

Neutral Citation Number: [2023] EAT 13

Case No: EA-2020-000288-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 February 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MR A ALSTON AND 44 OTHERS

Appellants

- and -

THE DOCTORS LABORATORY LIMITED AND ORS

Respondents

Ms Laura Barroso (IWGB trade union representative) for the **IWGB-represented Appellants**
The remaining Appellants did not appear and were not represented
Mathew Purchase KC (instructed by Cater Leydon Millard, Solicitors) for the **Respondent The Doctors Laboratory**
The remaining respondents did not appear and were not represented

Hearing date: 7 February 2023

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:30 on 13 February 2023

SUMMARY

WORKING TIME REGULATIONS

Employment Tribunal's decision on the application of time limits in holiday pay claims under the Working Time Regulations set aside by consent in the light of the Court of Appeal's judgment in **Smith v Pimlico Plumbers** [2022] EWCA Civ 70.

Mrs Justice Eady DBE, President:

Introduction

1. This appeal concerns claims for unpaid annual leave under the **Working Time Regulations 1998** (“WTR”) and the approach to be taken in the light of the Court of Appeal’s ruling in **Smith v Pimlico Plumbers**.

2. I refer to the parties as the claimants and respondents, as below. This is the full hearing of the appeal brought by a number of claimants (38 members of the Independent Workers Union of Great Britain (“IWGB”) and 7 other appellants) against the judgment of the London Central Employment Tribunal (Employment Judge Elliott, sitting alone, on 3-5 February 2020; “the ET”), promulgated on 6 February 2020. By that judgment, the ET held (relevantly):

“(1) By consent, where the claimants have not taken annual leave, they carry over the right to do so from year to year.
(2) Where claimants have taken leave, the right to carry over is subject to... the limitation provisions.
...”

3. The ET was concerned with 49 claims for unpaid annual leave brought under the **Working Time Regulations 1998**. As at the date of the ET hearing, 45 of the claimants were represented by the IWGB; the four other four claimants – Mr E Anselmo, Mr B Bonnici, Mr A Cordeiro and Mr F De Macedo – were not represented. The claims were brought against The Doctors Laboratory Limited (“TDL”), the respondent below.

4. The present appeal was filed on 23 March 2020 by the IWGB, acting on behalf of those claimants who were represented by it; the remaining claimants did not file a Notice of Appeal and, accordingly, have been treated as respondents to this appeal. Since the appeal was filed, I understand that seven of the claimants for whom the IWGB previously acted – Mr T Pennacchia, Ms I Kithyaka, Mr A L T Gomes, Mr G Zyvatkaukis, Mr J Foster, Mr M Watson and Mr L M Preti – are no longer represented by the IWGB; it is understood that they ceased to be so represented on 23 January 2023.

5. By order seal dated 21 June 2021, the appeal was stayed pending the determination of the appeal made to the Court of Appeal in Smith v Pimlico Plumbers. The Court of Appeal gave judgment in February 2022 (see Smith v Pimlico Plumbers [2022] EWCA Civ 70), and the stay in the current appeal was lifted on 20 April 2022.

6. By letter of 16 November 2022, the IWGB, then acting on behalf of all appellants, applied to withdraw all but ground 1 of the grounds of appeal. By order of the Registrar, seal dated 11 January 2023, grounds 2-6 of the appeal were dismissed.

7. Subsequently, as confirmed by email of 25 January 2023, the respondent and those claimants still represented by the IWGB agreed a draft consent order in the following terms:

“1. Ground 1 of the Grounds of Appeal is allowed to the extent that it is consistent with the declaration set out in paragraph 3 below.

2. Paragraph (2) of the Employment Tribunal’s Judgment is set aside.

3. It is declared that the Claimants were and remain entitled to carry over any untaken paid annual leave (which includes taken unremunerated leave) to which they were entitled under regulation 13 of the Working Time Regulations 1998 and the principles of European law until termination or, if earlier, until the Respondent has provided a facility for the Claimants to exercise that right to paid annual leave in respect of the carried over leave.

4. The matter is remitted to the Employment Tribunal for directions.”

8. Although the EAT has sought confirmation as to the position of the remaining claimants (whether appellants or respondents to this appeal), no representations have been made by them or on their behalf. The EAT has therefore proceeded on the assumption that they have not agreed to the proposed consent order and the hearing of the appeal remained in the list, to allow for the possibility that they might wish to be heard. In the event, none of the unrepresented claimants attended the hearing.

The Background

9. At all relevant times, the claimants worked as couriers delivering medical products for TDL Collect Courier Services - a division of TDL, which provides clinical laboratory and diagnostic

services.

