

Holiday pay and carry over

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First, a reminder of the facts. Mr Smith had been a plumber for Pimlico Plumbers for five and a half years before being dismissed. Following his termination Mr Smith brought claims of, amongst others, unpaid holiday pay accrued throughout his employment. Pimlico Plumbers argued that Mr Smith was an independent contractor, and therefore was not entitled to holiday pay.

Employment status

The first issue the Employment Tribunal ("ET") had to consider was whether Mr Smith was:

- An employee for the purposes of the Employment Rights Act 1996 ("ERA"); or
- A worker for the purposes of the ERA and the Working Time Regulations 1998 ("WTR")

The employment status point reached the Supreme Court and it concluded that Mr Smith was a 'worker' for the purposes of the WTR and the ERA.

Once employment status had been determined, the claim returned to the ET to consider the holiday pay issue. The ET found that Mr Smith had taken holidays in each year of his engagement (but had not been paid for them). The claim was dismissed on the basis that it was out of time. <h2?carry>The ET went on to consider whether, under the principle set down in *King v Sash Window*, the WTR should be interpreted to enable Mr Smith to carry over from year to year a right to claim payment for unpaid leave (which would become payable on termination). </h2?carry>

In *King*, the ECJ found that Mr King had been deterred from taking holiday because his employer did not pay holiday pay. It went on to determine that a worker who does not exercise his or her right to paid leave (because his or her employer refuses to pay for it) is permitted to carry over the leave until termination, and then receive a payment in respect of all the untaken leave.

In Mr Smith's case, the Tribunal held *King* did not apply as Mr Smith had in fact taken leave but not been paid for it. They found that unlike Mr King, Mr Smith had been in a position to exercise his right to claim payment for the leave he took, pursuant to regulation 16 WTR but that he had not brought that claim in time. Mr Smith appealed to the EAT. <h2?eat>The EAT dismissed Mr Smith's appeal. In the EAT's view, the ECJ's decision in *King* as to carry-over and the right to payment in lieu of that leave can only apply when that leave has not been taken. The EAT undertook a detailed analysis of the law but held that had the ECJ intended to develop a carry-over right in respect of leave that is taken but unpaid, it would have expressly stated so. </h2?eat>

Series of deductions - Bear Scotland or Agnew?

The EAT also upheld the decision that Mr Smith's claim in relation to his most recent period of holiday was out of time. Whilst academic in light of this finding, the EAT did go on to consider whether a claim for unlawful deductions could include earlier periods of holiday as a 'series of deductions'. At first instance the ET relied on the EAT's decision in *Bear Scotland Ltd v Fulton* that a gap of three months or more between deductions prevents the deductions being a 'series'. Mr Smith argued that the Northern Ireland Court of Appeal's decision

in Chief Constable of Northern Ireland v Agnew should apply. Agnew had found that the 'three month gap' rule set down in Bear Scotland led to arbitrary and unfair results. The EAT indicated that it would not have been persuaded to depart from Bear Scotland. It pointed out that the Anew was a Northern Irish case and the EAT will generally follow its own previous decisions. However, Agnew is being appealed to the Supreme Court and the Supreme Court's decision will be binding on cases across the whole of the UK.

Where does this leave us on holidays and carry over?

- In accordance with King v Sash windows, where an employer has told the worker that leave will be unpaid (and therefore they have been deterred from taking it), the right to any untaken Working Time Directive holiday (4 weeks) will carry over, potentially until termination. This is likely to be the case where the employer wrongly considers that the worker is self-employed/an independent contractor and has no right to paid holiday.
- Where a worker has been unable to take their statutory holiday in the year in which it accrued because of maternity leave, the employer must allow the worker to carry it over to the following year (Merino Gomez v Continental Industrias del Caucho).
- Where a worker has been unable to take WTD holiday in the year in which it accrued because of taking sick leave, the employer must allow carry over. However, note that employers are allowed to limit carry over so that any holiday not used up within 18 months of the end of the leave year in which it accrued is lost.
- Workers do not have a carry-over right in respect of leave that is taken but unpaid. If a worker takes holiday but is not paid for it, they must bring a claim within three months of the non-payment (noting the decision in Bear Scotland on what constitutes a series of deductions).

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