



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-214/16
C. King v The Sash Window Workshop Ltd., Richard Dollar

Advocate General Tanchev considers that it is incompatible with EU law to require a worker to take leave first before being able to establish whether he is entitled to be paid for it

In circumstances where an employer has not provided a worker with paid leave, the right to paid leave carries over until he has the opportunity to exercise it and on termination of employment the worker has the right to payment in lieu of leave that remains outstanding

Mr King started working as a salesman for the Sash Window Workshop Ltd ('SWWL'), a company that provides and installs windows and doors, in 1999. He was paid by commission indexed to the sales that he brought in. He was not paid for leave taken and his contract was silent on the question of paid leave. In 2008, SWWL offered Mr King an employee contract but Mr King elected to remain self-employed. Mr King worked continuously for SWWL until he was dismissed with effect from his 65th birthday in October 2012.

In December 2012, Mr King brought proceedings against SWWL in respect of his dismissal before an employment tribunal in the UK. As a consequence of those proceedings, Mr King was found to be a 'worker' for the purposes of UK law¹, which implemented the Working Time Directive.² Mr King's action also included claims for paid holidays. One of these claims related to paid leave to which Mr King was entitled whilst working for SWWL but which that company did not provide.

The Court of Appeal of England and Wales now asks the Court of Justice a number of questions on the interpretation of the Directive, which provides that 'Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks'. The Court of Appeal specifically asks whether, in circumstances where there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay, it is compatible with EU law if the worker has to take leave first before being able to establish whether he is entitled to be paid.

In today's Opinion, Advocate General Evgeni Tanchev considers that **it is incompatible with EU law to require a worker to take leave first before being able to establish whether he is entitled to be paid for it.**

First, the Advocate General recalls the numerous **sources of European and International law which provide for workers' entitlement to paid annual leave.** In light of these sources, the Advocate General concludes that **employers are to provide adequate facilities to workers for the exercise of this entitlement.** The Advocate General considers that such a facility may, for example, take the form of a specific contractual term concerning paid annual leave or a legally enforceable administrative procedure or similar. In his view, it is for the national courts to decide whether any such facility was provided.

Second, **the Advocate General takes the view that it would be inconsistent with the Directive to require workers** like Mr King to make an application to a court or another body **to compel an**

¹ The Working Time Regulations 1998 No. 1833

² Directive 2003/88/EC of the European Parliament and Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p.18).

employer to create an adequate facility for the exercise of the right to paid annual leave. He considers that this conclusion is supported by the fact that Article 31 of the EU Charter of Fundamental Rights grants an unequivocal right to paid annual leave to every worker. Further, the Court's case law states that the existence of the right to paid annual leave is not to be subject to any preconditions whatsoever.

Next, the Advocate General considers that **a worker**, like Mr King, **may rely on the Directive to secure payment in lieu of untaken leave when no facility has been made available by the employer for exercise of the right to paid annual leave**, or if such a facility was only provided part way through the relationship. In the Advocate General's opinion, it goes beyond the discretion afforded to Member States in the implementation of the right to paid annual leave to permit employers to withhold creation of a facility for workers to exercise the right to paid annual leave and amounts to an unlawful precondition to the very existence of the right.

This means, in the Advocate General's view, that **if a worker does not take all or some of the annual leave to which he is entitled in the leave year, in circumstances where he would have done so but for the fact that the employer does not pay him for any period of leave he takes, the worker can claim that he is prevented from exercising his right to paid leave such that the right carries over until he has had such opportunity to exercise it.**

Third, the Advocate General concludes that, **upon termination of the employment relationship, a worker is entitled to an allowance in lieu of paid annual leave that has not been taken up until the date on which the employer made available to the worker an adequate facility for the exercise of the right to paid annual leave.** If this never occurred, then an allowance is due to cover the full period of employment until termination of the employment relationship. It is for the national court to decide whether SWWL's offer of an employment contract in 2008 to Mr King constituted an adequate facility for the exercise of the right to paid annual leave.

Finally, the Advocate General considers that it is incompatible with EU law to require a worker to take annual leave before being able to ascertain whether he will be paid for it. In the Advocate General's view, to do otherwise would amount to requiring the worker to take active steps to secure the creation of an adequate facility for the exercise of the right to paid annual leave, which he considers to be incompatible with EU law. He also considers that it would make the right to paid leave excessively difficult to enforce.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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