

Do Workers on Long Term Sick Leave Accrue Paid Holiday Under the Working Time Regulations 1998? The Story Continues....

The long running saga of whether employees on long term sick leave are entitled to holiday pay under the Working Time Regulations 1998 ("WTR") where they have been dismissed or have not yet returned to work looks set to continue. The case of *HM Revenue and Customs v Stringer* (formerly known as the *Ainsworth* case) concerns exactly this issue and has recently been heard by the House of Lords. However, the House of Lords did not bring the matter to a conclusion and referred the case to the ECJ.

Background

The case involves a group of employees on long term sick leave who had exhausted their entitlement to contractual and statutory sick pay. In both the Employment Tribunal and Employment Appeal Tribunal they won their argument that they were entitled to accrue paid holiday during their period of sick leave under WTR. However this decision was reversed by the Court of Appeal.

Current position

The Court of Appeal held that:

- workers on long term sickness absence who have exhausted their contractual and statutory sick pay entitlement cannot take holiday while on sick leave; and
- a worker who is dismissed, having been on sick leave since the beginning of the annual leave year, has no entitlement to leave under the Working Time Regulations.

The Court of Appeal concluded that the Tribunal and EAT had focussed too much on the definition of "worker" in the Regulations. For the Court of Appeal it was much more important to look at the ordinary meaning of the word "leave" which, the Court held, suggested a release from the obligation to work. The Court went on to say that to allow workers to designate part of that sick leave as holiday would provide the worker with an unjustified windfall. Further, this would not accord with the purpose behind the WTR which was to provide a health and safety benefit.

While the current position provides some comfort to employers, it is important to note that the Court of Appeal's reasoning was rather unclear and may therefore only be applicable in certain situations. The decision certainly applies where the employee has been absent since the beginning of the leave year and has been dismissed or has not returned to work. However, it does not provide a general rule that a worker on sick leave loses the right to accrue holidays under the WTR. As

a result a question remains as to whether an employee who spends 6 months on sick leave during a holiday year and then returns to work would remain entitled to receive his full entitlement of paid holiday on returning to work or whether the leave entitlement would reduce? Further, if the amount of holiday entitlement was to reduce, there is no indication by how much it should be reduced by as the WTR does not provide for pro rata reduction of holidays;

What now?

Hopefully, the ECJ will clarify matters once and for all but even if they do, that is likely to take some time. Employers therefore may wish to follow the current guidelines as laid down by the Court of Appeal but must appreciate that the position may be subject to change once the ECJ has pronounced.

As holiday leave entitlement under the WTR must be taken in the holiday leave in which it falls due, it is arguable that even if the ECJ disagrees with the Court of Appeal and provides long term sick employees with a right to paid holiday leave, employers should be able to avoid significant claims for back holiday pay as any claim should be limited to one year. At this time, this limitation cannot be guaranteed. Therefore the potential exposure to significant holiday pay claims – as a "windfall" once the employer's sick pay scheme is exhausted – might provide another good reason for employers to manage any workers on long term sick leave back to work, with reasonable adjustments if appropriate, or through a dismissal process.

This e-briefing is sent to you by Anderson Strathern's **Employment Unit**. We hope you find it useful. If we can help with any matters arising from this e-zine, or any employment law matter please contact **Joanna Matthews**, or any other member of our team.