

ARTICLE: Employee entitled to pay in lieu for 131 days holiday

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Introduction

A recent case has provided a serious warning to those employers who do not have formal written contracts with their employees. A dismissed employee was held to be entitled to pay in lieu for untaken holiday spanning the whole period of her employment.

The facts

Ms Wang was a traditional Chinese Medicine Professor who had been recruited by Beijing Tong Ren Tang (UK) Limited to work in their Herb and Health shop in London. At the time when she was recruited, Ms Wang was living in China. The expectation was that she would travel over to England to do this specific job and would then most likely return to China. She was employed from 15 November 2001 and was led to believe that her employment would continue until 31 December 2008 at the earliest. However, her employment was terminated on 8 January 2008. The Tribunal found the dismissal to be unfair. While the employer conceded this, it appealed on three issues as to the assessment of compensation.

The Employment Appeal Tribunal's (EAT) decision

The EAT examined each of the points of appeal in turn. The first two points of appeal concerned mitigation and salary, and involved the specific facts of the case. The EAT then moved on to consider the question of holiday pay owed.

Under the Working Time Regulations 1998 (WTR), any provision in an agreement that seeks to exclude or limit the effect of the WTR is void (Regulation 35). Further, leave under the WTR can only be taken in the year it is due (and not carried forward) and may not be replaced by a payment in lieu, except on termination of employment (Regulation 13). However, the WTR only represents a minimum standard and it is permitted for other provisions – for example, in an employment contract – to provide more favourable rights to an employee (Regulation 17).

Ms Wang received 30 days' leave a year, which is the statutory minimum provided for under the WTR (24 days at the time) with an additional 6 days. The employer argued that, under the WTR, Ms Wang was only entitled to pay in lieu of untaken leave in the final year of her employment, together with her additional 6 days' contractual leave for each year of employment.

The EAT rejected this argument. It held that this case was not a claim under the WTR but under contract. There was no formal written contract in place, but the Tribunal had made a finding of fact, based on the evidence before it, that there was an oral contract in place. This stated that Ms Wang would be paid for holidays not taken during her employment, such payment to be made at the end of her employment.

The employer tried to argue that the provision was void under Regulation 35 of the WTR as it excluded the effects of the WTR. However, the EAT held Ms Wang's provision was more favourable than the WTR, and so it was permissible under Regulation 17.

The EAT added that, should there be "the slightest doubt" about its conclusion that this was a contract case and not a case under the WTR, attention should be taken of *HMRC v*

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Stringer. We covered this case in a previous article to be found at:
(<http://www.davidsonlargelaw.com/downloads/jul09stringerHoL.pdf>)

In the opinion of the EAT, *Stringer* is authority to show that the Working Time Directive requires pay in lieu of leave not taken to be carried forward to termination. In particular, the EAT drew attention to a comment of the Advocate General in his opinion on the case – that the point of a payment in lieu is to enable a worker to take a period of rest following termination of employment before embarking on new employment.

Conclusion

The EAT was clear to state at every opportunity that this was a contract case. However, in its penultimate paragraph the EAT commented that *Stringer* would provide the same answer to such a claim if it was brought under the WTR rather than contract. As such, employers who do not have formal written contracts in place could run the risk of substantial holiday pay claims against them when dismissing an employee.

If you would like further information on this case, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.

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