

Group income protection insurance and holiday pay - Souter v Royal College of Nursing Scotland

Introduction

Although in recent times there have been a number of cases looking at an employee's right to annual leave while absent due to sickness, there are still many unanswered questions.

In particular very little clarity has been provided around the issue of how holiday pay and the benefits under group income protection insurance policies interact. However, we now have an Employment Tribunal decision in *Souter v Royal College of Nursing (RCN) Scotland* which focuses on this particular issue.

Background

We know from the House of Lords ruling in *Stringer and others v HMRC* that:

- employees continue to accrue and can take paid statutory holiday during sick leave
- on termination of employment a worker who has been unable to take paid holiday while on sickness absence is entitled to payment in lieu
- a claim can be brought for unlawful deduction of wages under the Employment Rights Act (ERA). This means that a claim must be brought within three months of the unlawful deduction or within three months of the last in a series of deductions.

Under the Working Time Regulations (WTR) workers have the right to 5.6 weeks holiday in each leave year and must be paid a week's salary for each week of leave taken.

Souter v RCN Scotland

Mrs Souter retired from her job on 21 April 2010. She had been on long term sick leave since 7 November 2001 and in receipt of group income protection benefits of around 50% of pre-incapacity salary since 7 November 2002.

The holiday year for Mrs Souter ran from 1 January to 31 December each year. Mrs Souter had not taken or requested any holiday while she had been off sick.

When Mrs Souter retired RCN made a payment in lieu to cover holiday entitlement from 1 January 2010 to 21 April 2010.

In May 2010 Mrs Souter brought an unlawful deduction of wages claim against RCN seeking unpaid statutory holiday pay for the whole period of her sickness absence, including the years when she was receiving group income protection benefits.



The Employment Tribunal rejected Mrs Souter's claim for the following reasons:

- **The claim was out of time.** On her retirement Mrs Souter had received a payment in lieu for untaken holiday entitlement for 2010. So even if RCN had made a series of deductions from her wages in respect of statutory holiday pay, the last in that series occurred on 31 December 2009. As Mrs Souter brought her claim in May 2010, this was more than three months after the last in a series of deductions.

Please note: Some see this rationale as questionable as under the WTR an employee cannot receive payment in lieu of untaken holiday while in employment. So the first time the payment becomes due is the date the employment is terminated and the time limit for making a claim for payment in lieu on untaken holiday would start to run from that date.

- **Untaken holiday leave does not carry over.** Mrs Souter did not request or take any holiday while she was off sick and was not prevented from taking holiday by the WTR or her employer. The WTR prevent workers carrying over untaken leave from one year to the next and so Mrs Souter's unused holiday entitlement was expunged at the end of each leave year. Consequently, she had no holiday entitlement for 2001 -2009.

Please note: In the case of *Pereda v Movilidad* the ECJ ruled that a worker who is sick during a period of previously booked statutory holiday should, under the Working Time Directive, have the right to re-schedule the holiday for a later date and possibly even in a subsequent leave year. In the UK the Working Time Directive is implemented by the WTR, which state that the first four weeks of statutory holiday can only be taken in the leave year in which they are due and cannot be carried

over. The decision in the *Pereda* case and the WTR do not sit comfortably together leaving the UK situation unclear.

- **Holiday payments would have been at the rate of Mrs Souter's group income protection benefit rather than at her pre-incapacity salary.** When Mrs Souter began to receive group income protection benefits it was clear that she would not be able to return to work. The Employment Tribunal said this was a permanent arrangement and her contract of employment was effectively varied to provide a lower salary equivalent to the amount of the group income protection insurance benefit. This meant that if she had taken holiday while on sickness absence she would have been paid at the new lower salary rate (ie the group income protection benefit) which she had received each week regardless of whether or not she took the leave and not at the higher rate she would have received if her contract had not been varied.

Summary

Souter v RCN is an Employment Tribunal case and as such has no precedent value (ie it is not binding on other Tribunals).

However, employers will welcome the comments (especially as there is very little guidance in this area) and other Employment Tribunals will refer to the case when making decisions involving similar or related subjects. The decision indicates that group income protection insurance benefits cover an employer's liability to pay holiday pay during sickness absence.

The above is based on Bupa Group Risk's understanding of the Employment Tribunal decision and is not intended to form a definitive view.



Bupa Group Risk protection products are provided by Bupa Health Assurance Limited.
A private company limited by shares and established in the United Kingdom, having its head office at The Core, 40 St Thomas St, Bristol BS1 6JX. Registered in England and Wales No 2774803†.
Bupa Insurance Services Limited. Registered in England and Wales No 3829851 †
† Authorised and regulated by the Financial Services Authority.
Registered Office: Bupa House, 15-19 Bloomsbury Way, London WC1A 2BA.