

Does holiday entitlement accrue during long-term sickness absence?

The case of HM Revenue and Customs ("HMRC") -v- Stringer (formerly known as the Ainsworth case) which considered the issue as to whether employees on long term sick leave are entitled to holiday has reached another development in its long running saga. Sejal Raja reports on this latest development.

The History

The Claimants were all previously employees of HMRC. One of them had sought to take annual leave during a period of sick leave but was prevented from doing so. The other three had been absent on sick leave and were then dismissed. They had not taken any holiday whilst on sick leave and, upon termination, sought payment in lieu for outstanding holiday. HMRC said they were not entitled to payment as they had been on sick leave. The Claimants successfully argued before the Employment Tribunal and the Employment Appeal Tribunal that they were entitled to be paid annual leave under the Working Time Regulations. However in April 2005, the Court of Appeal allowed an appeal by the HMRC. The Court of Appeal agreed with HMRC that first, holiday could not be taken whilst a worker was on sick leave. Secondly, if it could not be taken whilst on sick leave then workers were not entitled to payment for such leave upon the termination of their employment.

The House of Lords on hearing the appeal decided that the case raised questions about the interpretation of the Working Time Directive and so referred the matter to the European Court of Justice ("ECJ") for a preliminary ruling. The question was, in essence, whether a worker is entitled under the Directive to be paid annual leave during a period that would otherwise be sick leave.

The Advocate-General's Opinion

The Advocate General has now given her opinion and has stated:

- entitlement to paid holiday does accrue whilst an employee is absent on sick leave;
- however, workers may not take their holiday while they are on sick leave; and
- after the termination of the contract, workers are entitled to a compensatory payment to reflect accrued but untaken holiday leave, even where the worker was on sick leave for the full holiday year.

It should be noted that this is only an opinion and as such is not binding: the next stage would be for the ECJ to make its decision and then for the House of Lords to determine how to interpret it.

What does this mean for employers?

At the moment we must await the decision of the ECJ as this is only the Advocate General's opinion. The ECJ does not have to follow the Advocate General's proposals although it usually does. If the ECJ does adopt the opinion then this could have far reaching consequences in that if an employee has been on long term sick leave for say two years and then returns to work, the employee will

have to take the holiday accrued in the previous year in the year that he/she returns which, could put the employer in difficulties in terms of meeting business demands.

We will keep you informed of further developments. However, if you require any further information, contact Sejal Raja on sejal.raja@rlb-law.com.

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If you would like any information on any of these or other employment matters, then please contact Sejal Raja (sejal.raja@rlb-law.com) or Lara Crane (Lara Crane (lara.crane@rlb-law.com) or telephone on 020 7222 7040.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.