
The HR Forum

Holiday Pay for those on long term sick leave – Stringer – any answers? – 16th July 2009

Background:

1. The Law surrounding whether those on long term sick leave are able to claim holiday pay has long been unclear.
2. The case of Stringer v HMRC (2009) ALL ER(d)(168) was supposed to rectify that. The case previously known as “Ainsworth” goes back to Employment Tribunal Judgments from 2003.
3. The House of Lords finally handed down Judgment on the case on 10th June 2009. It was hoped that the House of Lords would clarify the many unanswered questions about the law relating to statutory annual leave, but those hopes have, after all this time, been dashed.
4. Only two points of law are dealt with in the Stringer House of Lords Judgement:-
 - (a) the issue of whether statutory annual leave may be taken during periods that a worker is off sick; and
 - (b) whether a failure to pay a worker in respect of statutory annual leave may be claimed under the deduction from wages jurisdiction

(a) Statutory annual leave rights during periods of sickness

5. After the European Courts of Justices (“ECJ”) ruling, HMRC conceded point (a) above. The ECJ had held that it was compatible with the Working Time Directive for workers to take annual leave whilst on long term sick.
6. It is therefore fairly safe to assume that annual leave rights do accrue under the UK Working Time Regulations whilst the worker is on sick leave, even if he is off sick for the whole of the relevant leave year.

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(b) Claiming holiday pay as a deduction from wages

7. The House of Lords concluded that failures to make payments in respect of statutory annual leave do constitute a deduction of wages within the meaning of Section 13 of the Employment Rights Act 1996.
8. This means that worker's claims for holiday pay whilst on sick leave can now be brought either under Regulation 30 of the Working Time Regulations or under the Deduction of Wages jurisdiction (ERA 1996, Section 23).

The result, the law and the practical consequences

9. Because of the concession by HMRC on the first point, and the narrowness of the second point, a proper analysis of the Law overall is still dependent on Judgments prior to the Stringer Case which are all at EAT level.

The Current Law

Carrying leave over

10. Statutory annual leave itself cannot under the Working Time Regulations be carried over into a subsequent year if it is not taken during the leave year during which the entitlement arises.

Holiday actually taken by an employee whilst sick

11. Whilst still employed, a worker cannot seek (and an employer may not provide) payment in lieu of annual leave (Working Time Regulation 13(9)(b)). However where a worker takes annual leave, but it is not paid (or not fully paid) for the leave years taken, he may bring a claim for the shortfall at any time during the three months following the date that the unpaid money falls due, even though he remains employed. Such a claim may now be brought either under the Working Time Regulations or the Deduction from Wages regime.

Claims during employment where leave not taken – still unclear!

12. The key question remains:-

Can a worker, whilst he is still employed, bring a claim for unpaid holiday pay in respect of leave which he has not taken, or sought to take (considering the prohibition on payments in lieu), or must he wait until his employment is terminated ?

13. Crucially the House of Lords in Stringer did not consider this question. As such it is unclear whether an employee must notify the employer that he is taking annual leave in order to claim payment under the Working Time Regulations.
14. Two previous cases provide conflicting decisions on the issue.
15. In Kigass Aero Components v Brown (2002) IRLR 312 the EAT concluded that a worker does have to give notice under the Working Time Regulations to claim holiday pay, unless "some clear and comprehensive pre-emptive indication of a refusal by the employer to permit the leave has been given". However, this is not a binding decision as the comments were obiter.

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16. However, shortly afterwards in the case of List Design Group v Douglas and Catley (2003) IRLR 14 the EAT concluded that it was not a requirement that the employee had actually taken the leave.
17. It remains to be seen which line the Employment Tribunals will take. Some commentators feel that Tribunals are more likely to follow List Design since it is the later decision.

Practical Implications

18. If List Design prevails, and employees are entitled to be paid in lieu of holiday pay without taking the leave or without leaving employment, this means that employers will potentially be liable for significant amounts of back pay where employees on long term sick leave have not previously been paid holiday pay.
19. Going forward, employers should develop a policy for managing the payment of holiday pay for those on sick leave. The following are some of the issues which employers should think about:-
 - (a) Pay employees for statutory holidays whilst off sick where the employee has notified the employer of holiday to be taken.

Where employment is terminating

- (b) Pay employees accrued but untaken statutory holiday pay in lieu for final year of employment.

Where employee is on sick leave

- (c) By ensuring that employees on extended sick leave take annual leave, employers can prevent significant liabilities accruing over time.
 - (d) However, in these circumstances, employers may wish to wait and see if an employee brings a claim, as whether the employee can claim is still undecided.
 - (e) The decision may encourage some employers to terminate employees on long term sick leave sooner than they would otherwise do in order to avoid the ongoing holiday pay. If so, care must be taken to avoid successful unfair dismissal and/or disability discrimination claims.
20. In addition 3 issues arise in respect of employees in receipt of permanent health insurance benefits ("PHI").
 - (i) Employers should ensure that paying holiday pay does not bring an end to the benefits under the rules of the scheme
 - (ii) PHI policies should be drafted (or varied where possible) to ensure that PHI payments are set off against holiday payments
 - (iii) Employers considering termination of employment should check whether PHI benefits would cease (if so, termination may be in breach of contract or create a DDA issue).

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If you would like any further information on the topics covered in these notes please contact Andrew Cross, Head of Employment Law, Brabners Chaffe Street, on 0151 600 3062 or andrew.cross@brabnerscs.com

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