

Employment

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Holidays and sickness absence

In a decision which will prove costly for employers, the ECJ has finally issued its judgement in **Stringer v HMRC** regarding the accrual and payment of holidays during long term sickness absence.

The ECJ has decided that employees do accrue holidays during long-term sickness absence but there is no right to take the holidays until they come back to work, even where the absence covers a different holiday leave year. Similarly, upon termination of employment, employers should make a payment in lieu of leave accrued during the sickness absence. The employee does not have to work during the holiday year to be entitled to the leave. Therefore, if an employee has not been able to take holidays because of illness, they cannot be deprived of exercising their right to take their holidays, such right is not extinguished at the end of the leave year but should be carried over.

The long running saga is not over yet, since the case must return to the House of Lords in order to apply the ECJ ruling and reconcile the prohibition in the Working Time Regulations (WTR) on carrying over leave with the European Directive. The ECJ also said it is up to the national court to decide whether leave should be taken during the sickness period or after.

Facts

The ECJ considered questions relating to the European Working Time Directive in relation to two separate cases - *Stringer v HMRC* and *Schultz-Hoff v DRB*. The cases were considered together by the ECJ because they concerned similar issues.

Stringer concerned several current and former employees of HMRC. One of the employees was on indefinite sick leave. She asked HMRC to take several days paid annual leave during her sick leave. HMRC refused. The other employees in this case had been on long-term sick leave and had been unable to take their annual leave during the leave year. These employees sought payment in lieu of the unused annual leave.

Schultz-Hoff v DRB is a German case. Mr Schultz-Hoff was on sick leave from September 2004 until September 2005 when he was found to be incapable for work and granted a permanent pension. In May 2005 Mr Schultz-Hoff requested paid annual leave in relation to his entitlement for the 2004 leave year. DRB refused on the basis that annual leave could only be taken if an employee was fit for work and that Mr Schultz-Hoff was not.

Under German law an employee is entitled to payment in lieu of annual leave if they have been unable to take the leave because they were on sick leave. The employee loses this right if they are incapacitated during the entire leave year or at the end of any carry-over period (which cannot exceed three months). Therefore Mr Schultz-Hoff also lost the right to be paid in lieu of his annual leave for the 2004 leave year.

The House of Lords in the *Stringer* case and the German Higher Labour Court in the *Schultz-Hoff* case asked the ECJ for guidance on the interpretation of the Working Time Directive.

The ECJ found that it is acceptable for national legislation to prevent an employee from taking paid annual leave during periods of sick leave. The ECJ also found that if an employee has been on sick leave for the whole or part of the leave year and has therefore been unable to take his annual leave, the employee does not lose his entitlement to annual leave and can take the annual leave when he returns to work. In addition, where an employee has been on sick leave prior to his employment being terminated and has therefore been unable to take his annual leave, he is entitled to a payment in lieu of that annual leave even where he has been absent for the entire leave year.

The cases now go back to the national courts. The House of Lords will have to apply the ECJ's judgement to UK law and issue a final decision in the *Stringer* case and may involve an amendment to the WTR.

What does this mean for employers?

Immediate impact:

- Employers can continue to stipulate in their contracts of employment and sickness policies that contractual leave which exceeds the statutory minimum does not accrue during sickness absence. The ECJ's decision only applies to the basic statutory entitlement under European law which is 20 days annual leave rather than the current 24 in the UK.
- Employers should give credit for holidays which accrue during sickness absence. Similarly upon termination of employment, employees should be paid for holidays which are accrued during absence.
- For the public sector this also means that carry over of leave can no longer be prohibited and credit should be given for this in either an accrual of leave or payment upon termination. Human Resource teams will need to communicate this to the business line and payroll colleagues in order to act on it accordingly. However, public sector employers may prefer not to amend their written sickness absence and sick pay policies until the House of Lords has ruled, in order to minimise the administrative aspects for wider communication.
- It is not entirely clear how the ruling which prohibits the carry over of leave where an employee has been unable to take it will impact on private sector employers. Whilst public sector employees can rely directly on the Directive to enforce their rights, the same is not true of the private sector. For the private sector, a prudent approach to the carry over issue may be to advise employees that you are awaiting clarification from the House of Lords before dealing with leave accrued in a previous leave year.
- The costs involved in dismissing an employee who has been absent on sick leave for a long period will increase significantly as a result of this decision. Employers should therefore audit long term sickness absence cases to ensure that they have budgeted for holiday pay liabilities. Employers will have limited opportunity to expedite a capability dismissal where an employee is suffering from a disability, since it's highly unlikely that a tribunal would be sympathetic to a failure to make a reasonable adjustment based on the accrual of outstanding holiday pay. In fact the increased costs of dismissal may incentivise employers further to explore reasonable adjustments to facilitate a return to work more quickly.
- Employers should review their PHI policies now to check whether accrued leave is covered and payable under their terms, both in relation to employees returning to the workforce and those who may be dismissed where an insurer is seeking to commute a claim, in preparation for the House of Lords decision.

Once the House of Lords issue their decision:

- Sickness absence policies will need to be reviewed in anticipation of likely amendment in relation to carry over arrangements. The better time to amend policies is when the full domestic picture is available.
- It is implicit within the ECJ's reasoning that leave may be carried over several leave years. If an employee has been absent over several leave years then they will expect to be able to take such leave upon return or be paid in lieu for the holidays accrued over that absence if they are dismissed. This is obviously particularly difficult for employers who either have employees on permanent health insurance policies (PHI) which enable an employee to be absent for several years, or for employers who fail to deal with an absence - the common scenario that someone has exhausted their sick pay but is still "on the books". As noted above, the terms of PHI policies should be checked to determine if they cover accrued holiday pay such that the cost can be met by the insurer not the employer.

This Article is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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