

# HOLIDAY PAY CLAIMS

# Insight

12 June 2009

ISSUE NUMBER 4

The House of Lords handed down its judgement in *HM Revenue and Customs v Stringer and ors* [2009] UKHL 31 on Wednesday, holding that holiday pay does continue to accrue whilst an employee is off sick, and claims to enforce entitlement to holiday pay can go as far back as 1998, when the Working Time Regulations ("WTR") came into force. Whether an employee who is off sick for more than one holiday year can carry over unused holiday was not addressed in the judgement. However, we give some guidance below.

## Background

This case has a long and well-documented history. The matter was first referred to the Court of Appeal by the EAT to obtain clarity on the situation involving holiday pay accrual during sick leave. The Court of Appeal decided in 2005 that the right to paid holiday leave did not accrue during periods of sickness absence and could not be claimed under the unauthorised deductions from wages provisions.

The House of Lords then referred the main issue - whether workers can accrue holiday entitlement during sick leave - to the European Court of Justice ("ECJ"). The ECJ's judgement, published in January this year, found that workers do accrue holiday during sick leave and the "use it or lose it" provisions within the WTR (where, if a worker could not exercise their right to paid holiday within a holiday year, the leave did not carry over) are contrary to European law .

The matter was referred back to the House of Lords to assess how the UK would implement the ECJ decision. The House of Lords was also to decide the residual issue of whether holiday pay claims which arose prior to the most recent leave year could be claimed as a series of unauthorised deductions from wages, under the Employment Rights Act 1996 ("ERA"), rather

than under the more limited enforcement provisions of the WTR.

## House of Lords judgement 1 Holiday Pay

Disappointingly the ECJ's ruling regarding accrual of holiday entitlement during sick leave was not considered by the House of Lords (because the parties agreed that the EAT's decision on this point should be reinstated in light of the ECJ's ruling).

This means that the issue of accrued annual leave being extinguished at the end of the relevant holiday year has not been addressed.

WTR do not currently provide for carry over of leave from one holiday year to the next, and we had expected the House of Lords to resolve this disparity. Without that clarification, our assessment would be that:-

- Workers on long-term sick leave will accrue statutory holiday entitlement;
- If they are not allowed to take this leave, they can claim either under the Working Time Regulations or as a series of unlawful deductions;
- Employers may wish to designate statutory leave during periods of sick leave using the WTR notification of leave provisions;



- Leave which is not taken can be paid in lieu only on termination.

## 2 Unlawful Deductions?

The House of Lords' unanimously decided that claims to enforce entitlement to holiday pay under the WTR can be enforced under the unauthorised deduction from wages provisions of the Employment Rights Act 1996 ("ERA"). This is because:-

- unpaid holiday pay falls within the definition of 'wages' under the relevant provisions of the ERA; and
- under the European principle of equivalence, which requires national remedies for breaches of European rights to be no less favourable than remedies available in similar domestic proceedings, enforcement of statutory (WTR) holiday and contractual holiday should both be capable of enforcement under the ERA.

### Practical implications of this decision

#### 1 Holiday Pay

This ruling could see an increase in claims from self-employed contractors. Companies which engage self-employed contractors should examine their contracts and working practices to assess whether these individuals could qualify as workers for the purposes of the WTR.

Employers may opt to dismiss long-term absent employees more quickly. Such dismissals must be fairly managed and must not breach the contract of employment in respect of, for example, PHI entitlement.

PHI providers will need to review the terms of their policies to take account of this issue and

to ensure that their products remain attractive, although any additional cost to the insurers is ultimately likely to be passed to the employer by way of increased premiums.

Employers may require employees on PHI to take holidays during each holiday year. However, care will have to be taken that such holidays would not "break" the PHI cover, and the PHI terms should be carefully considered.

#### 2 Unlawful Deductions

Workers will be able to claim for a series of years of unpaid holiday entitlement, going back as far as 1998.

Workers will be able to bring a claim for a series of holiday pay deductions within three months of the last deduction in the series, rather than having to make a claim within three months of each individual deduction.

The most serious financial impact of this ruling is likely to be felt by:

- employers who terminate the employment of individuals on long-term sick leave who have not taken or been paid for holiday during many years of sick leave. This is often the case where employers retain individuals as employees to preserve their right to payments under PHI schemes; and
- companies which engage self-employed contractors for long periods. Particularly in the current market conditions, many of these self-employed contractors are having their engagements terminated and, with less prospect of finding another



engagement, may be more minded to bring claims for unpaid holiday pay, on the basis that they were "workers" as defined by the WTR.