10. None of the claimants were paid any holiday pay until 1 January 2018 but TDL began paying holiday pay from that date. There is an issue between the parties as to whether the claimants were “workers”, which could not be resolved at the hearing in February 2020 and remains outstanding; the ET determined the issues before it at the preliminary hearing at that stage on the assumption that the claimants were workers. The claimants’ claims concerned the right to four weeks of paid annual leave provided by regulation 13 (read together with regulation 16) **WTR**. Some of the claims made stretch back for a number of years and the key issue for the ET (so far as relevant for present purposes) related to the application of the statutory limitation periods where the claimants had taken time off work but had not been paid.

11. As set out above, on this issue, the ET concluded that the claimants’ rights were subject to the application of the limitation provisions.

12. By their appeal, the IWGB represented claimants contended that the ET thereby erred in law; by ground 1, they argued:

“The ET erred in holding that the Claimants’ full entitlement to four weeks paid annual leave per year did not carry over and accumulate, following *C-214/16 King v Sash Windows Ltd & Anor ECLI:EU:C:2017:439* until the present time (or until termination in the case of those Claimants no longer employed), in circumstances where the employer did not provide any facility for paid annual leave until January 2018. EU law on annual leave does not recognise a right to unpaid leave; it recognises a single composite right to *paid* annual leave. It is therefore irrelevant whether or not the Claimants took any periods of unpaid leave.”

13. This ground of appeal was initially resisted. On 1 February 2022, however, the Court of Appeal handed down its judgment in **Smith v Pimlico Plumbers**, by which it was held (relevantly):

“87. ... a worker can ... carry over and accumulate a claim for payment in lieu on termination when the worker is prevented from exercising the right to paid annual leave, and does not take some or all of the leave entitlement, or takes unpaid leave, for reasons beyond his control, because the employer refuses to recognise the right and to remunerate annual leave. ... The three-month time limit for making a claim, which runs from the termination of employment, applies in either case. Provided a claim for payment in respect of the breach of these rights is made within a period of three months

beginning with the date of termination, it will be in time.”

14. Having had the opportunity to reflect on the judgment in **Smith v Pimlico Plumbers**, those acting for TDL have agreed a proposed consent order with the IWGB represented claimants in the terms I have set out at paragraph 7 above.

15. For TDL, it is made clear that it has thus conceded the point of principle but has made no concession as to the existence and extent of any carried over rights on the facts of any particular cases. In particular, Mr Purchase KC has emphasized that his client does not concede that part of ground 1 that suggests that each claimant had a right to carry over their full entitlement’ to four weeks’ annual paid leave “*until the present time (or until termination in the case of those Claimants no longer employed)*”. TDL’s position is as follows: (1) it makes no concession as to the period of time, prior to 1 January 2018, that any claimant was a “worker”, and (2) it makes no concession that any claimant’s employment as a worker was continuous throughout any material period, as opposed to comprising discrete periods of work which terminated periodically (and which, TDL argues) would trigger the limitation period in respect of any right to paid annual leave carried over up until that point.

16. Ms Barroso emphasizes her clients’ position that they were “workers” throughout but accepts that the factual issues that were not previously determined by the ET will fall to be decided at the remitted hearing in these proceedings. For completeness, I further note that there appears to have been some argument before the ET as to whether TDL’s position on “worker” status was clear from the pleadings; this, however, must also be a matter for the ET.

Conclusions and Disposal

17. In the light of the Court of Appeal’s ruling in **Smith v Pimlico Plumbers**, the ET’s judgment at paragraph (2) cannot stand and must be set aside. The proposed declaration set out in the draft consent order, correctly states the legal position consistent with **Smith v Pimlico**

Plumbers, and shall stand in substitution for paragraph (2) of the ET's original judgment. This matter will now need to be remitted to the ET for further directions. I make no order as to the composition of the ET before which the remitted hearing should take place. It seems to me that the time that has passed since the original judgment would mean that little would be gained by remission to the same ET but I consider this to be a decision best left to the Regional Employment Judge.

18. My order is thus in the terms proposed by the parties:

- (1) Ground 1 of the Grounds of Appeal is allowed to the extent that it is consistent with the declaration set out in paragraph 3 below.
- (2) Paragraph (2) of the Employment Tribunal's Judgment is set aside.
- (3) It is declared that the Claimants were and remain entitled to carry over any untaken paid annual leave (which includes taken unremunerated leave) to which they were entitled under regulation 13 of the Working Time Regulations 1998 and the principles of European law until termination or, if earlier, until the Respondent has provided a facility for the Claimants to exercise that right to paid annual leave in respect of the carried over leave.
- (4) The matter is remitted to the Employment Tribunal for directions.