Holiday Pay and Sickness Absence - A summary of recent cases and the impact on Group Income Protection

In recent years there have been a number of cases particularly from the European Court of Justice, which have explored the right an employee has to annual leave and the interaction with other absences - and particularly how this interacts with sick leave.

The purpose of this document is to explore recent case law.

Holiday Pay & Sickness Absence
HMRC v Stringer and others, House of Lords, June 2009
Court of Appeal decision

In 2002, the Employment Appeal Tribunal (EAT) declared that workers on long-term sick leave were entitled to accrue and be paid for their statutory holiday entitlement under the Working Time Regulations 1998 (WTR). For a short time thereafter, a worker on long-term sick leave, who had exhausted all sick pay entitlement, could designate four weeks in any year of absence as paid annual leave.

This decision was overruled by the Court of Appeal in *Stringer* (which previously went under the name of *Commissioners of Inland Revenue v Ainsworth*) in 2005. The Court of Appeal ruled that a worker could not take paid holiday under the WTR during a period of sick leave and confirmed that if a worker's employment ended without them having worked at all during the holiday year, they would not qualify for a payment in lieu of untaken leave.

The Court further ruled that claims for unpaid holiday could not be brought as a claim for an unlawful deduction from wages. The Court of Appeal's decision was appealed to the House of Lords, which referred the case to the European Court of Justice (ECJ).

European Court of Justice

At the ECJ, *Stringer* was linked to a German case (*Schultz-Hoff*) which, similarly, centred on whether workers should receive minimum paid annual leave during a long period of incapacity. The ECJ concluded:

Taking annual leave when off sick

When a worker is on sick leave, their entitlement to accrue annual leave under the Working Time Directive continues. However, the ECJ said that it is up to Member States whether annual leave can be taken during a period of sickness.

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Carrying forward untaken leave

If the worker is *unable* to take their annual leave, he or she must be allowed to carry over leave into a subsequent leave year.

Payments in lieu when employment ends

The Directive gives workers who have been on sick leave for all or part of the leave year the right to a payment in lieu of their untaken leave on termination of employment. Such a payment must be calculated according to the worker's normal remuneration. This precludes any agreement to lessen the amount of a payment in lieu.

House of Lords

Having the benefit of the ECJ clarification, the House of Lords proceeded to decide the merits of Stringer's case. It confirmed, overruling the Court of Appeal, that claims for unpaid holiday **can** be brought as a claim for an unlawful deduction from wages. (Until this decision, the Court of Appeal's decision had meant that such claims could only be brought under WTR which has more restrictive time limits and does not allow claims for a "series" of deductions).

This means that workers who are persistently refused paid annual leave, will not have to bring a claim on each occasion but instead, can bring a single complaint covering a series of refusals that might conceivably date back over a number of years. The ruling means that claims such as that in *Canada Life*, in which the claimants received £20,000 and £30,000 respectively after they successfully argued that their claim for holiday pay should be backdated to the introduction of the WTR in 1998, could be successful in the future.

The House of Lords' decision dealt with this single issue. No other issue was addressed. The upshot of this is that, although some questions around the interplay between WTR leave and sickness absence can be answered with certainty following the ECJ's decision, many other questions still remain.

A summary of the ECJ/Lords decision

- Employees on sick leave are entitled to take paid WTR leave even when sick pay is exhausted.
- It does not necessarily follow from the ECJ judgment in *Stringer/Schultz-Hoff* that if, due to sickness, a worker does not take their annual leave entitlement he or she will be able to carry that leave forward to a subsequent leave year. In some circumstances a worker might, at best, have an argument that they are entitled to carry forward WTR leave.
- There is case law that suggests a worker who does not take their annual leave entitlement in any year is nevertheless entitled to be paid for it (List Design, Canada Life). It is arguable that those authorities are no longer good law.
- When employment terminates, a worker is entitled to a payment in lieu of untaken WTR leave for the leave year in which termination takes effect, even if the worker has been off sick for the entire year.
- Workers who are denied holiday pay or a payment in lieu of holiday on termination can pursue a claim to an employment tribunal for unauthorised deduction from wages. This opens the door, in appropriate cases, to claims for arrears of holiday pay going back several years.

In view of the above, workers on long-term sick leave should be permitted (and possibly even encouraged) to take paid WTR leave. Managers should be advised accordingly and any contract/policy terms that suggest this will not be permitted should be amended.

Although focused on the WTR entitlement, consideration should also be given to any additional contractual holiday entitlement; for example, employers may wish to ensure that employment contracts provide that contractual leave over and above the statutory minimum does not accrue during sick leave.

