EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/30 Worker who did not take holiday for a reason other than sickness was not entitled to pay in lieu on termination (UK)

<p>In a case involving a claim for holiday pay, the Employment Appeal Tribunal (‘EAT’) has allowed an appeal by the employer against findings that the worker was entitled to a payment in lieu of holiday that he had not taken during previous leave years for reasons other than sickness</p>

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Background

The Working Time Directive (93/104/EC) (the 'Directive') provides that all member states must ensure that every worker is entitled to:

"(1) paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice" (Article 7(1)); and

(2) the minimum period of paid annual leave may not be replaced by an allowance in lieu except where the employment relationship is terminated".

The Working Time Regulations 1998 (the 'WTR') implement the Directive in the UK.

Regulation 13(9) of the WTR provides that holiday to which a worker is entitled must be taken in the leave year in respect of which it is due, i.e. the worker must 'use it or lose it'. The leave year is usually set out in the employment contract; it might be a calendar year but is not necessarily so. The WTR provide that if there is no provision in the contract, the holiday year starts on 1 October every year for workers already employed at 1 October 1998 (when the WTR came into force), or on the date of commencement of employment for other workers.

Regulation 13(9) prohibits replacing such holiday with a payment in lieu, except upon termination of employment. This is to ensure that the health and welfare objectives of the Directive are met, namely that workers are taking proper breaks from their work throughout the relevant holiday year.

Regulation 14 deals with payment in lieu of accrued holiday on termination of employment, including how to calculate the amount due if a worker leaves part-way through a leave year.

There has been much discussion at both EC and UK level about what happens if workers are unable to take their holiday in a leave year because they have been off sick for that whole year. In *Pereda v Madrid Movilidad SA [2009] IRLR 959*, the Court of Justice of the European Union made it clear that the Directive requires carry-over of statutory holiday from one leave year to the next in circumstances where a worker chooses not to take their holiday because they are on sick leave.

However, the WTR prevent carry-over of leave (although it is possible, and common, in UK contracts, to allow workers to carry over a limited number of days' holiday to the next leave year, with the approval of the relevant manager.) Given this, it became apparent that the WTR did not correctly implement the Directive. Following *Pereda*, the UK Court of Appeal in *NHS Leeds v Larner [2012] IRLR 825* held that Regulation 13(9) of the WTR should be read as follows (in bold), to bring it in line with the Directive:

"Leave to which a worker is entitled under this regulation may be taken in instalments, but –

(a) it may only be taken in the leave year in respect of which it is due, **save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave".**

Regulation 14 was also read so as to allow for payment in lieu of such untaken carried over holiday upon termination.

A worker who has not been allowed to take paid holiday or who has not received payment for

holiday can bring a claim, either under the WTR, or by bringing a complaint of 'unlawful deduction from wages'. The WTR claim must be brought within three months of a specific nonpayment. The unlawful deductions claim must be brought within three months of the last in any series of deductions, which may span more than one year, meaning that unpaid holiday pay from previous years can be recovered in a successful claim.

Facts

Mr King worked as a commission-only salesman for The Sash Window Workshop Ltd ('Sash Window') from July 1999 until the termination of his engagement in early October 2012, when he reached the age of 65.Other than in 1999, Mr King took time away from work each year. He was not at any time paid for such holiday.

Mr King brought a successful claim for age discrimination in relation to his dismissal at the age of 65. He also brought claims for unpaid holiday, going back to 2000.

The Employment Tribunal ('ET') awarded Mr King holiday pay in three different categories:

holiday pay calculated under regulation 14(2) WTR, representing the number of days' holiday that Mr King had accrued but not taken in the holiday year 2012/2013 (the year in which he left Sash Windows), calculated at the date of termination;
holiday pay for holiday requested and taken in previous years, calculated as a series of unlawful deductions from wages;
holiday pay in lieu of leave that had accrued in previous years but not been taken ("Holiday Pay 3"). This amounted to just under GBP 9,500 (around 24 weeks' holiday). The ET based its decision on the judgment in Larner; although, in Larner, the employee had not been able to take the holiday because of sickness, the ET held that there was no difference in principle between being unable to take the holiday because of sickness and being refused paid leave. The ET found that Sash Window would have refused the paid leave had Mr King requested it because Sash Window erroneously thought that Mr King was not entitled to it.

The employer appealed to the EAT against the award of Holiday Pay 3.

Judgment

The central question for the EAT was whether the ET was wrong in law to hold that Mr King was entitled to payment for Holiday Pay 3.

