

ARTICLE: Holiday accrual on long-term sick leave

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The European Court of Justice has recently given a significant judgment on joined United Kingdom and German cases, *Gerhard Shultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and ors v HMRC*. Both cases related to what happens to an employee's annual leave accrual and entitlement when the employee is absent from work through illness for part or all of the leave year.

The ECJ case and judgment

The facts in the UK case involved a worker who had asked her employer if she could take a number of days paid annual leave while she was on an indefinite period of sick leave. Following the Court of Appeal decision that annual leave does not accrue during a period of sick leave, the case went to the House of Lords which referred it to the ECJ.

In summary, the ECJ came to the following conclusions:

- Member States may lay down rules as to the circumstances in which the right to paid annual leave may be exercised. However, Member States may not make the existence of the right itself subject to any preconditions whatsoever.
- If a Member State should legislate to prevent the exercise of annual paid leave during a period of sick leave, then such legislation must be subject to the condition that the worker may exercise his right to annual leave which he has accrued during another leave period instead.
- Member States can legislate to allow workers to take annual leave during sick leave.
- Accrued annual leave must be paid in lieu in the event of termination of employment, regardless of whether the worker has been on sick leave for all or part of the holiday year.

Implications for UK employers

For all employers, our view is that the decision only impacts on the statutory right to paid annual leave. It does not apply to any excess contractual entitlement. However, the paid annual leave entitlement will increase to 28 days including public holidays in April, and this is likely to represent the maximum entitlement of most employees, certainly in the private sector.

For employers in the public sector, the ECJ decision has immediate effect under the principle of "direct effect". Employers must allow workers to carry over any unused holiday entitlement from one leave year to the next if their sick leave has prevented them from taking it, and must give payment in lieu of any untaken holiday if employment is terminated, with no deduction relating to the period of sick leave.

For employers in the private sector, the position is not so clear cut. The UK case will be remitted to the House of Lords to make a decision in the light of the ECJ judgment but the Working Time Regulations 1998 have effect to prevent a worker from carrying over leave at the end of the leave year, whether they have been absent through sickness or not. The House of Lords must also deal with the issue of whether the Working Time Regulations can be interpreted to give effect to the ECJ's ruling on payments in lieu where workers have not been able to exercise their right to take paid annual leave in the previous holiday year.

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It is likely that in cases where employers choose not to grant paid leave or make payments in lieu which reflect the ECJ rulings, workers in the private sector may start employment tribunal proceedings to ensure that any claim is not time-barred.

Another potential financial problem is that employers may now be faced with claims for holiday pay from employees who are receiving payments under permanent health insurance policies.

There has been no official announcement from the Government yet, but one possibility is that the Government will take seek to amend the Working Time Regulations to reflect the decisions in the ECJ cases. There may be a consultation period as the decisions do allow scope for different regulations. For example, should workers be precluded from taking annual leave during a period of sickness absence and should there be a statutory carry over period.

The ultimate practical consequence of this ruling is that there will be further financial and administrative burdens placed upon employers. It could mean that workers who have already been off-work on sick leave for a substantial period may choose to delay their return to work even further by taking a period of annual leave following their sick leave. Not only would this have serious cost implications for the employer, but may also harm the employee's ultimate re-integration into the workplace.

The ruling would seem to work against the Government's current initiative to encourage employees to get back to work, and might even tempt some employers to terminate the contracts of those on long-term sick leave in an attempt to minimise the amount of annual leave they may ultimately be required to pay in lieu. This would be a risky strategy, especially in cases where workers are suffering from a legal disability.

Another possibility is that employers will seek to change sick pay policies, especially sick entitlements, in an effort to reduce the effects of the change in the law. However, any unilateral change could expose employers to claims for breach of contract.

The increased costs that will inevitably accrue in respect of employees on long term sickness absence should act as a focus to actively manage such employees and deploy long terms sickness policies promptly. Even in cases involving employees with disabilities, provided that employers act properly in dealing with the duty to consider reasonable adjustments, employment law does not preclude dismissal where proper consultation has taken place and medical advice is obtained before any decision is made.

The UK case will be remitted to the House of Lords sometime this year for their judgment. We will be reporting on this case further in the future. If you wish to receive any follow up articles we publish, or if you have any queries related to other aspects of employment law, please email David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com and request to be added to our mailing list.