

Review

Employment



Are workers on long-term sick entitled to paid annual leave?

Believe it or not, the Tribunals and Courts have been debating this issue since 2003 when Mr Ainsworth and his colleagues first presented their claims for unpaid holiday pay. And even though the House of Lords has now given its decision in *HMRC v Stringer* it is probably fair to say we still do not know all the answers! In fact, this latest ruling has thrown up as many questions as it answers, which is a little disappointing, putting it at its lowest, given the matter's age. In this month's newsletter we set out what now appears to be certain and provide some guidance on how to deal with the remaining uncertainties in this area.

- It is now clear that workers on long-term sick leave (i.e. those who have been off for a whole year or those who have worked for part of the leave year before taking sick leave for the rest of it) continue to accrue statutory paid holiday. Under the Working Time Regulations 1998 an individual merely has to be a "worker" to accrue holiday - the Regulations say nothing about actually having to do any work! The Lords more or less took that as read.
- It seems however that in order to trigger the right to paid annual leave such workers will have to make a request to take holiday in accordance with Regulation 15 of the WTR, stipulating the days on which they want to take leave.
- This all seems fairly straightforward (if expensive, more than faintly offensive to common sense and administratively frustrating), but what happens if a worker does not make such a request? Is he entitled to carry over his holiday from one leave year to the next and take it as and when he finally returns to work? Or does it just lapse? Is he entitled to get paid for it if his employment is terminated? Unfortunately the answers to these questions are still unclear, as the Lords did not deal with the issue of "carry over" in their decision.
- There is an argument that if a worker on long-term sick does not ask to take the leave to which he is entitled he will lose it, as the WTR do not on their face allow workers to carry over holiday from one year to the next. After all, if I was at work and did not ask to take holiday in a given year (as opposed to did ask to take it but was refused due to pressure of work, etc), then I would lose it! Why should the position be any different if I am off sick?
- These waters are however muddied somewhat by the ECJ's ruling earlier this year. It said that if a worker is unable to take his holiday during a particular leave year because of illness he is entitled to carry it over to a subsequent leave year. This does also lead to the obvious next question – bearing in mind that the WTR do not exclude those off sick from holiday accrual or payment, under what circumstances could someone be unable to take holiday by reason of illness? Too sick to do the things one does on holiday? Like stay at home? The Lords' decision does not clarify this. In any case, the ECJ was proceeding on the basis that a worker was **unable** to take his leave. What if he simply did not ask to take it?
- However, that is not the end of the matter! The main argument before the House of Lords was whether workers can bring unlawful deduction from wages claims under the ERA 1996 if they do not receive paid annual leave. It decided that holiday pay was "wages" and therefore that such a claim could indeed be brought. Leaving aside some of the more detailed problems created by this decision, it would now seem established that a worker could still bring a claim for unpaid holiday going back years, depending on how long he was absent from work for.
- What happens if an employer rejects a worker's request to take holiday during sick leave? Whilst an employer has a limited right under the WTR to control when a worker takes holiday it cannot postpone a request indefinitely. In any event it will simply be storing up trouble for later. As and

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when the worker's employment is eventually terminated it will simply face an unlawful deduction from wages claim potentially stretching back years, and at 5.6 weeks per year, the sums for unpaid holiday could be substantial.

- Employers offering permanent health insurance need to be aware that employees in receipt of such benefits will also accrue holiday in line with this decision. This is because there is nothing in the WTR which says that a worker has to actually work during the leave year to get the right to paid leave. For example, an employee on long-term sick leave who is receiving 75% of his salary under a PHI scheme will also accrue holiday every year. The provision of such schemes is likely to become still less attractive for employers unless they can be rewritten to cover these additional costs.

So where do employers go from here? Apart from throwing their hands up in despair the most sensible approach is probably going to be to allow workers to treat part of their sick leave as holiday. This should enable them to avoid the risk of workers accumulating vast amounts of holiday that they subsequently want to be paid for on leaving. One unintended but entirely predictable consequence of this is a much harder line to be taken against long-term sick workers. Employers can be expected to let many fewer of them just sit on the books accruing 5.6 weeks' pay per year. If any further reason were needed for the discontinuance of PHI provision to workers, this could be argued to be it.

Employers should carry out a review of those staff who are on long-term sick leave to get an idea of the potential scale (and cost) of the problem. The (slightly!) good news is that only a small percentage of employees are ever off work for more than a year. Short-term absence is still the major issue for private sector employers. According to the CIPD's 2008 Annual Absence Survey absences of up to seven days account for 74% of total time lost to employee absence.

EMPLOYMENT WORKSHOPS

In July we will be running breakfast workshops on handling bullying and harassment investigations.

If you would like to find out more about these workshops, please go to:
www.hammonds.com/employmenttraining

FURTHER INFORMATION

For more information relating to this article, please contact:

Sue Nickson

Chief Operating Officer and International Head of Human Capital
 E: sue.nickson@hammonds.com

Mark Shrives-Wright

Partner & Head of Leeds Human Capital
 E: mark.shrives-wright@hammonds.com

David Whincup

Partner & Head of London Human Capital
 E: david.whincup@hammonds.com

Nick Jones

Partner & Head of Manchester Human Capital
 E: nick.jones@hammonds.com

Teresa Dolan

Partner & Head of Birmingham Human Capital (Employment)
 E: teresa.dolan@hammonds.com

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