

“ Plain speaking legal advice ”

## Holiday Entitlement for the Long Term Sick

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**NO HOLIDAY FOR EMPLOYERS WHEN IT COMES TO  
LONG TERM SICK LEAVE**

Previously the Courts had made what seemed to be a perfectly logical decision, that employees on long term sick leave were not entitled to accrue a right to paid annual leave. The rationale being that annual holiday is provided for a Health and Safety reason to give people a break from work. Those on long term sick leave did not need a break from work so had no entitlement to paid annual leave.

That reasoning has been put back into the melting pot with the case of *Stringer & Others –v- HMRC*.

The case started when Mrs Khan was absent for a number of months on sick leave and notified her employer HMRC that she wished to take her 20 days paid holiday entitlement (and of course receive her normal weekly pay rather than the lower sick pay). Her employers refused. She brought proceedings and the Employment Tribunal upheld the claim. Three more employees of HMRC were then dismissed, having been absent on long term sick leave. None had taken any annual leave during the year they were absent for sick reasons. They also brought proceedings to be paid for the annual holiday. The Employment Tribunal in each case also upheld their claims.

HMRC appealed to the Court of Appeal which upheld HMRC's position, and the employees consequently appealed to the House of Lords.

The House of Lords referred it to the European Court of Justice (ECJ) for a preliminary ruling.

Two questions were to be answered.

1. Is a worker on indefinite sick leave entitled to take or be paid annual leave whilst on sick leave?
2. If they are, how should it be calculated?

When a matter is referred to the ECJ for a preliminary decision, you first get a recommendation from the Advocate General (AG).

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The AG recommendation has now been published and states:

1. Workers on sick leave **are** entitled to accrue paid annual leave, but they will only be entitled to take it when they return from sick leave, even if that means it falls into the next leave year.
2. A worker whose employment is terminated whilst on long term sick is still entitled to be paid in lieu of accrued but untaken holiday. The sum should be calculated at the same rate as their normal pay.

The recommendation does leave a number of unanswered questions for employers:

1. If you have a holiday policy that prevents your employees carrying over holiday from one year to another and you end the employment of someone on long term sick leave, do you just pay the accrued holiday for that year or do you have to pay for all the holiday accrued whilst they were off sick?
2. How do you assess an employee's average weekly pay when they have been off work for more than 12 weeks? Should you work back to the last period the employee was working and take the average weekly pay at that point?
3. What happens about contractual paid holiday? The ECJ decision can only operate on the minimum paid holiday provision under the Working Time Directive. What happens if an employer contracts to give an employee more holiday and then they go off on long term sick leave?

In the past the ECJ almost always followed the AG's recommendation, however in more recent years that has not been the case. It is a complex area and the ECJ may well end up raising more questions than it answers if it decides to go with the AG recommendation.

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At the moment the best advice to employers is to “park” requests for payment of holiday pay by those on long term sick leave, i.e. acknowledge the employee’s right to make the request but confirm it will not be dealt with until the ECJ has published its decision. If you simply reject them out of hand you are inviting a claim and whilst that claim may be put in limbo pending the decision, if the ECJ goes with the AG recommendation a Tribunal may increase the award on the basis that you as the employer failed to deal with the grievance process.

If you would like to discuss any of the issues raised in this article then please contact Frankie Tierney on 01276 686222 or email [frankie.tierney@herrington-carmichael.com](mailto:frankie.tierney@herrington-carmichael.com)

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Watchmoor Park  
Camberley  
Surrey  
GU15 3YL

tel: 01276 686222

4 Station Road  
Aldershot  
Hampshire  
GU11 1HU

tel: 01252 322451

51 Guildford Road  
Bagshot  
Surrey  
GU19 5NG

tel: 01276 451451

3&4 Market Place  
Wokingham  
Berks  
RG40 1AL

tel: 01189 774045

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