Can a worker claim, on termination, payment for untaken holiday carried over from previous holiday years?

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The Court of Appeal have found, in ***Smith v Pimlico Plumbers Ltd*** 2022 EWCA Civ 70, that the answer to the above question is affirmative, in some cases.

Yet again, Pimlico Plumbers Ltd has come to the rescue of employment lawyers everywhere by providing the opportunity for the courts to clarify the law on workers and their rights. The question left open by the ECJ in ***King v Sash Window Workshop and anor*** 2018 ICR 693, has now been answered.

The question left open by *King*

Mr King had claimed pay for unpaid or untaken annual leave over some thirteen years, after he had wrongly been characterised by SWW as a self-employed contractor, instead of a worker. The ECJ stated the **Working Time Directive** 2003/88 ("the Directive") required a worker to be able to carry over and accumulate paid annual leave rights until the termination of employment, where rights have not been exercised over several consecutive reference periods because an employer refused to provide holiday pay. The ECJ found that the effect of the domestic law (the **Working Time Regulations 1998**) was that the worker was obliged to take unpaid leave and then claim payment for it, rather than claim for holiday which was not taken because the employer refused to provide paid annual leave. The ECJ found this was incompatible with Article 7 of the Directive when read with Article 47 of the EU Charter of Fundamental Rights – the right to an effective remedy. The ECJ referred it back to the Court of Appeal, but the matter settled before the Court of Appeal decided what to do about claimants who were unable to claim in respect of paid leave due but not taken during their employment.

The factual background of Mr Smith's claim and the Tribunal's determination

Gary Smith had worked for Pimlico Plumbers from 2005 to 2011 and was one of many plumbers wrongly characterised as self-employed contractors, rather than workers (according to the Supreme Court in ***Pimlico Plumbers Ltd and ors v Smith*** [2018] ICR 1511). In August 2011, Mr Smith presented his ET claim for paid holidays and unlawful deduction from wages. He had taken some unpaid leave (the last of which was in January 2011). The Tribunal interpreted ***King*** as establishing that there were two rights in relation to holiday pay: the right to take annual leave and a separate right to be paid when leave is taken. Therefore, as the ECJ found, a worker who had not taken any holiday because he was not going to be paid for it, was left without a financial remedy. The Tribunal found that Mr Smith was, in any event, out of time to claim holiday pay because he had claimed more than 3 months after his payday for the last period of unpaid leave. It found that there had also been gaps of more than 3 months in any series of deductions and therefore the chain had been broken. It also found that his pleaded case did not include a claim for pay for accrued but untaken holiday.

The Court of Appeal's judgment in *Smith*:

The Court of Appeal in ***Smith*** have now clarified that the ruling in ***King*** means that a worker can claim pay for annual leave carried over from one leave year to the next, if the worker has been prevented from taking annual leave at all or has only been permitted to take unpaid leave. The Court of Appeal relied upon the same well-established principle as the ECJ in ***King*** that the right to paid annual leave could not be lost unless the worker had the opportunity to exercise that right before their contract was terminated. Both for workers who did not take leave and those who took unpaid leave, their contracts did not recognise the right to paid leave and their employers refused to remunerate leave. In both situations, the worker was prevented from exercising the single composite right to annual leave and to be paid for it. Because Pimlico Plumbers Ltd failed to recognise their workers as such, these workers were prevented from exercising the single right to paid leave afforded by Article 7 of the Directive. The Tribunal had therefore erred in denying Mr Smith a remedy.

On the pleading point, the Court of Appeal found, given that ***King*** had a wider scope, that there was a single right to paid leave, which the employer had denied because it refused to remunerate annual leave, the claim was arguably, therefore, both in time, and inherently including a claim for pay instead of annual leave as well as pay for unpaid annual leave taken. It was unnecessary for him to have specified in his claim form whether the leave was untaken or taken but not paid. The

employer's approach had prevented the worker from exercising the right throughout his employment. Since he could only lose the right to paid annual leave if he had actually had the opportunity to exercise the right, the right had crystalised upon termination of his contract. Therefore, time started to run from the effective date of termination, rather than the last period of unpaid holiday.

It is still the case that workers who have simply not taken paid leave which was available to them, cannot claim pay for carried over untaken annual leave, but the employer must have (1) given the opportunity to take paid annual leave, (2) encouraged them to have taken paid annual leave, and (3) informed the worker that the right would be lost at the end of the leave year if not taken.

As to whether there was "a series of deductions" within **s.23(3)** the **Employment Rights Act 1996** or whether it had been broken by a gap of three months or more, this question did not arise in ***Smith***, given the above findings. Helpfully, however, the Court of Appeal addressed the conflicting authorities on the point - ***Bear Scotland Ltd v Fulton*** [2015] 1 C.M.L.R. 40 and ***Chief Constable of Northern Ireland v Agnew*** [2019] NICA 32. The Tribunal in ***Smith*** had followed ***Bear Scotland*** and found that a gap of more than 3 months between one deduction and the next brought the series to an end. The Court of Appeal indicated its preference for ***Agnew*** instead – that nothing in **s.23(3)** suggested that the three-month time limit was intended to restrict or qualify the meaning of a "series of deductions". This opens the door for claimants to argue that time starts to run from the end of a series of underpayments, even if that series involves gaps of more than three months.

It is worth noting that the ***Smith*** claim was brought before Brexit, but the **European Union (Withdrawal) Act 2018** preserves the effect of EU law in force on 31st December 2020, including the ability to enforce directly effective EU rights, and the obligation on UK courts to read domestic legislation in a manner compatible with EU law where possible. Prior to Brexit, domestic courts and tribunals had shown themselves ready to insert words into legislation in order to achieve the required effect and it therefore seems likely that the Court of Appeal's interpretation of Reg 13 will survive Brexit, although further case law will be needed in order to confirm the position.

Practical ramifications for employment lawyers

Employment lawyers should advise employers to ensure that they provide an adequate facility for their employees and workers to take paid leave. The first step is correctly to characterise workers and employees as such, distinguishing them from the truly self-employed. Secondly, it is still permissible for domestic legislation and contracts to make clear that annual leave cannot be carried over to the next leave year, but such a provision is only effective where the worker has

had the opportunity to take paid leave within the year. It will be for an employer to meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take the leave and informed the worker that the right will be lost at the end of the leave year. Contracts should be amended if they do not yet set out that leave will be lost if not taken during the year. Employers should adopt the practice of regularly reminding and encouraging their workers to take annual leave before the end of their leave year.

In addition, if a potential claimant alleges a series of deductions with gaps of more than 3 months between deductions (e.g. a biannual bonus, or arguably perhaps even an annual bonus which has been consistently underpaid), they should no longer be turned away on the strength of ***Bear Scotland.*** There is now strong authority for preferring the ***Agnew*** interpretation of **s.23(3) ERA**.

22 February 2022

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