



**Bulletin 143**

**July 2009**

### **HOLIDAY PAY FOR THE LONG-TERM SICK**

The question of holiday pay for workers off sick has for some time vexed employers. The law relating to paid holiday for workers on long-term sick leave was recently referred to the European Court of Justice (ECJ) by the House of Lords in the long running case of *HMRC v Stringer* (formerly *Ainsworth v HMRC*).

#### **In January 2009, the ECJ decided:**

1. Workers and employees on sick leave accrue statutory annual leave whilst off sick.
2. Individual member states can decide whether to allow the worker or employee to take paid leave during a period of sick leave
3. If not permitted to take the paid holiday when off sick and so prevented from taking it before the end of the holiday year, the worker or employee must be allowed to carry over the holiday into the next holiday year and take it at a later date
4. The right to be paid in lieu of any accrued holiday on termination applies even if the worker or employee has been on sick leave for the whole (or part) of the holiday year.

The House of Lords' decision means that workers and employees on long-term sick leave can take paid holiday even though they are not in work.

In the light of the ECJ decision, HMRC conceded that annual leave can be taken during sick leave. Whilst that issue was not explicitly considered by the House of Lords, they implicitly agreed.

The House of Lords also addressed the question of time limits for workers and employees to bring claims for holiday pay. The issue here was whether claims for statutory holiday pay could be brought under the deductions from wages provisions of the Employment Rights Act 1996 (ERA), which has more generous time limits than claims brought under the Working Time Regulations 1998 (WTR).

The WTR implemented the Working Time Directive into UK law. Workers and employees are entitled to 5.6 weeks paid annual leave each year. If an employer infringes the right to paid statutory annual leave, the worker or employee can bring a claim under the WTR. Strict time limits apply. Claims must be brought within 3 months of the initial breach, here, the first failure to pay holiday pay. This means that claims for holiday pay are quickly out of time.

The key issue decided by the House of Lords in the *Stringer* case is that workers and employees can now bring claims for statutory holiday pay under the ERA as a deduction from wages. This confirmed an earlier decision of the EAT in *List Design v Douglas* (2003).

The significance of this is that workers and employees can take advantage of the more generous time limits and potentially claim back holiday pay from previous years when payments have not been made. A claim for a deduction from wages should be made within 3 months of the deduction – or the last in a series of deductions. This not only increases the time limit but significantly extends the period over which the claim could be brought. A worker or employee could bring a claim for holiday pay going back a number of years.

Disappointingly, the House of Lords did not address the key issue as to whether the worker or employee has to give notice and formally request the holiday in order to trigger the right to be paid holiday. It may be that they do not have to actually take the leave in order to bring a claim for holiday pay. This leaves employers and their advisers in a state of uncertainty and with the prospect of further litigation.

Employers potentially face expensive claims for holiday pay from previous years. Looking forward employers will also have to decide how to manage holiday pay for those staff off sick long-term if they want to avoid accruing potential significant liabilities.

This decision will lead to additional costs for employers as workers on long term sick leave can now take paid annual leave even after their sick pay entitlement has expired.

Employers may want to consider stating in their sickness absence policies that workers on long term sick leave are entitled to paid annual leave but to restrict the amount of paid leave that can be taken in those circumstances to the statutory minimum leave under the WTR (currently 5.6 weeks) and not the contractual holiday that may be more generous.

Employers should be aware of possible implications for permanent health insurance (PHI) schemes since workers or employees may well be entitled to holiday pay in addition to PHI benefits. Consider whether you can off set or agree to offset the PHI payments against the holiday payments.

If an employer is minded to terminate the employment of those on long-term sick in order to avoid on-going holiday pay, they must be on their guard to avoid claims of unfair dismissal and perhaps even claims under the Disability Discrimination Act.

Employers are advised to review individuals on long term sick leave, including those benefiting from PHI schemes, and their current sickness absence and holiday policies to assess the potential liability for holiday pay.

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](mailto:helen.calvert@brabnerscs.com)

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