Sickness whilst on leave

Pereda v Madrid Movilidad, European Court of Justice, 10 September 2009

The decision follows the earlier ECJ's ruling in the linked cases of *Stringer* and *Schultz-Hoff*. Whilst the *Stringer* case clarified some issues, it left others in doubt, in particular:

- whether someone who does not take their WTR leave entitlement because of illness can carry that leave forward to a subsequent leave year, and
- whether workers who fall ill during a period designated as annual leave can insist on having their leave reclassified as sick leave and their annual leave 'reimbursed'.

Pereda goes some way towards answering these questions. According to the ECJ, where a worker 'does not wish to take annual leave during a period of sick leave, annual leave must be granted to him or her for a different period'.

In essence the ECJ is saying that workers who are on sick leave have a choice: they can take annual leave if they wish, but if they would prefer not to do so they can insist on postponing their annual leave and taking it at a later date, possibly even in a subsequent leave year if it is not possible to schedule leave before the current year ends.

This takes things a step further than *Stringer*. As we have seen, in that case the ECJ said a worker should be permitted to carry forward leave if he or she is 'unable to take leave through no fault of his own'. This begged the question: in what circumstances will a worker be considered 'unable' to take leave, assuming the employer does nothing to prevent leave being taken? According to this ruling, the answer, it seems, is that a worker will be 'unable to take leave' whenever the worker is on sick leave and doesn't want to take holiday, regardless of the severity or nature of the illness.

What does this mean for UK employers?

Carrying forward leave

Even though EU law says workers should be allowed to carry forward leave in some cases, it is not yet clear that UK law (in the shape of the WTR) requires, or even allows, this. The WTR are quite clear that leave cannot be carried over from one year to the next (subject to a limited exemption covering the additional 1.6 weeks' leave introduced over recent years). So as the law currently stands, private sector employers may still be able to argue against leave being carried forward. There is, however, a risk of tribunals 'reinterpreting' the WTR to give effect to European law, despite their clear wording.

So far as public sector employers are concerned, it might be the case that, regardless of what UK law says, they must give effect to the Directive rather than UK law and allow leave to be carried forward. But past cases on that point have been inconsistent.

In summary, employers that don't allow leave to be carried forward risk a tribunal finding that they have breached the WTR. The risk is greater for public sector employers.

Rescheduling holidays

Pereda suggests that workers who fall ill during a period designated as annual leave may be able to insist on having their leave reclassified as sick leave and their annual leave 'reinstated' to be taken at a different time.

In the case before the ECJ, the claimant went on sick leave shortly before his annual leave was due to start. In those circumstances, the ECJ said, a worker should be allowed to reschedule leave if he or she wants to do so.

What if a worker falls ill after their annual leave has started? There seems to be no reason in principle for treating this situation any differently. But the question then is what evidence of illness must the worker produce in order to have their leave reclassified? If the individual has medical evidence showing that they would have been unfit for work

then that would surely suffice. But if the worker does not have that evidence, perhaps because the illness lasts only a few days, or occurs when the worker is holidaying away from home, will employers be expected to take the worker at their word? Until the European or UK courts say otherwise, it could be argued that employers are entitled to require workers to produce convincing evidence of their illness and that it would have rendered them unfit for work before allowing workers to 'reallocate' holidays.

Shah v First West Yorkshire Limited ET/1809311/09, 20 November 2009

Facts

Mr Shah booked four weeks' holiday from 22 February to 21 March 2009. As he worked three days a week, this accounted for 12 days of his annual holiday entitlement. The relevant holiday year under his contract of employment ran from 1 April to 31 March.

In January 2009 Mr Shah broke his ankle and was absent from work between 15 January to 18 April 2009. His sickness absence, therefore, overlapped with his booked period of holiday. However, during this absence he received contractual sick pay and was also paid holiday pay, at a higher rate, for the twelve days leave he had booked.

On 4 April 2009 he wrote to his employer, First West Yorkshire Limited (FWYL), asking to reclaim his 12 days' holiday. FWYL responded on 21 May that the holiday could not be reclaimed as it related to a previous holiday year and had therefore been "lost".

On 16 September 2009 Mr Shah submitted a claim for loss of holiday under the WTR and unlawful deduction from wages under section 13 of the Employment Rights Act 1996. FWYL argued that:

The tribunal had no jurisdiction to hear Mr Shah's claim because it had been submitted more than three months after the date on which the holiday should have been taken and was therefore out of time.

Regulation 13(9) of the WTR requires leave to be taken in the current holiday year only.

