The EAT finds that workers are not entitled to carry over unpaid annual leave that was actually taken in Smith v Pimlico Plumbers Ltd UKEAT/0211/19/DA

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Facts

1. Mr Smith worked for Pimlico Plumbers as a plumbing and heating engineer between August 2005 and May 2011. Pimlico Plumbers maintained that Mr Smith was an independent contractor and as such was not entitled to various rights available to workers/employees, such as sick pay and holiday pay. It was not in dispute that Mr Smith did in fact take periods of unpaid annual leave.

2. Following the termination of his contract, Mr Smith brought a number of claims including a holiday pay claim in relation to unpaid annual leave. The initial question to be determined was the employment status of Mr Smith; in 2018 the Supreme Court confirmed that Mr Smith was a worker, not an independent contractor. Thus, he was entitled to proceed with his claim for holiday pay.

3. The issue to be determined was whether or not he was entitled to carry over his unpaid holiday pay each year under the Working Time Regulations 1998 ('WTR'). The relevance of this is that if he was entitled to carry over his unpaid holiday each year, it would be payable on termination of his employment and would thus mean that the time limit would run from this point, and not from the point at which the payment ought to have been made.

4. Regulation 16 WTR provides the right to payment for leave that is taken. However, this does not provide any provision linking a series of underpayments, such that the time limit is 3 months from the date of each underpayment. The House of Lords in Revenue and Customs Comrs v Stringer [2009] ICR 987 held that "wages" included claims for payments of leave under Regulation 16 WTR, which meant that one could rely on the "series of deductions" provisions in section 23 of the Employment Rights Act 1996 ('ERA') to claim

for payments related to previous years. However, the Deduction from Wages (Limitation) Regulations 2014 imposed a 2-year limit on unlawful deduction from wages claims. Thus, if Mr Smith could establish that he could carry over his annual leave under the WTR, he could circumvent the 2-year limitation applicable in a claim for holiday pay brought under the unlawful deduction provisions in the ERA.

5. Mr Smith argued that he had been prevented from taking leave under Regulations 13 and 13A WTR [which provide an entitlement to a minimum number of weeks leave per year]. In effect, his case was that as he was unaware of his right to take paid leave under the WTR, the leave that he did in fact take was not taken in exercise of his rights under Regulations 13 and 13A. He further argued that the ECJ case of King v The Sash Window Workshop Ltd C- 214/16 required the tribunal to interpret the WTR such that one was entitled to carry over from year to year a right to claim for unpaid leave. As such, it was Mr Smith's case that payment was due on the termination of his employment.

The ET decision

6. The arguments centred around the ECJ case of King v The Sash Window Workshop Ltd C- 214/16. The King case concerned a worker who had not taken holidays as he was not paid for them. The issue in that case was whether untaken holidays could be carried over each year (contrary to regulation 13(9) WTR). The ECJ found that untaken holidays which had not been taken because one had been deterred from taking them due to a lack of payment *could* be carried over each year such that payment became due on the termination of employment. As the claim for an unlawful deduction in this scenario was found to crystallise on termination of employment, there was only one deduction and not a series of deductions, such that the time started to run from termination. The King decision also threw into question the UK's two year back stop on unlawful deductions claims and the decision of the EAT in Bear Scotland Limited v Fulton which held that unpaid holiday cannot be claimed as the last in a series where more than three months has elapsed between deductions.

7. The ET distinguished the case of King on the basis that it applied to annual leave *not actually taken* on the basis that it would not be paid for, which the ECJ considered meant that Mr King had been denied the opportunity to take leave to which he was entitled. The ET therefore found that the holiday pay claim was out of time as the right to be paid did not crystallise on the termination of his employment, rather the claim crystallised 3 months

from the date of the underpayment. Mr Smith appealed to the EAT contending that the ET had incorrectly interpreted the case of King.

