

PAY IN LIEU OF HOLIDAY ACCRUED DURING SICK LEAVE

In the recent case of *Khan v Martin McColl* an Employment Tribunal held that in order for workers on sick leave to be entitled to carry their holiday entitlement forward they have to have been “denied” their holiday. It also held that an employer can break a series of deductions by making a payment in lieu of holiday accrued during the last holiday year of employment when the employee’s employment terminates, which may mean that claims for previous years’ accrued but unused holidays would be out of time.

Mr Khan was TUPE transferred to Martin McColl in 2007. Martin McColl promised that he would not lose his holiday. He had 2 weeks holiday remaining which he carried over into the 2008 holiday year. Mr Khan went off on long term sick leave in 2008 having not taken any of his holiday for 2008 or the holiday carried over from 2007. He remained absent due to long term sickness until he resigned in August 2009. He did not request any holidays during this period. On termination Martin McColl paid him in lieu of the holiday he had accrued during the 2009 holiday year up to his resignation. Mr Khan brought claims for his 2007 and 2008 accrued holidays under the unlawful deductions from wages provisions and the Working Time Regulations (WTR).

In *Stringer* the European Court of Justice held that in order for workers on sick leave to be entitled to carry their holiday entitlement forward they have to have been “denied” their holiday. Furthermore, the House of Lords in *Stringer* decided that claims for holiday pay can be a series of deductions, meaning it might be possible for workers who have been off sick for a number of years to recover holiday pay for all of those years.

The Tribunal held that Mr Khan had not been “denied” his holiday for 2007 and 2008 because he had not requested it during the relevant holiday years. As such he could not carry it over. Payment of Mr Khan’s accrued holiday for 2009 at the point of termination had broken a series of deductions and consequently Mr Khan was out of time in bringing his claim for holiday accrued during the 2007 and 2008 holiday years. The Tribunal also held that his claim under the WTR was out of time given that such a claim had to be brought within 3 months of the date on which the holiday should have been allowed or paid.

➤ Practical Tips

Although this is a Tribunal decision, and therefore not binding on any other Tribunal or higher court, it provides some useful guidance:

- In order to bring a claim for accrued but unused holiday an employee has to have made a request to take holiday and that request has to have been denied
- Employers should consider paying an employee in lieu of unused holiday accrued in the last holiday year to deprive them of holiday pay claims for previous holiday years.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

If you no longer wish to receive the bulletin please let us know by return e-mail to helen.calvert@brabnerscs.com

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