

Paid holidays and long term sickness absence – more questions than answers?

Article

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Date: June 2009

Last week, the House of Lords gave its long-awaited decision in the case of *Stringer and others v HMRC*. Unfortunately, the Lords did not deal with many of the difficult issues, leaving employers in an uncertain position. The key issues in the case relate to how employers should treat “holiday” for those workers on long term sick leave, and the outcome is potentially costly for many employers already struggling to balance costs in the current economic environment.

The upshot of the decision is that workers can accrue, take and be paid for statutory annual leave (currently 28 days for full time workers) even when they are absent on long term sick leave. This means that workers, who may have exhausted sickness payments (both statutory and contractual) effectively having a “windfall” of 28 days full pay, regardless of whether they have actually attended work during that holiday leave year.

The other issue that is clear is that claims made in relation to unpaid holiday on termination of employment (as there is no right to be paid in lieu of holiday at any other time) can be claimed as a “series” of deductions enabling workers to potentially claim back several years as the series of non payments can be linked together.

So, these two aspects of the decision do not bode well for employers. It is clear that from this point, when a worker on long term sick leave requests holiday, they should be paid for it at their normal rate, even if they have exhausted sick pay provisions. There are however issues that the Lords failed to deal with, which is unfortunate given that further litigation will inevitably follow, at a cost.

The difficult aspects not dealt with relate to a ruling made by the European Court of Justice, which followed a series of questions referred by the House of Lords prior to making their judgement. What the ECJ found was that: a worker is entitled to accrue, take and be paid for statutory annual leave while on sick leave or alternatively, if they were not permitted to do so, they must be entitled to carry forward the accrued untaken leave and either be permitted to take it on return to work or be paid in lieu on termination. So the first aspect of this is costly, but clear. The second aspect in relation to carry over of holiday is a bigger problem.

Under the Working Time Regulations 1998 (WTR) (which were brought in as a result of a European directive) no statutory holiday (ie the 28 days) can be carried over at the end of a holiday year. Also, no payment can be made “in lieu” of holiday except on termination of employment. How then are employers to deal with the scenario where an employee has been off work for the last 3 years (and may have moved onto a permanent health insurance scheme) and never requested to take holiday, but (having heard of this judgement) this holiday year asks for holiday for the current year and back payments. Under the WTR there is no right to be paid in lieu except on termination, nor any right to carry over holiday. The ECJ however said that workers on long term sick leave should get the holiday either when off, or on their return. Despite the ECJ ruling a private sector

employer would currently be justified in paying for the current holiday year only, now the request has been made, as the WTR do not require more.

Further, what happens if a worker in the same scenario is terminated? Under UK legislation, payments can be made on termination, but how far back should the employer go? The House of Lords ruling makes clear that a claim could go back several years, but if the worker has never requested holiday in those previous years, is there any obligation on the employer to pay for holiday that was never requested? Unfortunately, because the Lords did not deal with this, we are left with two conflicting court decisions on the point, which is unhelpful and will also lead to further litigation.

Published

This article was published in The Telegraph in June 2009.

Whilst it is clear that employers need to revisit how they currently treat those on long term sick leave, what steps they should then take will not always be clear and inevitably commercial choices will have to dictate. If a worker off sick requests holiday, this should be permitted and paid for, even if the individual has exhausted sick pay provisions. If the worker has been off several years and has never requested to take holiday, the position is less clear and an employer could still take the line that as holiday was never requested, the individual has “lost” it under the WTR. At some point however this stance is likely to be challenged.

Another area for employers to consider is where there are employees benefiting from a permanent health insurance scheme whereby an insurance company pays an employee on long term sick leave a proportion of their salary. Arguably the employer should be “topping up” the payments for periods of holiday requested, but at the same time employers must be clear that making such payments does not breach the scheme.

As can be seen, many issues remain unresolved. This was a missed opportunity - at a time when many businesses are suffering, clear guidance from the House of Lords on these issues would have been welcome.

More information

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