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ALERT

Workers on sick leave are not entitled to holiday pay

EMPLOYMENT

The old law

In 2002, the Employment Appeal Tribunal held in the Case of *Kigass Aero Components Limited –v- Brown* that employees who are away from work on long term sick leave and who are no longer receiving any pay because they have exhausted their sick pay entitlement, could still claim up to 4 weeks' holiday pay per year under the Working Time Regulations. This meant that as long as employees gave notice to their employers that they intended to take holiday they would receive payment for it, even though they may not have attended the work place throughout the entire holiday year. The *Kigass* decision also meant that workers who, following a period of unpaid sickness absence then had their employment contract terminated, were entitled to receive payment in lieu of accrued but not taken statutory holiday.

The new law

However, last week the Court of Appeal handed down its judgment in the case of *Commissioners of Inland Revenue –v- Ainsworth & Others* and has reversed the *Kigass* decision. This means that workers who have exhausted their entitlement to contractual or statutory sick pay are no longer entitled to claim holiday pay either during the period whilst they are still absent from work or in the event that their employment is terminated.

The Court of Appeal in the *Ainsworth* decision concentrated on the use of the word "leave" in the Working Time Regulations. The Court agreed with the Inland Revenue's arguments that "leave" implies a relief from what would otherwise be an obligation, i.e., a worker's obligation to perform his duties if he were well enough to attend work, and that it would go against the ordinary usage of the word "leave" for a worker who is off work as a result of a serious illness to say that during some arbitrarily chosen part of that period he is taking "leave". As the Inland Revenue put it, "leave from what?".

The Court of Appeal recognised that the Working Time Regulations were intended to ensure minimum health and safety standards. The Court of Appeal was of the view that the *Kigass* decision had no such purpose and simply produced a windfall for employees in most cases, but also ran the risk of an employer terminating an employee's employment, rather than having to pay them holiday pay, and employees fearing that this may happen, returning to work before they really should.

Good news

The decisions made by the Court of Appeal seem sensible and will be welcomes by employers. However, the Court did recognise that there may be some anomalies arising from its interpretation of the Working Time Regulations but has invited the Government to make legislative amendments to deal with these.

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If you would like any information on any of these or other employment matters, then please contact Lara Crane (lara.crane@rlb-law.com) or Kerry Scott-Patel (kerry.scott-patel@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.

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