



briefing

Employment, Pensions and Benefits - January 2009

Sickness and annual leave

Case update following ECJ judgment

An end to the ongoing litigation involving accrual of holiday during long term sick leave is one step nearer. The European Court of Justice has just given its judgment in the case *Stringer v HMRC*, one year on from the Advocate General's Opinion.

Background

The Working Time Regulations 1998, which implemented the EC Working Time Directive, introduced the right to paid annual leave and also provided that annual leave cannot be replaced by a payment in lieu except where, on termination of employment, the worker has a period of untaken leave.

Stringer v HMRC, (previously called *Ainsworth v HMRC*) involved a number of workers who had been absent on indefinite sick leave and two specific issues arose. During the course of her sick leave, one employee gave notice that she wished to take 20 days paid annual leave but HMRC refused that request. The employee brought successful Employment Tribunal proceedings, arguing she was entitled to take paid annual leave.

The other employees were dismissed whilst on long term sick leave and they too brought successful claims for payments in lieu of untaken annual leave. The sums awarded ranged from £16 to £967.

HMRC unsuccessfully appealed to the EAT in 2004 and further litigation followed, culminating in 2006 with a stay of the proceedings and a referral by the House of Lords to the European Court of Justice (ECJ) for a preliminary ruling.

The first step in that process was consideration of the issues by the Advocate General, specifically:

- Whether or not a worker on indefinite sick leave is entitled to designate a future period of leave as paid annual leave and to take paid annual leave at a time when he would otherwise be on sick leave.
- Whether the Directive imposes any requirements or lays down any criteria as to whether a payment in lieu of untaken annual leave is to be paid or how it is to be calculated.

Advocate General's Opinion

In 2008, the Advocate General concluded that:

- Paid annual leave is a fundamental social right. The purpose of the Directive is to guarantee the protection of the safety and health of workers by ensuring that they are entitled to daily, weekly and annual minimum rest periods. The existence of the right to paid annual leave cannot be made subject to a worker's capacity for work. As a result, a worker incapable of working because of illness continues to accrue annual leave but this leave cannot be taken in a period in which the worker is on sick leave. The leave can only be taken if and when the worker returns to work.
- In relation to the second issue, as the worker has an entitlement to paid annual leave whilst on sick leave and can take that leave should they return to work, if the employment relationship is terminated, the worker is entitled to a payment in lieu of any accrued but untaken leave.

The matter then went before the full ECJ which generally, but not always, tends to follow the Advocate General's Opinion.

The ECJ has held that:

- The Directive does not preclude national legislation which provides that a worker on sick leave is not entitled to take paid annual leave during a period of sick leave but, subject to the worker having the opportunity to take that annual leave during another period. Whether or not annual leave can be taken during a period of sick leave is therefore still to be determined by the House of Lords and its final decision is not expected until later this year.
- The right to paid annual leave is not extinguished at the end of the leave year and/or of a carry-over period laid down by national legislation where the worker has been on sick leave for the whole or part of the leave year and where the persistent incapacity to work is the reason why the worker could not exercise his right to paid annual leave. This means that workers will continue to accrue annual leave while on sick leave and can take that leave on their return to work even if that is during another leave year.
- If employment terminates while the worker is on sick leave, he is entitled to a payment in lieu of untaken paid annual leave and the payment must be calculated taking into account the worker's normal remuneration.

More information

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The judgment is likely to be problematic for many employers who have members of staff on long term sick leave especially in this difficult economic climate. They could be faced with staff returning from sick leave with a significant amount of accrued paid holiday leave to take or, having to make payments in lieu of untaken holiday if employment is terminated.

Organisations should also consider reviewing their sickness and holiday policies and contracts of employment to establish, for example, whether or not holiday not taken because of sick leave can be carried over to the next leave year.

Nevertheless it is important to bear in mind that the vast majority of sickness absence is short term. According to the CIPD annual survey report on Absence Management 2007, in the private sector 75% of absence is short term absence of up to seven days and only 15% of absence is for four weeks or more.

Being proactive in managing sickness absence is essential and particularly effective methods for managing long term sickness include referrals to occupational health, rehabilitation programmes and flexible working opportunities such as a phased return to work or a return to an alternative role.



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