



Insight

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Human Capital (Employment)



Long-term sick are entitled to paid annual leave

Last week the ECJ dealt a blow to employers by ruling that workers on long-term sick leave are still entitled to paid annual leave.

In *Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer & ors v HMRC* the ECJ has confirmed that workers rendered incapable of work through illness still have the right to take annual leave. It said that if they are unable to take their holiday during a particular leave year because of illness they are entitled to carry over any untaken holiday to a subsequent leave year. Furthermore, if such workers have not had the chance to take their accrued holiday by the time their employment terminates, they are entitled to a payment in lieu of such leave.

The *Stringer* case will now be referred back to the House of Lords for it to make a decision in light of the ECJ's comments. It is clear however that the Lords are going to have to overturn the Court of Appeal's 2005 ruling in which it held that workers on long-term sick leave do not get the benefit of paid annual leave. Assuming this is the case we consider below the potential consequences for employers.

- The ECJ's ruling only affects those workers who have been on sick leave for a whole year or those who have worked for part of the leave year before taking sick leave for the rest of it. Any employees who are sick in the first part of the leave year will still be required upon their return to work to take any holiday entitlement in the current holiday year – as is the case now.
- Strictly this decision only affects the four weeks' leave granted to workers in accordance with the Working Time Directive. The additional 0.8 (soon to be 1.6) week's holiday was introduced following the Government's concession to the unions over bank holidays and is therefore not affected. However there is equally nothing in the Working Time Regulations 1998 (WTR) which says that a worker has to work in order to accrue paid annual leave and therefore it seems unlikely that the Lords will allow employers to draw a distinction between the two types of leave. There is still nothing to stop employers from stating in staff contracts that no holiday over and above statutory minimum accrues during long-term absence.
- Workers on long-term sick leave will be entitled to roll over any unused holiday from one year to the next – potentially indefinitely! Employers could find themselves having to deal with employees returning to work after

long periods of sickness absence and then demanding to take a further period of time off as annual leave. On a positive note there would appear to be nothing to stop employers requiring such employees to take any accrued leave on a phased basis rather than all at once. The WTR give employers a limited right to control when their workers take leave by issuing notices in response to leave requests. Employees will however still be entitled on termination to a payment representing any accrued but untaken leave.

- In the vast majority of cases employers will only be dealing with requests to carry over holiday from one year to the next – only a small percentage of employees are off for more than a year. Short-term absence is still the biggest problem 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. Public sector employers have the most to fear from this decision as they have to handle higher levels of long-term sick leave.
- This decision means that on termination workers will be able to bring claims for unpaid holiday stretching back over a number of years. The WTR do not currently provide for this. Regulation 13(9) states that statutory minimum leave "may only be taken in the leave year in which it is due". The ECJ's decision would therefore seem to require a change in the legislation. The Government has yet to respond on this.
- There seems to be no bar to the decision having retrospective effect, nor would a claim by a current employee be time-barred, however long ago the absence started, because any holiday accrual only crystallises on the return to work or termination of employment.
- 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 Working Time Directive 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 – at full pay. The provision of such schemes is likely to become still less attractive for employers unless they can be rewritten to cover these additional costs.

- This decision affects “workers”, i.e. not just employees, including those who are not working but still on the books, for example those on sabbatical or study leave provided there is still a contract in place governing the relationship whilst they are absent. Agency workers will also have these rights to the extent they are on long-term sick leave. It also potentially affects different types of leave such as maternity leave meaning that employers should ensure that employees on maternity leave are able to carry over any unused holiday from one year to the next if their maternity absence straddles a holiday year. In practice the best thing is to ensure they have taken it before they commence maternity leave.
- One other thing to bear in mind is that the ECJ said there is nothing in the Working Time Directive which stops Member States from allowing workers to take paid annual leave during sick leave. This would seem

to leave it open for employers to allow employees on long-term sick to treat part of their sick leave as holiday and thus get paid for it. This is likely to be attractive for employees, especially those who have exhausted their sick pay entitlement, as it means they will get the benefit of a few weeks’ full pay. It also means employers would not have to deal with the prospect of employees accumulating vast amounts of holiday that they subsequently want to take or be paid for.

This decision will have a number of (presumably unintended) social and employment consequences and ultimately may encourage employers to dismiss sick employees earlier than might otherwise have been the case. It is based on broad legal principles rather than practical reality and just the sort of thing to give the ECJ a bad name!

The House of Lords will give its decision later this year. In the meantime employers should consider carrying out a review of those staff who are on long-term sick leave to get an idea of the size (and cost) of the potential problem. They should also pull out any long-term absence and holiday policies and consider whether changes may be necessary in light of the ECJ’s ruling.

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Commenting on the Health Check, Belinda Burke a Senior Consultant of **HRplus**, said “Today more than ever many HR and business professionals are concerned that their existing pay and benefit strategies are not keeping pace with the challenging market conditions and associated

employment and legal issues facing their business. Others not affected to the same extent by the downturn are still looking to sustain, and ideally improve upon, their financial and operational efficiencies and are keen to obtain value for money from their overall payroll spend.”

For more information about the Reward Health Check contact Belinda Burke on +44 (0) 121 200 3180 or email: HRplus2@hammonds.com.

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