

HOLIDAY PAY REVISITED: GIG WORKER ENTITLED TO HOLIDAY PAY FOR WHOLE PERIOD OF ENGAGEMENT

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By: Paul Callegari, Natalie Taylor

SUMMARY

In the latest of a long line of cases relating to the calculation of holiday pay, the Court of Appeal has given a very significant decision that will impact all employers who engage independent contractors.

In a claim thought to be worth around £100,000, a worker who had taken unpaid leave for which he should have been paid, but who had not invoked his right to payment until after his employer terminated his contract, was entitled to bring a claim in respect of all unpaid annual leave accrued throughout his engagement, both taken and untaken, on the termination of his engagement.

FACTS

Gary Smith was a plumbing and heating engineer who worked for Pimlico Plumbers between August 2005 and May 2011. Pimlico Plumbers maintained that Mr. Smith was engaged on a self-employed basis with no entitlement to paid annual leave. In the United Kingdom, an individual performing work will be either employed, self-employed, or a “worker,” which is a hybrid category created by statute. Employees and workers are entitled to paid holiday, while genuinely self-employed independent contractors are not.

On 1 August 2011, Mr. Smith presented an Employment Tribunal claim, which included claims for unpaid leave taken during his engagement, and a claim for compensation on grounds that he had been prevented from taking holiday. The tribunal ruled as a preliminary issue that Mr. Smith was misclassified as an independent contractor and that he was instead a “worker” - a decision that was eventually upheld by the Supreme Court. This meant that he was potentially entitled to holiday pay.

At a further hearing in 2019 in relation to his claim for holiday pay, the Employment Tribunal dismissed his claim on the basis that his claim was brought after the time limit had expired, being three months from the date of his last period of unpaid leave. Mr. Smith argued that his claim was brought within three months of the end of his engagement and, therefore, in time. He appealed to the Employment Appeal Tribunal (EAT) without success, but his further appeal was upheld by the Court of Appeal in February 2022.

THE COURT OF APPEAL'S DECISION

The Court of Appeal decided that the right to paid annual leave under the Working Time Directive (WTD) is a “single composite right,” which could not be lost unless the worker had the opportunity to exercise that right before their contract was terminated. Therefore, the taking of unpaid leave could not discharge the employer's obligation to provide paid leave. In addition, it was not up to the worker to prove that they had been denied leave, but for the employer to show that it had “exercised all due diligence in order to enable the worker actually to take the paid annual leave to which [they are] entitled.”

The court further ruled that where the employer refuses paid leave, the right to paid annual leave under the WTD carries over indefinitely. As Pimlico Plumbers had refused to grant this right to Mr. Smith on the basis that they considered that he was not entitled to it, his full leave entitlement under the WTD of four weeks' paid leave per year accumulated from the beginning of his engagement. His right to claim a payment in lieu of that entitlement crystallised on termination of his contract.

The Court of Appeal disagreed with the approach taken in previous cases and ruled that, for limitation purposes, this was not a series of claims relating to each individual untaken period of holiday, but instead it was a claim for a single payment due on termination. Therefore, the tribunal and EAT had been wrong to rule that the claim was out of time. It had been brought within three months of termination and was therefore not time-barred.

In 2015, the UK government introduced legislation to impose a two-year backstop for holiday pay claims brought as unlawful deduction for wages claims after 1 July 2015. As a result of the court's decision, that two-year backstop does not now apply in relation to claims brought under the WTD.

Finally, while the court did not need to decide this point in relation to this case, it expressed a “strong provisional view” that previous caselaw that established that a series of deductions was broken by a gap of three months or more between deductions was wrong.

ADVICE FOR EMPLOYERS

This case is potentially very significant for employers. Coming so soon after the implementation of IR35, it emphasises the importance of employers being certain that independent contractors are genuinely self-employed, since it is only this category that has no right to paid holiday. This case is a further reason for employers to perform an audit into the status of their allegedly self-employed contractors.

Employers should also take note of the court's finding that liability will only be avoided where an employer has “exercised all due diligence” to ensure that a worker takes their paid leave. That will not happen if the employer is operating under the mistaken belief that the individual is genuinely self-employed.

There are two small crumbs of comfort for employers, however. This case relates only to the four weeks of holiday granted under the WTD, and not the additional 1.6 weeks of holiday granted by the Working Time Regulations 1998 (WTR). WTR holiday continues to be subject to the previous caselaw, including in relation to a series of deductions and the two-year backstop. Additionally, this case only applies where the employer has denied the right to paid holiday entirely - workers who claim that their holiday has been underpaid (e.g. because overtime or commission has not been included) will continue to be subject to the previously established rules on limitation and series of deductions.

KEY CONTACTS



PAUL CALLEGARI

PRACTICE GROUP COORDINATOR -
LABOR, EMPLOYMENT, AND
WORKPLACE SAFETY AND MANAGING
PARTNER, LONDON OFFICE

LONDON

+44.20.7360.8194

PAUL.CALLEGARI@KLGATES.COM



NATALIE TAYLOR

SPECIAL COUNSEL

LONDON

+44.20.7360.6367

NATALIE.TAYLOR@KLGATES.COM