

# A further twist in the holiday pay saga: workers can recover unlimited compensation for both untaken and unpaid annual leave taken during their engagement

In the recent case of *Smith v Pimlico Plumbers*, the Court of Appeal held that a worker was entitled to claim compensation for unpaid holiday covering the entire period of his engagement. This included both holiday that he did not take and holiday that he did take but which was unpaid.

## What does the law say?

The right of employees and workers to take paid annual leave comes from EU law. Under the Working Time Directive, they are entitled to take four weeks paid leave per year. In addition, the Working Time Regulations 1998 gives UK workers and employees an additional 1.6 weeks' paid leave per year, taking the entitlement to 5.6 weeks' paid holiday per year.

There has been a series of cases in recent years about the holiday entitlements of individuals who were wrongly classified as self-employed, and, as such, were not granted any paid holiday by the employer. In *King v The Sash Window Workshop Ltd*, the ECJ held that the right to paid holiday under the Working Time Directive was a single right and should not be spilt in two (i.e. one right to take annual leave and a second right to be paid for it). In that case, the ECJ held that Mr King was entitled to recover compensation for annual leave that he had not taken during his engagement. The initial interpretation of this case was that the ability to

recover holiday pay was limited to holiday that workers had not taken and would not apply to holiday that workers had taken but for which they had not been paid.

In *Bear Scotland Ltd and others v Fulton and others*, the EAT held that claims for unpaid holiday pay can be brought as a claim for unlawful deduction from wages. The time limit for bringing such a claim is three months from the date of the last deduction. The EAT held that if more than three months had elapsed between two deductions then the chain of deductions would be broken and a claim for earlier deductions would be time-barred. Following this decision, the Government enacted regulations which imposed a two-year backstop on claims for unlawful deduction from wages.

### **What happened in this case?**

Mr Smith worked for Pimlico Plumbers between 2011 and 2016. Throughout the engagement, Pimlico Plumbers maintained that he was a self-employed contractor and had no entitlement to paid holiday. As a result, Mr Smith took unpaid holiday during his engagement.

After the relationship ended, Mr Smith claimed that he had really been a worker, not a self-employed contractor, and was entitled to recover compensation for holiday pay that he should have been paid during the engagement. This included payment both for holiday that he had taken (but for which he was not paid) and for holiday that he did not take.

In 2018, the Supreme Court held that Mr Smith was a worker. As such, he was entitled to 5.6 weeks paid annual leave per year.

The question in this appeal was the extent to which Mr Smith could recover historic holiday pay, and specifically whether the decision in *King* meant that he could only recover holiday pay for holiday that he had not taken.

### **What was decided?**

Applying the decision in King, the Court of Appeal held that the right to paid holiday was a “single composite right” to paid holiday, not two separate rights. If an employer refuses to recognise that a worker is entitled to paid holiday, forcing the worker to take unpaid holiday in order to have time off, then the worker is not exercising his right to paid holiday. This meant that Mr Smith could recover holiday pay for holiday that he had taken, as well as the remainder of his entitlement that he had not taken.

The next question was whether Mr Smith could recover holiday pay for the entire period of his engagement. UK law provides that the right to take the additional 1.6 weeks’ paid holiday can lapse at the end of the holiday year. However, under the Working Time Directive, the worker must have the opportunity to take the holiday in order for it to lapse.

The burden of showing this rests on the employer, who must show:

- that it specifically and transparently gave the worker the opportunity to take the holiday;
- that it encouraged the worker to take paid holiday; and
- that it informed the worker that s/he would lose the right to paid holiday at the end of the holiday year if it were not taken.

If the employer cannot satisfy these conditions, then the right to take four weeks’ paid holiday will carry over until such time as the paid holiday is taken or the engagement ends.

As Pimlico Plumbers could not satisfy these conditions, Mr Smith was entitled to recover compensation for holiday pay for the duration of his engagement.

Given these findings, the Court of Appeal did not specifically need to address whether the ruling in Bear Scotland was correct. However, it expressed a “strong provisional view” that the decision was not correct and that a series of

deductions is not, in fact, broken by a gap of three months (although the two-year backstop would still apply to these claims).

### **What does this mean for employers?**

This judgment will have the greatest impact on employers operating within the so-called gig economy, where there is scope for individuals to question their employment status.

However, any employer who engages independent contractors should pause to consider whether they could, in fact, have worker status and be entitled to paid annual leave.

Employers should:

- consider conducting a review of their workforce to identify any independent contractors who could be designated as workers and consider whether changes need to be made to the working relationship;
- review employment contracts, holiday policies and practices around taking holiday to ensure that staff are genuinely able to take their paid holiday entitlement; and
- remember that this decision only applies to four of the 5.6 weeks' annual leave that a worker is entitled to under UK law.

### [Smith v Pimlico Plumbers](#)

**If you would like to discuss any issues arising out of this decision please contact Clare Brereton ([clarebrereton@bdbf.co.uk](mailto:clarebrereton@bdbf.co.uk)), Amanda Steadman ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.**