West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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King v Sash Windows

A new ruling from the European Court of Justice has once again cast doubt on the paid annual leave provisions of the Working Time Regulations.

In *King v Sash Windows*, Mr King was engaged (to use a neutral term) to sell double glazing on what Sash Windows insisted was a self-employed basis. He was paid commission only and not offered any paid leave. When he retired after 12 years, however, he sought to recover unpaid holiday entitlement over the whole course of his employment.

The Working Time Regulations do allow for a worker to be paid for holiday 'accrued but not taken' when the employment comes to an end - but that only applies to the holiday accrued in the current holiday year. There is nothing in the Regulations suggesting that workers can 'save up' untaken holiday over a period of years and then claim it all when they eventually leave.

Sickness absence has been treated as a special case with a series of ECJ decisions holding that an employee on long-term sickness absence could not be made to take annual leave during that absence and could transfer any unused leave into the next holiday year. This was confirmed to be the position in the UK by the Court of Appeal in the case of *NHS Leeds v Larmer*. However, it was subsequently held by the EAT in *Plumb v Duncan Print Group* held that this carry-over could not continue indefinitely. Relying on the ECJ decision in *KHS AG v* Schulte the EAT held that no more than 18 months' worth of annual leave could be carried over in this way.

In King, the Court of Appeal asked the European Court of Justice (among other things) whether this limitation on carrying over untaken leave could be subjected to a similar limit when the reason paid leave was not taken was the employer's refusal to grant it. The Court held that it could not. The reason a limit had been placed on carry-over in cases of sickness was fairness to an employer who was already having to cope with long periods of absence from the employee. That didn't apply when the situation arose from the employer's failure to guarantee that annual leave would be properly paid. An employer who does not allow workers to exercise their right to paid annual leave must, said the Court 'bear the consequences'. It followed that Mr King was entitled to keep his unpaid annual leave carrying over year on year until his retirement.

Now you could take a narrow view of this case and say that it only applies where the employment has ended and the employer has refused to allow the worker to take any paid holiday. I don't think that it is safe to do that. I think there are strong grounds to believe that the same principle – let the employer 'bear the consequences' – would also apply to cases where the employer accepts that there is a right to paid holiday but disputes how holiday pay should be calculated.

Take a situation in which a worker's holiday pay has been calculated to exclude overtime. The need to include both compulsory and voluntary overtime in the calculation of holiday pay is now clearly established by two EAT decisions. The 2014 decision in Bear Scotland Ltd v Fulton concerned compulsory overtime and in July this year the EAT confirmed in Dudley Metropolitan Borough Council v Willetts that the same principle applied to voluntary overtime.

When the prospect of having to include overtime in the calculation of holiday pay was raised in the Bear Scotland case, the Government was concerned to avoid landing employers with claims for unpaid holiday potentially stretching back over many years. It therefore amended the legislation on unlawful deductions from wages to limit claims to a maximum of two years of back pay. As it happens, that rule was hardly necessary because the EAT in Bear Scotland held that a series of deductions from holiday pay could only be included in a single claim if there was no more than three months between any two deductions in the series. This made it very difficult for employees who had been underpaid holiday pay over extended periods to construct a case. To do so they would have to look at each individual instance of underpayment and check it was not more than three months after the last one. And in any event, they could not claim for a series of deductions going back more than two years.

The question raised by King, however, is whether this limitation on claims for back pay can still be valid. It is true that King was concerned with a complete failure to allow paid annual leave, rather than an underpayment of the amount due, but I don't think that can really make a difference. Every time it gets an opportunity, the ECJ makes it clear that the right to paid annual leave is a fundamental right and that in order to ensure that workers are not deterred from exercising it is important that 'normal pay' is maintained. In King, The Court insisted that an employer who failed completely to provide paid annual leave should 'bear the consequences' of that and even went so far as to say that any limitation on the amount that could be claimed by the worker would amount to the 'unjust enrichment' of the employer.

Is it really likely that the Court would take a different view where the employer had been paying some - but not all - of the holiday pay that was due? I would be prepared to bet that, if asked, the Court would say that the two-year limit on back pay – and the 'three month' rule set out in Bear Scotland - are in breach of the Directive and must be disregarded.

Of course, it may be some time before we get final clarity on this. In the meantime, however, employers who have yet to sort out the inclusion on overtime in holiday pay are potentially vulnerable to claims stretching back to the introduction of the right to paid annual leave in 1998.

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