



## briefing

Employment, Pensions & Benefits - June 2009

### Sickness and annual leave

#### The remedies for unpaid holiday pay

**The long standing litigation between the HMRC and some former employees has now been concluded following the House of Lords judgment, given on Wednesday 10 June 2009 in the case of [HMRC v Stringer](#).**

#### Background

As a brief reminder, [Stringer](#) involved five employees who had been absent on indefinite sick leave and who had exhausted their entitlement to contractual and statutory sick pay. During the course of one employee's sick leave, a request was made to take annual leave but this was refused by [HMRC](#). The other employees were dismissed following long term absence and they brought claims for payments in lieu of holiday which they claimed they had accrued but which was not taken at the time of the termination of their employment.

All the employees brought successful Employment Tribunal claims which were subsequently upheld by the EAT. [The Court of Appeal](#), however, allowed HMRC's appeal and held that a worker cannot take statutory annual leave while they are on sick leave and is not entitled to a payment in lieu of any untaken holiday on the termination of their employment.

The employees appealed to the [House of Lords](#) which referred the matter to the [European Court of Justice](#) (ECJ) which held in January this year that:

- the entitlement to paid statutory annual leave does accrue whilst an individual is on long term sick leave;
- the right to paid statutory annual leave is not extinguished at the end of the leave year which means that a worker can take their leave on their return to work even if that is during another leave year;

- if employment is terminated while the worker is on sick leave they are entitled to a payment in lieu of untaken and accrued paid statutory annual leave which is calculated taking into account the worker's normal remuneration.

For further details on the background to this case, please refer to our previous briefing (no.13, published January 2008), available on our website.

#### House of Lords decision

In light of the ECJ judgment, the parties agreed that the decision of the EAT relating to the accrual of statutory annual leave while absent on sick leave should be reinstated. This meant that the key issue before the House of Lords was a rather technical one about time limits and what constituted 'wages' which in turn determined what remedies are available to individuals bringing claims in relation to unpaid holiday pay.

The case was decided taking into account the provisions of the

- Employment Rights Act 1996 (ERA), and the
- Working Time Regulations 1998 (the Regulations).

Section 27 ERA defines 'wages' as any sums payable to the worker in connection with employment including any fee, bonus, commission, holiday pay or other emolument, and includes statutory maternity, paternity and adoption pay for example.

Section 13 ERA provides that if an employer has made a deduction from wages, the individual is entitled to complain to an Employment Tribunal. The time limit for presenting an unauthorised deductions claim is three months. However the Employment Tribunal can consider a complaint presented within a reasonable time after that period if it is satisfied it had not been reasonably practicable for the complaint to be presented within the 3 month period. Significantly however, where there are a [series of deductions](#), section 23 ERA allows a complaint to be made within three months of the [last](#) deduction in the series.

HMRC argued that paid annual leave under the Regulations did not come within the ERA definition of 'wages'. On that basis, an individual wanting to pursue a claim for unpaid annual leave could only do so under the Regulations rather than ERA. This meant they had to rely on the time limit provided for under Regulation 30, that is, three months or such further period as the Employment Tribunal considers reasonable in a case where it is satisfied it is not reasonably practicable for the complaint to be presented before the end of the period of three months. There is no equivalent provision within Regulation 30 to extend the time limit where there has been a series of deductions.

The key issue before the House of Lords was whether a claim based on an alleged failure to make payments under the Regulations (unpaid holiday pay) can be brought as a claim for unauthorised deduction from wages under ERA. This seems a very technical point but it has significant practical implications because, in reality, section 23 ERA provides for an extended time limit for bringing claims. If the answer is no, then a claim can only be brought under the Regulations with its less generous time limit.

The House of Lords held that:

- payment in respect of annual leave is part of the consideration which the employee receives in return for the work done and so comes within the normal meaning of 'wages';
- a failure to pay annual leave or to make a payment in lieu on termination of employment could constitute an unauthorised deduction from 'wages';
- this gives the individual the right to bring a claim under ERA (with the benefit of the extended time limit) as well as under the Regulations.

For many employers, whilst the decision on enforcing claims for unpaid holiday will be of interest, the main issue for them will be whether workers absent on sick leave still accrue annual leave. This point was referred to the ECJ by the House of Lords. However the House of Lords did not rule following the ECJ decision on this point. This appears to be based on the parties to the case agreeing that the EAT decision should be reinstated in light of the ECJ decision.

This is unsatisfactory in our view as there is still conflict between what the Regulations say (holiday not taken is lost) and the EAT decision (annual leave accrued by a sick worker cannot be lost and should be carried over to the next holiday year). It also does not address the issue as to whether this principle applies to those on sick leave, or if it also applies to others on leave e.g. maternity leave. The Regulations should be amended to deal with this, but no information on any such amendment has been published to date.

## The implications of the decision

For many employees, who have been on long term sick leave and who have not been given paid holiday leave they now have the option of pursuing an unauthorised deductions from wages claim under ERA. Clearly, they will benefit from the House of Lords decision as they will be able to take advantage of the extended time limit which applies to such claims.

For employers, the decision could prove costly. Individuals will continue to accrue statutory annual leave while on sick leave and will have the right to take that leave on their return to work or if they do not return, to a payment in lieu if their employment is ended. One option is to permit the carrying over of statutory annual leave to the subsequent leave year if someone has been unable to take holiday because of illness. It is possible that the Regulations may be amended in due course to allow for this. What is clear is that as a result of this decision, managing sickness absence will become even more of a priority for organisations especially in the current economic climate.

## More information

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If you would like further information, or would like to discuss the potential impact of these decisions on your organisation, please call Debra Gers, or your regular Morgan Cole contact.



**Debra Gers, Associate**  
T: 02920 385 487  
E: [debra.gers@morgan-cole.com](mailto:debra.gers@morgan-cole.com)

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