a payment in lieu of that untaken leave). However, in situations other than long-term sick leave this could only be done if the worker was unable to take his holiday for “reasons beyond his control” – a phrase used by the CJEU in *Stringer v Revenue & Customs Commissioners C-520/06*. The EAT thus allowed the appeal to the extent of remitting it back to the ET for further findings of fact.

The Court of Appeal

13. Mr King appealed to the Court of Appeal against this remission, on seven different grounds. All of these were permitted to proceed and the Court of Appeal (Elias, Floyd and Vos LJ) heard the appeal in February 2016. Mr King argued in particular that the fact that his employer was not paying him for his leave meant that as a matter of law he had been denied the right to paid leave for reasons beyond his control.

14. The source of the right to paid annual leave in EU law is Article 7 of the Working Time Directive 2003/88. This gives workers the right to at least four weeks of “paid annual leave” and provides that the leave may not be replaced by a payment in lieu “except where the employment relationship is terminated”.

15. The Directive was implemented in the UK by the Working Time Regulations SI 1998/1833. The composite Article 7 right to “paid leave” was separated in the drafting into two distinct regulations:

- Reg 13 confers the right to “leave”
- Reg 16 confers the right to “pay” for the leave.

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16. Reg 30 of the Regulations deals with enforcement and remedies, but distinguishes between claims where the worker is denied the right to time off and cases where the employer fails to pay for the time off taken.
17. The central issue raised on the appeal was whether the Regulations (either as drafted or with wording read into them to ensure a conforming interpretation) provide an effective remedy for the enforcement by workers of their rights under the Directive. SWWL submitted that Mr King's right to bring an ET claim for holiday pay during his employment gave him an adequate remedy if his employer was not paying him for his leave; it also submitted that any leave could only be carried over for 18 months after the end of the leave year in which it fell due.
18. At the conclusion of the hearing, the Court of Appeal referred five questions to the CJEU. These are as follows:
1. *If there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to article 7 of Directive 2003/88, is it compatible with EU law, and in particular the principle of effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid?*
 2. *If the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it?*
 3. *If the right carries over, does it do so indefinitely or is there a limited period for exercising the carried-over right by analogy with the limitations imposed*

where the worker is unable to exercise the right to leave in the relevant leave year because of sickness?

4. If there is no statutory or contractual provision specifying a carry-over period, is the court obliged to impose a limit to the carry-over period in order to ensure that the application of the Regulations does not distort the purpose behind article 7?
5. If so, is a period of 18 months following the end of the holiday year in which the leave accrued compatible with the article 7 right?

Impact of the case

19. The case will be of significance to all those who have not been paid holiday pay by their employer – most obviously workers who have been historically categorised as self-employed. Up till now, many claims for holiday pay have only covered holidays actually taken (whether paid to some extent or not), or untaken leave in the final, incomplete leave year of the employment.
20. If the CJEU finds in Mr King's favour, claimants who were not paid holiday pay may be able to seek a payment in lieu on termination for all the leave to which they were entitled under the Regulations but did not take, stretching back to 1998 (or the beginning of their employment if later). They may also be able to wait until the termination of their employment before bringing such a claim and establishing whether or not they have the status of a worker.
21. The effect of this ruling on some businesses could be very substantial. The case could also lead to the principles relating to pay for holiday actually taken (currently set out in the EAT decision in *Fulton v Bear Scotland Ltd [2015] ICR 221*) being revisited.

22. The hearing in the European Court is on 29 March 2017. James Williams has acted for Mr King at all stages of his claim, instructed by Clare Gilroy-Scott at Goodman Derrick LLP. Prof Sir Alan Dashwood QC is also acting for Mr King in relation to proceedings in the ECJ.

James Williams

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