

Employment

Mistakes about Paid Annual Leave

All employees are entitled to receive 5.6 weeks' paid annual leave. For an employee working a five day week, the entitlement adds up to 28 days' paid holiday. In England, an individual's leave entitlement is generally separated into a period of 4 weeks' leave to be taken at the election of the employee and the remaining 1.6 weeks taken as the eight public bank holidays.

A recent European Court of Justice ('ECJ') judgment has confirmed that, where an individual is prevented from taking holiday because of a mistake on the part of the employer about the individual's entitlement, that individual will be allowed to bring a tribunal claim to either permit them to take leave (if they are still employed) or for a payment in lieu of leave if their employment has come to an end.

In this particular case the ECJ considered an individual who had been retained by the employer as a self-employed contractor. Because the self-employed do not have the right to take paid annual leave, the employer company had not paid him when he took holiday. In addition to not being paid for the leave he took, the individual had also taken less than his minimum holiday entitlement each year.

Unfortunately for the employer, when the working relationship was analysed by a court it determined that it was more than self-employed and held that the individual was actually a worker for the purposes of the Working Time Regulations 1998 ('WTR').

As with employees, the WTR entitles workers to the minimum paid annual leave of 5.6 weeks. As the individual in this case had been prevented from taking enough leave (because he would not be paid for it), and the leave he had taken had been unpaid, the tribunal awarded him compensation for all of his holiday entitlement right back to 1999, which was the start of his contract with the employer company.

The ECJ case confirmed that the correct position is that, for a worker or employee, an employer cannot prevent or discourage the individual from taking their minimum 5.6 weeks' paid annual leave. Where an employer has not permitted the individual to take their annual entitlement, that entitlement will continue to roll over until their employment is terminated.

In the case of an employer who mistakenly believes that an individual is not entitled to annual leave, there will be no protection. Unfortunately, simply labelling an individual as self-employed will not be sufficient to guarantee that they are not entitled to annual leave. The same could be true where an individual is retained on an employment contract with an overseas entity, such as a parent company, but seconded to a UK company. If the employment contract with the overseas company provides for fewer than the minimum WTR entitlement to paid leave, the UK entity should allow the individual to take the full 5.6 weeks entitlement.



If you have any queries about individuals who are retained as self-employed, have expat employees with contracts which provide for fewer than 5.6 weeks, or would like further information, please contact our Employment team.

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