Decision of the Employment Tribunal

The tribunal upheld Mr Shah's claim. It made a declaration (under regulation 30 of the WTR) that FWYL had refused to permit Mr Shah to exercise his rights under the WTR by refusing him to take his accrued holiday in the following holiday year when he was prevented from taking it in the current leave year.

The parties agreed that the claim should be adjourned for three months (until 20 February 2010) to allow time for settlement. If there was no settlement of the claim by that date, the tribunal would consider awarding compensation under regulation 30(3)(b) of the WTR.

The tribunal noted that Mr Shah's primary claim was for his lost holiday entitlement, rather than unlawful deductions from wages. In any event, Mr Shah accepted that if he was successful in carrying over the 12 days' holiday to the next holiday year, he may be required to repay the corresponding holiday pay received during his sick leave.

The tribunal held:

It was clear following the ECJ's decision in *Pereda* that in order to comply with the Directive, national law must permit an employee who falls sick during a period of annual leave to take that annual leave subsequently, within the current holiday year, or if time does not permit, within the following leave year.

If it was not permissible to construe regulation 13(9) of the WTR in such a way, Mr Shah would be left with a *Francovich* claim against the Government for its failure to implement the Directive properly. This would be an inadequate remedy for Mr Shah as, at most, it might financially compensate him but it would not require FWYL to permit him to carry over his leave.

The primary health and safety purpose of regulation 13(9) is to give workers paid periods of holiday regularly throughout the year and prevent them from storing it up or taking lengthy periods of extended leave. It is entirely consistent with that primary purpose for workers who have fallen ill and have consequently been unable to take their leisure, to be allowed to take their leave, if necessary, in the following year, as *Pereda* requires.

It was entirely consistent with "the underlying thrust" of the WTR to add words to regulation 13(9) to cover the "limited and special situation" dealt with in *Pereda*.

The tribunal therefore construed the WTR by adding the words:

"Save where a worker has been prevented by illness from taking a period of holiday leave, and returns from sick leave, covering that period of holiday leave, with insufficient time to take that holiday leave within the relevant leave year; in which case, they must be given the opportunity of taking that holiday leave in the following leave year".

Read this way, Mr Shah was entitled to take the holidays which he was prevented by ill-health from taking in March 2009 at some subsequent time in the following leave year.

Comment

This is the first case in which a tribunal has given effect to *Pereda*. As Mr Shah's position was "essentially the same" as Mr Pereda's (as acknowledged by the tribunal), it would have been surprising if the tribunal had not considered itself bound to follow *Pereda*.

As the strict language of regulation 13(9) of the WTR itself makes it impossible to give the WTR a purposive interpretation in line with *Pereda*, the tribunal read in additional words. In light of the incompatibility between regulation 13(9) and the Directive (as reinforced by *Pereda*), it seems likely that tribunals will apply this decision.

Lyons v Mitie Security Limited UKEAT/0081/09, 18 January 2010

Facts

Mitie Security Ltd (Mitie), which supplies security staff to clients at various locations, employed Mr Lyons as a security officer. Its holiday year runs from 1 April to 31 March. Mr Lyons' contract confirmed his entitlement to the statutory minimum holiday and also provided that:

Holiday requests had to be submitted on Mitie's standard form at least four weeks before the holiday start date wherever possible. Applications for holiday on shorter notice would be considered on their merits and subject to staffing requirements.

All holiday had to be taken during the relevant holiday year and could not be carried forward to the following year.

Pay for holiday entitlement not taken in the relevant holiday year would be forfeited.

At the beginning of March 2008 Mr Lyons had an outstanding entitlement of nine days' holiday which needed to be taken by 31 March (the end of the holiday year). On 6 March 2008 Mr Lyons sent a fax to Mitie requesting payment for those nine days before the end of the holiday year. He did not make a request for specific days as holiday and did not use Mitie's standard form.

At the beginning of April, after discovering he had not been paid for the nine days, Mr Lyons brought a grievance. When this was rejected he resigned and presented a claim for unfair constructive dismissal (based on a breach of trust and confidence, the failure to pay nine days' holiday pay being the last straw) and pay in lieu of untaken holiday. The tribunal dismissed both claims.

Mr Lyons appealed.

Decision of the Employment Appeal Tribunal

The EAT upheld the appeal. The tribunal had failed to deal properly with the question of whether Mitie had breached the contractual provisions governing Mr Lyons' exercise of his right to holiday. This was key to his constructive dismissal claim. The case was remitted to a different tribunal for rehearing.

