

HOLIDAY ENTITLEMENT ACCRUES DURING SICKNESS ABSENCE



In a decision which will prove one of the most unpopular with employers in recent years, the European Court of Justice (ECJ) has handed down its decision in Stringer -v- HMRC

The ECJ has determined that:-

- A worker who is on sick leave for the whole of an annual leave year is entitled to a period of four weeks' paid annual leave, despite the fact they are not actually at work; and
- That the right to paid annual leave is not extinguished at the end of a leave year if the worker was on sick leave for the whole of that year, or if he was absent on sick leave for part of the year and was still on sick leave when his employment terminates.

The House of Lords now has two issues to decide:

- Firstly, it must consider whether it can interpret the Working Time Regulations (WTR) in line with the ECJ's decision. (If they cannot, Parliament will require to introduce amending legislation to correct that incompatibility); and

- Secondly, if the House of Lords is able to interpret the WTR compatibly, it will then require to determine whether the worker can request paid leave during periods of sickness absence or whether it is an accrued right which is carried over from leave year to leave year and for which payment requires to be made upon return to the workplace or on termination of employment.
- It is hoped that when delivering its judgement the House of Lords may provide guidance in relation to accrual of holiday entitlement during periods of sickness absence of less than a year.

The Facts

There were two categories of claimant. The first was on indefinite sick leave. She gave notice to her employer that she wished to take 20 days paid annual leave. Her employer declined the request. She claimed that she was entitled to take annual leave notwithstanding the fact that she was absent and to be paid for it.

The second category of claimant was dismissed by the employer. He had been absent on long term sick leave throughout the whole of the leave year in which his employment was terminated and had not taken any annual leave during that year. He claimed that he was entitled to a payment in lieu of annual leave accrued but not taken during that leave year.

The Court of appeal found in favour of the employers but the employees appealed that decision to the House of Lords who referred the case to the ECJ.

The Implications for Employers

Much will be clarified by the House of Lords decision. A further update will be circulated following on from that but in the meantime:-

- Contracts & policies will require to be reviewed following the House of Lords decision. It will be possible to stipulate that contractual leave in excess of that provided for under the WTR will not accrue during periods of ill health as the ECJ's decision only relates to annual leave entitlement deriving from European Law under the WTR which is 4 weeks. Whatever the House of Lords decides in relation to the application of the ECJ's decision to the WTR, it leaves a question mark over whether the principles also apply to additional annual leave or not (which increases from 4.8 weeks to 5.6 weeks from 1st April this year). Hopefully that matter will also be clarified.
- Employers should consider making budget provision for accrual of annual leave entitlement under the WTR during sick leave not only for current leave years but also in relation to

previous leave years where employees have been absent over several leave years.

- Where there are Permanent Health Insurance (PHI) policies in place, these should be reviewed to identify whether provision is made for annual leave entitlement.
- Management of long term sickness absence should be reviewed. The economic implications where employees have been off sick for several years is now potentially a major consideration. Clients should audit their long term sickness absence numbers. Whereas previously these employees may simply have been a statistic for headcount there are good reasons to identify whether adjustment can be made to assist these individuals back into the workplace or whether a capability dismissal is apt. Clearly this is problematic where PHI policies are in place, particularly those which provide for cover to retirement.

If you would like to discuss any matters arising from this update, please contact any member of the Employment Law Team:-

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