

## ARTICLE: ECJ case on holiday pay comes back to House of Lords

June 2009

### Introduction

Readers of our bulletin will recall our article on the ECJ judgment in relation to *HMRC v Stringer & Ors*

(<http://www.davidsonlargelaw.com/downloads/feb09holiday&sickleave.pdf>)

This case has now returned to the House of Lords for judgment on issues relating to whether non-payment of holiday pay while an employee was off sick could be considered an unlawful deduction from wages.

### The facts of the case

Mr Ainsworth was employed by HMRC from 1976 until November 2002, and was absent from work due to sickness from December 2000. Having been off-sick for the last two years of his employment, HMRC refused on termination of his employment to pay him in lieu of holiday pay as would normally be required under the Working Time Regulations 1998 (the 1998 Regulations). Mr Ainsworth brought a claim under section 23 of the Employment Rights Act 1996 (ERA 1996) for unlawful deductions from wages, but HMRC contended that the claim should have been brought under Regulation 30 of the 1998 Regulations. The Court of Appeal agreed with HMRC but the House of Lords overturned their ruling.

### The Law

The arguments put forward were very technical and centred around the definition of wages. Legislation provides specifically what may be considered "wages" which, in essence, are any sums payable to the worker in connection with employment. An employer cannot make a deduction from a worker's wages unless it is authorised by statute or the worker's contract, or the worker agrees in writing. Section 23 of the ERA 1996 permits a worker to complain to an employment tribunal within three months of the deduction or, if the complaint relates to a series of deductions, the date of the last deduction in the series.

However, a worker's entitlement to paid annual leave is contained in the 1998 Regulations and HMRC argued that, because of this, Mr Ainsworth's claim should be brought under Regulation 30 which has much stricter time limits.

### The decision

The Court of Appeal had agreed with HMRC that such complaints should be brought under Regulation 30 and that, because of the stricter time limits, Mr Ainsworth's application was out of time.

The Lords disagreed and held that holiday pay plainly constituted part of the consideration given to the worker in return for work done. The Lords ruled that both holiday pay itself and the payment given on termination in lieu of untaken holiday, fell within the definition of "wages". As a result, claims for non-payment of holiday pay could be brought under section 23 of the ERA 1996 and so benefit from more generous time limits.

### Effect on employers

Disappointingly, the parties in this case made a concession that taking holiday leave during sick leave was permitted. Because of this, the Lords focussed only on the unlawful deductions issue and did not comment on the part of the ECJ ruling which stated that annual leave continues to accrue on sick leave and should either be taken during the leave

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year or rolled over to the next. Since the 1998 Regulations require a worker to take leave in the year in which it has accrued and do not permit carrying it over, some guidance from the Lords would have been welcomed on how this conflict with EC law should be resolved in practice.

As matters currently stand, workers will now be entitled to holiday pay whilst they are on sick leave. This could mean that employees who were about to drop down to half-pay under their employer's sickness policy, could request to take their annual leave. The effect of this would be to stop the clock running on the sickness policy arrangements and provide the employee with 4 weeks full pay before the sickness policy was re-engaged and the employee received half-pay.

Employers would be wise to review their sickness policies in light of these new rules. This could include reducing sick pay to accommodate the cost of now having to pay for annual leave as well, although employers should note that unilateral changes imposed on an employee's contract could lead to breach of contract and claims of unfair constructive dismissal if employees resign as a result.

A further issue which was not addressed by the Lords is that, while European law provides entitlement "to paid annual leave of at least four weeks", the 1998 Regulations provide for 5.6 weeks' annual leave. It is not clear whether a worker is entitled to accrue and take only four weeks during sickness absence or whether his entitlement extends to the extra 1.6 weeks provided by the 1998 Regulations. The same question would apply in relation to contractual holiday pay accruing during sick-leave.

If you would like to discuss this case and how it might impact on your business, 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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