

Long term sick leave and holiday rights

The law relating to holiday rights for employees on long term sick leave has been in a state of uncertainty over recent years. In particular, it has been unclear whether an employee's holiday entitlement under the Working Time Regulations 1998 accrues during periods of sick leave; whether an employee on sick leave can instead take paid annual leave (particularly where any sick pay entitlement has been exhausted); whether untaken holiday can be carried over to the next holiday year; and whether, upon termination of employment following an extended period of absence through sickness, an employee is entitled to a payment in lieu of untaken holiday.

The case relating to this issue has been known as the "Ainsworth" and more latterly "Stringer" case. As a result of this case, the House of Lords sought guidance from the European Court of Justice (ECJ) on the interpretation of the relevant legal provisions. The ECJ ruled that:-

- A worker absent through sickness continues to accrue statutory annual leave during a period of sick leave;
- Whether a worker is entitled to take annual leave during a period of sick leave is a matter for national law to determine;
- However, if a worker has been prevented from taking annual leave owing to sick leave, national law must enable the worker to carry the leave over and take their holiday at a later date, even after the end of the leave year;
- In addition, accrued holiday must be paid in lieu on termination of employment, even if the worker has been on sick leave for the whole or part of the year.

Following the ECJ's judgment, the case went back to the House of Lords and we expected (or at least hoped) that the House of Lords would answer the outstanding questions. However, rather than do this, the House of Lords, with agreement of the parties in the case, simply reinstated the decision of the Employment Appeal Tribunal in "Ainsworth".

Given the uncertainty over what the House of Lords has done, and the continued uncertainty over certain aspects, we thought it would be helpful to clarify the current position, which is that:-

- Workers on sick leave retain annual leave entitlements, so that statutory holiday accrues during periods of sick leave;
- A worker who is absent from work due to ill-health is nevertheless entitled to claim a right to paid holiday under the Working Time Regulations (which is now 5.6 weeks). Therefore, an employee on sick leave and being paid SSP can take "holiday" and be paid at the relevant rate for that period;
- A payment in lieu of untaken statutory holiday on termination must be unaffected by sickness absence.

- Failure to make a payment in lieu of statutory holiday pay on termination is an unlawful deduction of wages. An employee has three months from the last in a series of deductions to put in a claim under the Employment Rights Act 1996.

Whilst this may be unsatisfactory for employers, we are at least moving towards some certainty. However, an important aspect of the ECJ's ruling was not considered by the House of Lords. This is the question of whether annual leave accrued by a sick worker (but not taken by the worker in the holiday year) is extinguished at the end of the holiday year, or whether it must be carried over to the next holiday year (as the ECJ's ruling suggests).

Other issues of potential uncertainty include:-

- Whether employers have the right to force workers to use their annual leave instead of taking paid sick leave. This could be useful if the employee is being paid full sick pay at the relevant time;
- What the implications are for permanent health insurance schemes (PHI), since workers will arguably be entitled to holiday pay on top of their PHI benefits.

It is our view that the issue of carry over of leave will have to be considered by the legislators and the Working Time Regulations will need to be amended. One would hope that the entire situation would be clarified but we are not optimistic in this regard. We suspect there will be more litigation over the next few years and the answers will come gradually from this litigation.

In the meantime, the safer option for employers is likely to be to allow sick employees to carry over untaken holiday at the end of the holiday year. Employers might also want to agree with employees that a period of their sick leave will be taken as holiday, even if the employee has not raised this. If employers wish to try and force sick employees to take holiday at a particular time (which might be more beneficial for the employer) then employers will have to give a minimum period of notice to the employee and specialist advice should be sought in this case.

NEED SOME GUIDANCE? PLEASE CONTACT US ...

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