

## ARTICLE: Two cases on holiday pay following Stringer

April 2010

### Introduction

Following on from our previous articles on the case of *Stringer v HMRC* and the case of *Pereda v Madrid Movilidad SA* (see <http://www.davidsonlargelaw.com/downloads/jul09stringerHoL.pdf> and [http://www.davidsonlargelaw.com/downloads/nov09rescheduling\\_holiday.pdf](http://www.davidsonlargelaw.com/downloads/nov09rescheduling_holiday.pdf) respectively) two cases have come before the English courts raising questions in relation to an employee's entitlement to holiday pay. The first ruling confirms that employees on sick leave should be allowed to take any prearranged holiday which falls during the sick leave at a later period. The second ruling shows that employers may require employees to adhere to notice provisions for booking annual leave, even where this might result in an employee being unable to exercise their leave at the end of the year.

### The facts of *Shah v First West Yorkshire Limited*

Mr Shah worked three days a week and his holiday year ran from 1 April to 31 March each year. In January 2009 he broke his ankle, resulting in him being absent from work from 15 January to 16 April 2009. Consequently, he was off-sick during a period of annual leave which he had previously booked to last from 22 February to 21 March 2009.

On his return to work, Mr Shah wrote to First, asking to claim back his four weeks holiday entitlement. First responded in May 2009 that he could not reclaim this holiday because he "returned to work in the new holiday year, therefore these days are "lost"." On 16 September 2009, Mr Shah submitted a claim to the Employment Tribunal on two grounds – an entitlement to leave which had accrued but not been taken under the Working Time Regulations and withholding holiday pay being an unlawful deduction of wages under the Employment Rights Act 1996 (ERA).

There was some debate at first as to whether the matter was out of time, being over three months since First's response to Mr Shah's grievance in May 2009. However, the Tribunal held that the matter was within time and that it could successfully be brought under both provisions of the Working Time Regulations (WTR) and ERA.

It was noted that the unlawful deductions claim was not pursued with any vigour. Indeed, since he had been off-sick and on statutory sick pay, Mr Shah had in fact been paid full wages for his period of annual leave and so, in practice, would have been overpaid if this claim succeeded. However, it was clear that the WTR claim was the key one and so the Tribunal focussed on that.

### The Tribunal's decision

The Tribunal gave some detailed thought to the WTR claim, commenting that First's solicitor had "attended the Tribunal armed with a copy of [the *Pereda* judgment], prepared to argue the point". Regulation 13(9) of the WTR states that entitlement to leave may only be taken in the leave year during which it has accrued and cannot be replaced by payment in lieu except where employment is terminated.

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The Tribunal considered the case of *Pereda* to be very similar to Mr Shah's. Having quoted part of the *Pereda* judgment, the Tribunal summarised it by stating that national law must permit an employee on sick leave during a period of annual leave to take that annual leave after their sick leave has ended. This would be so even if it meant the annual leave had to be carried over into the following leave year. The Tribunal asked itself whether it was permissible to construe the WTR in this way.

Several previous cases were noted where Tribunals had "added in" words to national legislation in order for it to comply with the corresponding European Directive. However, words were only added where it was "compatible with the underlying thrust" of the existing legislation. Having considered the matter, the Tribunal concluded that it was permissible to add the following words at the end of Regulation 13(9) about leaving not being carried over:

"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".

Much like the ECJ in *Pereda*, the Tribunal looked at the primary purpose of annual leave (to provide a worker with a period of rest and relaxation) and the purpose of sick leave (to provide a worker with a period of recuperation). It held that where a worker falls ill on annual leave, the purpose of that leave is defeated. However, it is entirely consistent with the purpose of annual leave to allow it to be taken when the worker returns to work, even if that is during the next leave year.

Mr Shah received a declaration that he had been refused the chance to exercise his rights under the WTR and the matter was adjourned for the parties to settle outstanding issues. If agreement was not reached between the parties, a remedies hearing would be convened.

### **Conclusion**

Whilst a ruling in one Tribunal is not binding on any other Tribunal, nevertheless this is the first case to follow the ruling in *Pereda* and it is likely that others will follow its lead. As such, employers should be prepared to allow workers who are off-sick when their prearranged holiday falls to rearrange such holiday at a later mutually convenient date.

However, in allowing such, employers should be aware that it might be viewed as inconsistent and unfair treatment by those employees who wish to carry over leave but have not been off-sick. Clear wording and explanations in the relevant policies should be provided in an attempt to avoid such unrest.

It should also be noted that the leave under scrutiny in *Shah* was only statutory annual leave. The position is likely to be different where additional contractual leave is involved.

### **The facts of *Lyons v Mitie Security Limited***

From October 1997 Mr Lyons was employed by Mitie as a security officer and he was supplied to Mitie's clients at various locations. He was paid only for the hours that he worked and was not guaranteed a minimum number of working hours per week. His holiday entitlement was 4 weeks' paid leave a year, the holiday year running from 1 April to 31 March. Applications for leave had to be made 4 weeks in advance on the correct request form. Applications with shorter notice periods were considered on their merits and subject to staffing requirements.