The EAT allowed the appeal and remitted the case back to the same tribunal.

The EAT held that the ET had erred in law by assuming that Mr King was unable to take paid leave because it would have been refused by Sash Window if he had asked for it. Mr King did in fact take a large proportion of his holiday entitlement each year but chose not to take all of it. In Larner, Lord Justice Mummery had said that the worker must be "*unable or unwilling* , **because of reasons beyond his control**, *to take annual leave*". The ET failed to make any findings about any restrictions on Mr King's ability or willingness for reasons beyond his control to take holiday. There was nothing to support a conclusion that he was ever prevented from taking holiday. The EAT accepted that, had Mr King been paid for his holiday, he might have been more likely to take his full entitlement. However, there was no evidence that he had ever requested holiday and been refused it. The ET should have based its decision on evidential findings, not on assumptions.

Moreover, any more general right to a payment in lieu of holiday would defeat the health and welfare benefits of the Directive and the WTR, by providing workers with an incentive not to take holiday. Even if Mr King was, in fact, prevented from taking annual leave, he worked the periods in question and was paid in full for them. Had he received holiday pay for the same period, this would have been a double recovery, which would not be consistent with the purposes of the legislation.

Given that Mr King received his full wages for the periods he would otherwise have taken as holiday, there could not have been any unlawful deduction from wages. It was not wages that he lost: it was the benefits of taking periods of holiday. Where an employer has failed to pay correct holiday pay to a worker on termination of employment, the correct remedy is an order from the ET requiring the employer to pay that amount to the worker. However, where the worker's complaint is that the employer has refused to allow him to take his holiday, the correct award is 'compensation', awarded on a just and equitable basis (taking into account the employer's refusal and the loss the worker has suffered), not 'wages', i.e. consideration for work done under the contract.

Commentary

As explained above, it is now established that a worker who is prevented from taking holiday by reason of sickness can carry over that holiday into the next leave year and be paid in lieu of it on termination. The EAT appears at first glance to have widened the scope for holiday pay claims, such that workers who are prevented from taking their holiday for reasons *other than sickness* can also carry that holiday over, as long as those reasons are beyond their control. This could open the floodgates for more claims for holiday pay: for example, would a lawyer who was unable to take all of their holiday in the previous year because of a heavy case-load now be able to be paid that holiday upon termination if they had carried it over? Yes, on first

glance but, looking in more detail at the EAT's decision, that seems likely to constitute double recovery as the lawyer would have received full wages for those periods of working. The lawyer might be awarded compensation, however, for having been prevented from taking holiday. As a result of this decision, there is perhaps scope for litigation about what is meant by reasons beyond a worker's control.

Comments from other jurisdictions

Austria (Thomas Pfalz): According to section 4(5) of the Austrian Holidays Act (*Urlaubsgesetz*), entitlement to statutory paid leave is lost two years after the end of the leave year in respect of which it is due, i.e. three years after the entitlement commences. Thus, an employee can carry over his untaken leave into the next leave year and the leave year after that, irrespective of the reasons that prevented him from taking it.

Payment in lieu of accrued leave is regulated in section 10 of the Holidays Act. For the last leave year of the employment relationship, section 10(1) provides for a prorated payment. Further, an employee is entitled to compensation for carried-over leave from previous leave years pursuant to section 4(5).

Romania (Andreea Suciu, Andreea Tortov): The latest amendments to the Romanian Labour Code, in force since 25 January 2015, stipulate that if the employee, for justified reasons, is unable to take the annual leave he or she is entitled to during a calendar year, the employer is obliged to grant the untaken leave within a period of 18 months starting with the next calendar year. However, there are no express statutory provisions about what happens if the employee does not take the leave during those additional 18 months.

Given the employee-friendly approach of the Romanian Courts, it is hard to believe that a decision such as the EAT's would have been made in Romania. Usually, the Romanian Courts oblige the employer to compensate for all untaken leave upon termination of employment, without analysing why the leave was not taken. The Courts base this on Article 269(1)c) of the Romanian Labour Code, which says that employees are entitled to claim compensation within three years of a specific non-payment. Hence, employees are normally compensated for untaken leave for the last three years prior to termination. Given that the amendments to the Labour Code are new, there is no case law about 'justified reasons'. It would be interesting to see if the Romanian Courts continue to consider employees to be entitled to an allowance in lieu of untaken annual leave without a justified reason even after the extra 18 months have elapsed.

Creator: Employment Appeal Tribunal

Verdict at: 2014-11-04
Case number: UKEAT/0057/14/MC, UKEAT/0058/14/MC