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Employment Group Legal Alert

Employees on long-term sick leave accrue statutory holiday

Many employers struggle with the idea of allowing absent employees to take holiday during sick leave. Holidays are often seen as (perhaps much needed) time off from work. If employees are not at work due to ill-health, particularly if they are on long term sick leave, employers would be forgiven for assuming that these employees do not need a holiday.

The English courts have grappled with this thorny issue, most notably in the case of Ainsworth v HMRC (as it was then known), involving statutory holiday under the Working Time Regulations 1998. The current position under English law is the Court of Appeal's decision in that case; that employees on long term sick leave do not accrue statutory holiday. As a result, employees were not entitled to accrue statutory holiday whilst on sick leave or to be paid in lieu of any untaken holiday.

The case was appealed to the House of Lords, which referred the matter to the European Court of Justice. The ECJ has now released its judgment (in what is now known as Stringer v HMRC). Employers may be disappointed to learn that the ECJ has taken a different view.

In essence, the ECJ's decision provides that:

- Workers on long term sick leave should not be denied the right to annual leave. They should either be allowed to take paid holiday during sick leave or accrue holiday and be able to take it when they return to work.
- If these workers do not have the opportunity to take paid holiday during their employment, they should be paid it in lieu when they leave. There appears to be no time limit, which means that a worker who is absent for several years, and who has accrued statutory holiday during that period, would be entitled to payment in lieu of all accrued holiday when they leave.
- Member States can introduce conditions for when and how holiday can be taken. This suggests that the Government could amend the Working Time Regulations so that some part of sick leave could be deemed to be holiday, or amend the provisions about paying workers in lieu during their employment or when they leave.

Our recommendation to employers

The decision now needs to be considered by the House of Lords to establish how this applies to the Working Time Regulations. Presumably, the Lords will need to decide if the Regulations can be interpreted in line with the ECJ's decision or whether the Government needs to amend them. In the meantime, we recommend the following:

- If you do not allow workers to accrue holiday during long term sick leave, you do not need to change your policy now. However, be aware that, once we have clarification on the English law position, it is likely that workers on long term sick leave will accrue statutory holiday. This may well apply retrospectively, for the whole of their absence;
- If you currently allow workers to accrue holiday, your policy is likely to comply with the ECJ's decision. If you have restrictions on carry over of holiday, these may not comply so far as they restrict carry over of statutory holiday for workers on sick leave;
- Employers should review their policy on contractual holiday. This case only deals with statutory holiday (which is currently 28 days per calendar year including bank and public holidays for a full time employee). It is possible to treat contractual holiday differently but this should be made clear to workers. Any change to contract terms or holiday policies could raise additional issues;
- If you offer permanent health insurance or similar, we recommend you review the terms of your scheme. It may not take account of the right to statutory holiday.

If you would like to discuss this case or any issues arising from it, please speak to your usual contact in the Employment Group.

Nicholas Robertson

Head of the Employment Group (London)
Tel: +44 (0)20 7782 8919

Christopher Fisher

Partner, Employment Group (London)
Tel: +44 (0)20 7782 8724

Bernadette Daley

Partner, Employment Group (London)
Tel: +44 (0)20 7782 8667

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0232emp
January 2009