



The restless topic of holiday pay (courtesy of the EU)

By **Hannah Mahon** - 30 November 2018

Holiday pay continues to be a complex area of law with which many employers struggle. It can also be an expensive one for employers – recently the Royal Borough of Greenwich (a local government authority in London) reached a settlement with nearly 5,000 workers for holiday pay which is speculated to be in the region of £4m. Recent decisions for the EU's European Court of Justice (CJEU) show that new facets to this complex area are still being revealed.

The CJEU recently gave judgment in two similar cases from Germany. This considered whether a German law which provides that accrued but untaken holiday will be automatically lost on termination or at the end of each holiday year if the employee failed to seek to take their holiday. The effect of this law is that there would be no entitlement to a payment in lieu of notice. The CJEU appears to suggest that an employer must have enabled an employee to take holiday in the year it was due before the employer can safely rely on the German law[1]. These cases seem to suggest that an employer must encourage an employee to take their holiday and, at the same time, inform the employee that a failure to take holiday will mean that the holiday will be lost at the end of the holiday year. The CJEU also said that such information should be given in good time i.e. when the employee still has time to take the leave. If the employer can prove (it has the burden of proof in such cases) that it took such steps and the employee still failed to take the leave, then EU law does not prevent German law providing that the leave or payment in lieu is lost.

It will be interesting to see what, if any, litigation arises in the UK off the back of these decisions. Under the Working Time Regulations 1998[2], statutory leave may only be taken in the year in which it is accrued[3]. However, over the past few years there have been a number of exemptions to this rule that have been established in case law such as where an employee has been prevented from taking holiday due to sickness or absence on maternity leave so it may well be the case that this will become just another exemption!

The CJEU also recently reiterated its position that if a worker has accrued but untaken statutory annual leave at the time of their death, their estate is entitled to the payment in lieu in respect of the untaken holiday[4].

[1] *Kreuziger v Berlin* (C-619/16) EU:C:2018:872 (06 November 2018) and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu* (C-684/16) EU:C:2018:874 (06 November 2018)

[2] *Working Time Directive (2003/88/EC)*

[3] *Regulation 13(9) Working Time Regulations 1998*

[4] *Stadt Wuppertal v Bauer (C-569/16); Willmeroth v Broßonn (C-570/16) EU:C:2018:871*