During his employment with Mitie, Mr Lyons raised numerous grievances relating to

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shortfalls in holiday pay, claims for expenses and being banned from certain client sites (sometimes by mistake). Most of his grievances occurred quite a while before his Tribunal claim and seemed to be for the most part resolved.

In March 2008, Mr Lyons raised a grievance about three shifts which had been allocated to him on 29 February and 1-2 March and then cancelled. Further, there was a fax at the beginning of March from Mr Lyons stating that he still had nine days' holiday due for which he wished to be paid during March. Only being paid for the hours he worked, he was not scheduled to be working during that month and so wanted his holiday pay instead. Although no copy of the fax was given in evidence, it was agreed that no specific dates were requested and that the request was not made on the official form. When this money was not received by him by the beginning of April, he raised a further grievance in relation to this.

Both grievances were dealt with in early April and a letter of 23 April from Mitie apologised to Mr Lyons for a mistake causing him to be banned from a client's site and advised that his cancelled shifts had been due to a miscommunication. In relation to his holiday pay, the letter stated that the minimum 4 weeks' notice had not been given, that leave could not be carried over and that they were unable to pay Mr Lyons in lieu of leave while he was still working for them. Mr Lyons resigned and claimed constructive dismissal.

He brought a claim before the Employment Tribunal claiming breach of trust and confidence by Mitie, being a cumulative effect of all its previous actions against him with the refusal to pay holiday pay being the last straw.

The Tribunal found that Mr Lyons had failed to establish that Mitie had breached the contract in the way alleged. Mr Lyons then appealed to the Employment Appeals Tribunal (EAT) which examined both his complaints and the two issues in the case.

### **The EAT's decision**

With regards to the finding that there was no unfair constructive dismissal, the EAT found in favour of Mr Lyons. The Tribunal had failed to provide a detailed analysis of the cumulative effect of all of the previous events and grievances, of which the holiday pay was the last straw. It was nevertheless accepted that at the heart of the Tribunal's decision was the refusal to pay holiday pay, which the EAT went on to examine.

Having considered the WTR, the EAT phrased the question: is the employer legally obliged to permit an employee to take all of his paid leave within the leave year even if requested by the employee towards the end of the leave year at a time when it may not fit in with the staffing patterns of the business? The EAT identified three elements from the contract which should have been analysed by the Tribunal: why Mr Lyons did not submit his form the requisite 4 weeks in advance, and (given the company's policy on short notice) the merits of the application and the staffing requirements. It felt that the Tribunal had not dealt "adequately or indeed at all with these three important issues".

The relationships between the various provisions of the WTR and the relevant Directive were argued before the EAT, in particular whether one regulation could override another and whether the right to annual leave was an inalienable right which was defeated if notice requirements were rigorously applied. There was also discussion about what obligation, if any, was placed on the employer: whether it should assume a passive role waiting for an employee to exercise his right, whether employees should be forced to take their leave even if they do not wish to do so, or whether employers must ensure that leave is taken, particularly towards the end of the leave year.

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In the first sentence of its conclusion, the EAT admitted that they had “not found this an easy issue to resolve”. It claimed that the absence of case law indicated that in general, managers take great care in making sure that full leave is taken. It commented that any unreasonable actions by the employer in such an area would no doubt lead to grievances and possibly even claims for constructive dismissal, as in this case.

The EAT was satisfied that the right to statutory leave is not inalienable and can be subject to notice provisions. It added that a mechanism for notice must be clear and operate consistently throughout the whole leave year to ensure an employer could manage their staffing levels, and that this could indeed result in the loss of the leave at the end of a leave year. However, the EAT warned that such a mechanism “must not be operated by an employer in an unreasonable, arbitrary or capricious way so as to deny any entitlement lawfully requested”.

The case was remitted to a fresh tribunal since the EAT did not consider the constructive dismissal to be unfair.

### **Conclusion**

In *Lyons*, the EAT held that the right to take holiday was not an inalienable right. The exercise of it could be made subject to particular notice provision, which might result in holiday being lost at the end of the leave year. It should also be noted that Mr Lyons had plenty of opportunity to use his leave at any time he wanted, unlike Mr Shah who was unable to do so since he was off-sick at the time. This undoubtedly had a bearing on the outcome of each case and whether leave could be carried over.

While employers can require employees to give suitable notice before taking their leave (presumably whether arranging it for the first time or rearranging it after a period of sickness), policies regarding notification should not be enforced in an unreasonable way. Tribunals may not be sympathetic where they believe an employer has been unreasonable in requiring employees to notify them in a particular way if such a mechanism is not supported by evidence that it is necessary to maintain suitable staff levels. In addition, while a notice period effectively prevented an employee from taking all his due leave by the end of the holiday year in the case of *Lyons*, it should be inferred from the decision in *Shah* that although notice provisions can be enforced, they cannot be used to deny an employee accrued holiday before the end of the leave year where they have previously been off-sick and unable to exercise their rights.

If you would like further information on either of these cases, please contact David Hill at [dhill@davidsonlarge.com](mailto:dhill@davidsonlarge.com) or Lucy Bond at [lbond@davidsonlarge.com](mailto:lbond@davidsonlarge.com).

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