SQUIRE PATTON BOGGS

UK Court of Appeal Gives Important Holiday Pay Ruling

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It has been a while, but another high-profile holiday pay case was decided this week.

In *Smith v Pimlico Plumbers Limited,* the Court of Appeal held that a worker who took regular unpaid leave during the course of his engagement (his employer wrongly believed him to be self-employed and, thus, not eligible for paid holiday) was entitled on termination to be paid for any accrued but unpaid annual leave, whether such leave was taken or not.

This case is the latest instalment in the litigation between Mr Smith and Pimlico Plumbers (PP). Mr Smith worked for PP for a number of years as a plumbing and heating engineer. From time to time, he took periods of unpaid leave, but as PP maintained he was self-employed, he was never paid for it.

On termination of the relationship, Mr Smith brought a number of claims against PP, including a claim that he was a worker within the meaning of the Working Time Regulations (WTR) and on the back of that was entitled to paid holiday under the WTR. The issue of Mr Smith's employment status went all the way to the Supreme Court, which ruled in his favour and confirmed that he was a worker and was, therefore, allowed to proceed with his claims for unpaid holiday pay. At first, he was unsuccessful in this, with both the Employment Tribunal and the Employment Appeal Tribunal dismissing his claims, principally on jurisdictional issues concerning the way in which his case had been pleaded and whether the claims were out of time or not. Crucially, for the purposes of this appeal, they rejected his argument that the ECJ's decision in ***King v The Sash Window Workshop Ltd*** meant that he was entitled on termination of his engagement to bring a claim in respect of all accrued but unpaid annual leave, whether taken or not. They held that the principles set out in ***King*** were limited to cases where leave had not actually been taken. See previous blog here.

The Court of Appeal has this week reached a different conclusion. It held that although the ECJ's decision in ***King*** dealt with a worker who had not taken all the leave to which he was entitled under the Working Time Directive, it could be extended to cover workers who had taken such leave but not been paid for it.

It said that in both situations, workers had been unable to exercise their right to paid annual leave because of the employer's refusal to recognise that right. A failure to pay for annual leave or uncertainty about pay was liable to detract from the rest and relaxation that should be afforded by periods of paid leave and may deter workers from taking it, even if on the facts they actually did.

This decision will be of particular interest, not to say great concern, to businesses making substantial use of self-employed individuals, e.g. those in the gig economy.

It further increases the financial risks of getting someone's employment status wrong. It means that if someone notionally self-employed shows themselves to be a worker in the ET, they could potentially be entitled to significant sums in terms of unpaid annual leave.

We should flag that this appeal dealt with Mr Smith's right to carry over the four weeks' paid leave derived from the Working Time Directive (sometimes referred to as "Euro leave"), not the additional 1.6 weeks' leave granted under the WTR ("UK leave"). The sums in question could, however, still add up quickly if you have someone who has been working for you for a number of years or where the status of a large number of individuals is in question.

What about the two-year back stop on such claims? Unfortunately, the two-year limit only applies where the claim is presented as an unlawful deduction from wages claim. As Mr Smith was successful in his claim under the WTR, no such backstop applies. **Sash Window** had already said that the two-year limit would work where the individual had an express right to paid leave that the employer defaulted upon, but not where there was no adequate facility for that leave in the first place.

On that note, and unhelpfully for employers, the Court of Appeal cast non-binding doubt on the current case law, which provides that a gap of more than three months between deductions prevents there being a "series" of deductions for the purposes of an unlawful deductions claim – a major hurdle for claimants bringing claims for unpaid leave. It seems we haven't seen the last of the holiday pay cases yet!

However, nothing in the court's ruling takes away the three-month limitation period between the most recent non-paid holiday and starting ET proceedings through a reference to Acas for early conciliation. While this ruling has potentially very difficult consequences in relation to current or recent contractors, it does not seem to create any new risk of such proceedings by those who last provided their services over three months ago.

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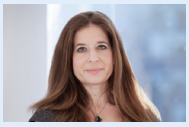

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