

## Holiday pay for departing employees

### Beijing Ton Ren Tang (UK) Limited v Ms S P Wang

The Working Time Regulations (the “**Regulations**”) are in the news again, this time in relation to how they are interpreted when an employee relies on their contractual holiday entitlement to be paid in lieu of holidays not taken on termination.

#### The facts

Ms Wang had an oral contract which entitled her to 30 days holiday a year. She was also told that if she did not take her holidays, she would be paid in lieu of holidays not taken at the end of her employment. She took minimal holiday during her seven and a half years of employment and therefore on termination, was asking to be paid in lieu for the balance of untaken holiday going back several years.

The employer argued that under Regulation 13(9) of the Regulations, holiday could not be carried over from one holiday year to the next; the “use it or lose it” rule. Therefore, Ms Wang would only be entitled to payment in lieu for untaken holiday in her final year of employment and any contractual untaken holiday that exceeded her statutory entitlement to holiday under the Regulations. The employer suggested that Regulation 35 of the Regulations, made it impossible to contract out of the effects of the Regulations so this had to be the logical conclusion.

#### Decision

The EAT rejected the employer’s argument. Ms Wang had a contractual right to recover all untaken holiday as a payment in lieu. Although this is a more favourable provision than the Regulations, this is permitted under the Regulations. The Regulations were not being excluded or limited; their effect was being enhanced. The employer was ordered to make a payment in lieu of 131 days of unpaid holiday.

#### Impact

There has been uncertainty about the interplay between a contractual holiday entitlement which remains unpaid on termination and the “use it or lose it” statement in the Regulations. Following this case, if an employee makes a claim under contract for unpaid holiday on termination and their contract gives them greater rights than the Regulations, the employer cannot rely on the Regulations to limit the wording in the contract.

#### Practical steps

If your contracts of employment provide for employees to have more holiday than the Regulations, you will want to consider how to minimise the risk of extended “carried over holiday” on dismissal.

- When re-drafting contracts of employment, include a provision in the contract that payment in lieu for untaken holiday is limited to holiday which remains untaken in the year of termination. This would prevent a claim for untaken holiday in previous years.
- Many contracts already contain a clause which prevents or limits employees carrying holiday over into “new” holiday years. Such a clause could be relied upon to prevent an employee trying to claim untaken contractual holiday in previous years. However, in practice, such a clause would need to be managed and enforced by the employer.
- Managers need to be reminded that if they allow an employee to carry over more than that laid down in the contract or handbook, even on a verbal basis, then the clause limiting carry over of holiday loses its weight. An employee may be able to rely on the fact that they have regularly been able to carry over in excess of the amount stated in their contract and/or that they know that other employees do the same. Managers need to be aware of the importance of making exceptions to the rule.

- Update your company handbook to ensure that the company's requirements in relation to taking holiday in the current holiday year and the limitations to any carry over of holiday, are clearly set out. This will enhance a defence to a claim like this even if an employee's individual contract does not specify that payment for untaken holiday on termination will be limited to the year of termination. However, once again this requirement must be implemented in practice and actively managed.

## Contact details

### **Nicholas Robertson**

Partner

+44 20 3130 3919

### **Christopher Fisher**

Partner

+44 20 3130 3724

### **Bernadette Daley**

Partner

+44 20 3130 3667

---

Mayer Brown is a leading global law firm with approximately 900 lawyers in the Americas, 300 in Asia and 450 in Europe. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, São Paulo, Washington  
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai  
EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris

ALLIANCE LAW FIRMS Mexico, Jáuregui, Navarrete y Nader; Spain, Ramón & Cajal; Italy and Eastern Europe, Tonucci & Partners

Please visit our web site for comprehensive contact information for all Mayer Brown offices.

[www.mayerbrown.com](http://www.mayerbrown.com)

© 2009. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved.

Mayer Brown is a global legal services organisation comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. "Mayer Brown" and the "Mayer Brown" logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.