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Workers may be entitled to backdated holiday pay where they have been incorrectly classed as "self-employed"

There has been much speculation recently about whether workers who do not take paid annual holiday because their employer refuses to pay, can carry over their entitlement to paid holiday or whether they lose any such entitlement at the end of the holiday year.

The Court of Justice of the European Union (CJEU) has ruled in the case ***King v Sash Windows*** that the entitlement to holiday pay can be carried over.

The details of the case are that the employer, Sash Windows, believed that Mr King was self-employed and he was therefore not given paid holiday. However, it was held at Tribunal that Mr King was in fact a worker, and therefore entitled to the statutory minimum 5.6 weeks' paid annual leave. Sash Windows argued that even if it was accepted he was a worker, Mr King lost his entitlement to carry over holiday pay at the end of each holiday year in accordance with the Working Time Regulations 1998.

However, the CJEU held that Sash Windows had wrongly maintained that Mr King was self-employed, and had therefore prevented him from taking his holiday entitlement by refusing to pay him for that period. Mr King had therefore been prevented from exercising his EU rights. They therefore held that Mr King's entitlement could be carried over, and he was therefore entitled to back-dated holiday pay.

The CJEU were particularly critical of the position adopted by Sash Windows, and confirmed that any backpay claim could potentially go as far back as 1996, when the original Working Time Directive came into force. Furthermore, they stated that any UK Regulations that assert that a worker loses his rights to holiday pay as suggested by Sash Windows are incompatible and must be disregarded.

This is an extremely important decision for businesses to take note of. In particular, a business must be sure that any "self-employed" contractors will not in fact be classed as workers. If they get this point wrong, they could end up with a very significant claim for back-dated holiday pay (depending of course upon the length of service of the individual). Whilst the CJEU ruling applied only to 4 weeks' holiday entitlement rather than the 5.6 weeks' entitlement under UK law, employers could still be faced with a claim of up to 20 years at 4 weeks' entitlement if they get this point wrong.

If there is any doubt as to whether an individual is genuinely self-employed, we do recommend legal advice is obtained as soon as possible. If Swinburne Maddison LLP can be of any assistance whatsoever, please do not hesitate to contact Jonathan Moreland or Roland Fairlamb on 0191 384 2441.

Kind Regards

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