

Holiday pay and the long-term sick

The subject of employees on long-term sick leave and their holiday pay entitlement has been the subject of a long-running saga spanning some ten years, which has seen a referral to the European Court of Justice (ECJ) and has ultimately been decided recently by the House of Lords. So what was all the fuss about? Actually, £16.14!

The case of HMRC v Stringer & ors (previously known as HMRC v Ainsworth) concerned long-term sick employees who brought claims for their statutory holiday pay in terms of the Working Time Regulations (WTRs), having been off work long-term sick and having exhausted their entitlement to sick pay. In 2005, the Court of Appeal ruled that workers on long-term sick leave had no right to take annual leave during their absence from work and that workers on sick leave throughout an entire holiday year had no right to holiday leave or pay in that year. In addition, any claim for holiday pay had to be brought under the WTRs.

The claimants appealed to the House of Lords, which first heard the case in October 2006 but remitted issues to the ECJ. In January this year, the ECJ ruled that a member state could allow a worker to take paid holiday while off sick or preclude them from doing so but in the latter case, a worker must be allowed to take it at a later date. In addition, annual leave continues to accrue during sickness absence and the right to paid annual leave may not be extinguished at the end of the leave year. The ECJ also confirmed that a worker is entitled to a payment in lieu of any untaken holiday on termination of employment.

The case then returned to the House of Lords for a final ruling. It was hoped that the Lords would clarify a number of issues - but in light of the ECJ's ruling, the Revenue accepted that they were obliged to pay Mr Ainsworth the sum claimed for, since his right to payment in lieu of holiday on termination of employment was unaffected by sickness absence.

Whilst there were originally five claimants in the Stringer case, the Revenue's concession meant that the only outstanding issue for the House of Lords to actually rule on (raised by Mr Ainsworth's claim) concerned whether a claim for unpaid holiday can be pursued as an unauthorised deduction from wages claim under the Employment Rights Act 1996 ("ERA"), as well as under the WTRs. The House of Lords ruled that it can, meaning that a worker can now take advantage of the more generous time limits which apply to unlawful deduction claims. A claim under the WTRs must be brought within three months of each failure to pay the holiday pay or termination payment. By contrast, a claim for unlawful deduction from wages brought under the ERA can be brought within three months of the last in a series of deductions, so allowing a claim to go back more than three months if the underpayments form part of a series.

So where does this leave us? In summary, following the House of Lords ruling, the position in the UK is that an employer must allow statutory holiday entitlement to accrue throughout an employee's sickness absence and a worker is entitled to a payment in lieu of any untaken holiday on termination of employment (even if they have been off for the entire leave year). In accordance with the WTRs, an employer

cannot pay in lieu of holiday except on termination of employment but an employer can allow employees on long-term sick leave to take paid annual leave while off sick, which will clearly be advantageous to employees who have exhausted their sick pay entitlement.

The position with regard to carrying forward unused statutory holiday entitlement remains unclear.

Whilst it is implicit in the ECJ ruling that this should be permitted, certainly when the employee has otherwise been unable to take the leave, the WTRs prohibit this. Ensuring that an employee takes paid holiday while long-term sick will prevent significant liabilities for holiday pay accruing over time, otherwise and in any event, as things stand at present, an employer has the option to either allow an employee to carry forward unused statutory holiday entitlement (On breach of the WTRs) or take a robust line, and in accordance with the WTRs, not allow any carry forward of statutory leave entitlement and wait for an employee to make a claim and/or see if the WTRs are amended.

It will be interesting to see whether the WTRs will be amended and/or whether there will be test cases which clarify the position.

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