Mr Lyons argued that, applying regulation 17 of the WTR, the more favourable statutory right to take holiday during the holiday year overrode a contractual provision which could deprive him of that right. This was consistent with every worker being "entitled" to minimum holiday under Article 7(1) of the Directive. Further, in observing that entitlement, rather than either taking a passive role or forcing holiday to be taken against a worker's wishes, an employer had to ensure that holiday was taken particularly if any was outstanding as the end of the holiday year approached.

In support of this argument, Mr Lyons referred to the ECJ's decision in *Commission v UK [2006] IRLR 888* which considered DTI (now BIS) guidance on daily and weekly rest periods to the effect that, "Employers

must make sure that workers can take their rest periods, but are not required to make sure that they do take their rest". The ECJ held that employers could not withdraw into a purely passive role, granting only express requests, nor could they be required to force workers to invoke the rest periods to which they were entitled. To ensure effective health and safety protection, employers needed to invoke an atmosphere within which rights could be effectively observed: workers had to be granted the minimum rest periods and not be prevented from taking them (for example, by being deterred in practice from doing so). Mr Lyons argued that a similar approach should be applied to the taking of annual leave (which was, as the first recital to the Directive noted, a health and safety issue). Otherwise there would be nothing to prevent the notice provisions in regulation 15 from being operated in an arbitrary, capricious and unfair way.

The EAT rejected this argument and agreed with Mitie that the WTR did not support the proposition that statutory holiday was an inalienable right that effectively obliged employers to ensure that workers took the holiday to which they were entitled. There were obvious practical and logistical reasons for requiring notice of the wish to take holiday. These were reflected in the qualification in Article 7(1) of the Directive that annual leave was subject to the "the conditions for entitlement to and granting of such leave laid down by national legislation and/or practice". The position relating to annual leave was therefore distinguished from that relating to rest periods considered in *Commission v UK* which had, in any event, held that employers were not obliged to ensure that workers took all of the rest to which they were entitled. Article 7(1) clearly envisaged entitlement to holiday being subject to a mechanism for a worker to request leave and the employer to respond, where necessary specifying the dates on which holiday could and could not be taken.

Mitie also referred to the ECJ's decision in *Stringer and others v Revenue & Customs Commissioners* that, while the right to holiday was not extinguished at the end of a leave year where the worker had not had the opportunity to exercise that right because they were on sick leave, Article 7(1) did not preclude national legislation that lays down conditions for the exercise of the right to holiday, including the loss of that right at the end of a leave year, provided the worker had actually had the opportunity to exercise that right.

The EAT concluded that a worker's right to statutory holiday was subject to the notice provisions set out in regulation 15 of the WTR (as varied by contract, if applicable). Notice provisions had to be operated by an employer in a manner that was not unreasonable, arbitrary or capricious so as to deny any lawfully requested entitlement. If operated correctly it could, as envisaged in *Stringer*, result in the loss of the right to leave that had not been taken at the end of the leave year.

Mr Lyons also argued that his failure to request particular days as holiday was irrelevant. He had not been scheduled to work in March and therefore, to be paid in March at all, he was simply asking for nine days to be treated as paid days. Mitie's holiday request form only had to be submitted four weeks before the proposed start of the holiday "wherever possible". The tribunal had failed to consider the effect of either the use of the phrase "wherever possible" or the provision in his contract for shorter notice to be given. The EAT agreed that the tribunal had failed to consider the manner and timing of Mr Lyons' holiday request, the merits of a request on shorter notice or Mitie's staffing requirements for that period. It therefore remitted the case to a fresh tribunal for these matters to be decided.

Comment

The EAT noted that the absence of case law suggests that reasonable requests to exercise holiday entitlement have not been denied, even towards the end of applicable leave years. In practice, employers are aware that an unreasonable response to a request could result in a grievance and a possible constructive dismissal claim. As a result, care is generally taken in reviewing requests for holiday and many employers also permit a small amount of holiday to be carried over into the next holiday year.

The EAT identified the relevant WTR regulations relevant to this case as being 13, 15 and 17 (*paragraph 14*). It did not consider regulation 16, "Payment in respect of periods of leave", which provides that workers are entitled to be paid "in respect of any period of annual leave to which they are entitled" under the WTR at a rate of a week's pay for each week of leave, calculated with reference to the relevant provisions of ERA 1996. The question arises whether, even if Mr Lyons was legitimately prevented from taking his holiday, he could nevertheless be entitled to holiday pay.

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If you wish to obtain further legal advice, you may wish to contact Audrey Williams at Eversheds at audreywilliams@eversheds.com or alternatively telephone 0845 407 9797.

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