8. It was also found that, even if the last deduction had been in time, he would not be entitled to claim for earlier deductions under the “series of deductions” provisions in the ERA as there had been a gap of more than 3 months between deductions, which prevented the deductions forming part of a “series” for the purpose of section 23, in accordance with the decision in Bear Scotland v Fulton (No 1).

EAT judgment

9. The EAT agreed with the Employment Tribunal. They concluded that King did not mean that a worker who takes unpaid leave should be considered to have not taken their annual leave under Article 7 of the Directive. It was not possible to say you had been deterred from taking holiday you had actually taken. The focus in King was on situations where a worker declined to take leave as a result of the uncertainty as to pay. Had the ECJ intended to develop a carry-over right in respect of leave that is taken but unpaid, it could have been expected to say so.

10. Mr Justice Choudhury [at paragraph 89] concluded that:

I have considered whether, in the light of King, it can be said that the taking of unpaid leave can still amount to the taking of leave within the meaning of article 7, or whether such unpaid leave can never do so because of the omission of one of the two aspects of the same right, namely the right to paid annual leave. On one view, it might be said that the CJEU’s powerful statements as to the importance of being remunerated during leave mean that that any unpaid leave is tainted by uncertainties that would deprive a worker from fully benefitting from the intended rest and relaxation that he must be afforded. However, I do not consider that the CJEU did go as far as to suggest that. The CJEU’s references to being dissuaded from taking leave and the deterrent effect of the employer’s practices tend to suggest that its focus was on the situation where leave is not taken as a result of the uncertainties as to pay. Had it been the CJEU’s intention to develop, through its judgment in King, a carry-over right in respect of leave that is taken but unpaid, one could have expected it to say so in terms, especially as the right to an allowance on termination only applies, as it stands, in lieu of leave not taken, and as a carry-over right to that effect would negate the procedural limits applicable in respect of regulation 16, WTR claims.

11. The EAT also found that Mr Smith had not been denied of a fundamental European right (namely, the right to be paid for annual leave) as he had the opportunity of bringing a claim for such payment within 3 months of the when he ought to have been paid.

12. Mr Justice was fortified in his conclusions by the fact that, if one could carry over leave that was actually taken, this would render the time limits for such claims under Regulations 13 and 16 WTR ineffective.

13. Given that the limit for claims under Regulation 16 WTR has no provision linking a series of non-payments, the relevant time limit for a claim for unpaid holiday was three months from the date of the underpayment. Accordingly, Mr Smith's claim in relation to his holiday pay was out of time.

14. The EAT also agreed with the conclusions reached in relation to a gap of 3 months breaking the series of deductions. Mr Smith had relied on the NICA case of Chief Constable of Northern Ireland v Agnew which concluded that the 3-month gap rule set down in Bear Scotland should not be followed. However, Mr Justice Choudhury did not uphold this argument, pointing out that the NICA was not a court of coordinate jurisdiction and the general principle is that the EAT will follow previous EAT decisions. It was also noted that Agnew was under appeal to the Supreme Court and that it would not be desirable to introduce an inconsistency in the EAT on the basis of a decision which might soon be overruled.

Comment

15. This case has provided helpful clarity in relation to an argument that has been utilised by workers for many years following the ECJ decision in King. No doubt many businesses will breathe a sigh of relief. Within industries in which it is common for work to be conducted by people who are classified as independent contractors [and thus who are not paid holiday pay], there was a substantial risk that the classification by an employment tribunal of an individual as a worker as opposed to a self-employed person would lead to large sums potentially being due for holiday pay in respect of holidays which had been taken many years ago. Such payments will be limited to 2-years, unless there has been a gap of more than 3 months between underpayments, in which case claims will be cut off at that point, for now at least. However, the decision may well be appealed and so it is one to

watch, as well as the outcome of the Supreme Court decision in the Northern Irish case of Agnew. If that decision is upheld, this could lead to Bear Scotland being overturned.

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