

Update on Holiday Pay & Sick Leave:

Workers on Sick Leave can Accrue Holiday Pay

Last month the House of Lords, in the case of *HM Revenue and Customs v Stringer and ors*¹, decided that ‘holiday pay’ falls within the definition of wages under the Employment Rights Act 1996. This means that non-payment of holiday pay is regarded as an unlawful deduction, allowing workers to bring a claim under that Act.

In overturning the earlier decision of the Court of Appeal, it appears that the effect of this decision is:

- 1. A series of non-payments can be the subject of a tribunal claim, even if they stretch back as far as 1998 (when the Working Time Regulations came into force).** Employees will have three months from the deduction (date when payment should have been made) to make a claim, or three months from the last deduction in the series. Further, the employee may be allowed to have his or her complaint heard late, if they can show that it was not “reasonably practicable” for the complaint to be lodged in time.
- 2. Workers can accrue holidays whilst they are on sick leave.** This means that workers who leave their employment after being on long-term sick leave can claim full pay for their holidays, even if they have exhausted their sick pay entitlement.

This decision is not good news for employers. The House of Lords did not address the various consequences of the decision, such as: can an employee who is off sick for more than one holiday year carry over his or her holiday entitlement? If so, how does that fit in with the Working Time Regulations 1998, which provides that holidays must be taken in the year of entitlement?

Many employers currently have policies that say that holidays cannot be carried over to the following year if they are not used. Accordingly, they do not pay the “expired” holidays to leavers. Is it now illegal to do this?

Our view is that, as a result of the Stringer decision, if a worker leaves employment after being on long-term sick leave, they will be entitled to receive pay in lieu of any unused holiday pay at the end of their employment. That entitlement is likely to extend to holidays accrued in previous holiday years, if the employee could not take those holidays due to sickness.

If an employer does not provide holiday entitlement to workers who have been on long-term sick leave, they are likely to face claims of unlawful deductions from wages and, possibly, under disability discrimination legislation as well.

A further, rather absurd, consequence of the Stringer decision is that, for workers on long-term sick, it seems that holidays will accrue every year until the worker comes back or leaves. So, as

¹ [2009] UKHL 31

unreasonable as it may seem, if an employee returns to work after, say, a year and a half of sick leave, they will have a right to a long holiday (or a few short ones) on their return. This does not sit well with the Working Time Regulations 1998, which provide that leave may only be taken within the year that it is due. Unfortunately, answers to these inconsistencies may not be available until they are addressed by the Courts in future cases.

To address some of the problems for employers as a result of the Stringer decision, we suggest that employers should consider the following measures:-

- Employers could require workers to take holidays during periods of sick leave. This would mean paying full pay for the holidays when employees would otherwise only be entitled to SSP, but the result is that the employer's obligation is spread over a longer period, rather than having to pay/provide holidays all at once.

The House of Lords did not address this possibility, but we are of the view that it can be done. If you are interested in this, it would be a good idea to amend contracts and policies and, in accordance with the 1998 Regulations, employers would have to follow the requisite notice provisions. Otherwise, an employee could simply refuse to take holidays during sick leave and the holidays would accrue instead. We would be happy to guide you through the necessary procedures, please contact us using the email addresses below.

- Contracts and policies could be amended to provide that any holidays, which could not be taken by workers due to sickness, must be taken within, say, 1 month of the employee returning to work.
- Staff absences should be monitored and managed more closely than ever.
- Employers may want to consider dismissing long-term absent employees at an earlier stage, although employers should note that, to avoid claims of unfair dismissal and disability discrimination, such dismissals must be fairly managed and the requisite procedures followed prior to dismissal.
- Employers who engage self-employed contractors should be wary, particularly if the contractor is off sick, because there is a chance that contractors will come within the definition of "workers" and will therefore be entitled to holidays.

For help with this, or for further information on any other employment issues, please contact:

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