

## Employees On Sick Leave Still Accrue Paid Holiday Rights

A long awaited decision has finally been made by the European Court of Justice and it will be disappointing for many employers. The decision in the case of Stringer -v- H M Revenue & Customs, which was amalgamated with a German case, focused on following issues:-

1. Does an employee accrue paid holiday during sick leave?
2. Can an employee, who is on long term sick leave, request to take their accrued paid holiday during their sick leave?
3. Is it in accordance with the European Directive to have national legislation which says that an employee will lose any accrued but untaken holiday at the end of the holiday year, or must the employee be allowed to carry this over.
4. If an employee's employment is terminated during a period of absence, is the employee entitled to a payment in respect accrued, but untaken, holiday?

The answers to these questions are as follows:-

### 1. **Accrual of holiday**

**An employee who is on long term sick leave continues to accrue paid holiday.**

The Court explained that the European Directive provided that all workers should have paid annual leave, but did not state that the entitlement to it would only accrue whilst working. Therefore the Court concluded that if an employee has been on sick leave for the whole or part of the leave year, they will still be accruing paid holiday entitlement.

### 2. **Can a sick employee take holiday at the same time?**

**An employee who is on sick leave cannot at the same time take holiday**

The Court held that an employee cannot be both sick and enjoying paid holiday at the same time. The Court said that the purpose of paid annual leave is to allow time for employees to rest and enjoy a period of relaxation and leisure. The purpose of sick leave is to ensure that employees have an opportunity to recover from illness. The Court concluded that the two types of leave were not interchangeable and an employee has no right to decide to allocate time they are sick as holiday time.

### 3. **Carry over of holiday**

**An employee who has been on long term sick leave and who has therefore not been able to take his or her holiday entitlement should be allowed to carry this over. National legislation which precluded carry over in such circumstances is unlawful**

The Court stated that the consequence of an employee on sick leave not being able to take holiday is that he or she may not have the opportunity to use the holiday entitlement they have accrued by the end of the holiday year. However the Court said that the solution to this was that an employee on

sick leave should not lose their accrued paid annual leave at the end of the holiday year. When an employee returns to work after a period of sick leave, an employer must provide the employee with the opportunity to take that accrued holiday, even if they return to work in a subsequent holiday year.

This is a very important part of the Decision because it says that an employer must allow an employee who is absent due to sickness to carry over unused holiday at the end of the holiday year. This goes against the current Working Time Regulations and the practice of many employers who operate a “use it or lose it” policy where holiday is concerned.

#### **4. Payment on termination of employment**

##### **National legislation should provide that an employee is paid for any accrued but untaken holiday on termination of employment**

The Court made it clear that upon termination of the employment relationship, after a period of sickness, a payment in lieu of the accrued paid annual leave should be made to the worker. The Court also clarified that the calculation for any payment in lieu of accrued holiday rights, would be based on the worker’s normal remuneration, as opposed to any sick pay entitlement.

This right to be paid for any accrued but untaken holiday would include any holiday accrued in the previous holiday year.

#### **Practical Points**

- The issues raised in *Stringer -v- H M Revenue & Customs* have now been referred back to the House of Lords to give a final ruling on the questions raised. Their decision will undoubtedly follow the logic of the European Court of Justice and then this change will come into force in the UK. In relation to the ability to carry over unused holiday after a period of sick leave, the Working Time Regulations will need to be amended to harmonise case law and legislation.
- In the meantime, employers should review their policies to ensure sick leave and holiday accrual is monitored. Allowing employees to stay on long term sick leave for very long periods could be costly as they will accrue holiday during their period of sickness leave.
- Employers may have to allow employees to take their accrued entitlement during the initial period back in their role. This may cause difficulties integrating the returning employee back into the workplace.
- The above only applies to statutory holiday, so an employer may have more scope to limit the payment of, or entitlement to, contractual holiday entitlement, although employers may decide that operating different systems for statutory and contractual holiday is too cumbersome.

# e-Newsbrief



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