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## ANNUAL LEAVE ENTITLEMENT DURING SICK LEAVE

Further to our January 2008 and July 2008 updates on this issue, the European Court of Justice has now issued its judgment in *HM Revenue and Customs .v. Stringer* (previously named *The Commissioners of the Inland Revenue v Ainsworth and Others*) ...

In the case of *The Commissioners of the Inland Revenue v Ainsworth and Others*, the Court of Appeal held that in terms of the Working Time Regulations, workers who are absent for the entire holiday year cannot designate part of their sick leave as annual leave, accrue holiday during the sick leave period and therefore cannot claim pay in lieu of that holiday. This decision was subsequently appealed to the House of Lords, (confusingly under the name of *HM Revenue and Customs .v. Stringer*) which referred the question to the European Court of Justice ("ECJ"). The Advocate General of the ECJ provided an [Opinion](#) in January 2008. The Opinion states that although a worker cannot designate a period of sick leave as holiday, he does accrue leave and he must be compensated for leave accrued and untaken at the end of employment, even if this means carrying leave forward into the new holiday year, after a full or partial year of absence.

The Court usually follows such opinions, and it has done so in this case in the ECJ's recently published judgment. The ECJ heard *Stringer* together with a German case *Schultz-Hoff v Deutsche Rentenversicherung Bund*. *Schultz-Hoff* dealt with the similar issue of whether holiday that has not been taken because of sickness absence can be carried forward into the next holiday year, or beyond any carry-over period. Under German law, the right to holiday pay is extinguished at the end of the holiday year or at the end of a carry-over period of three months.

The ECJ's judgment concludes that, since the Working Time Directive itself does not distinguish between workers who are absent from work on sick leave and those who have in fact worked during the course of the year, it must be implemented by Member States without any preconditions. On that basis, a worker cannot be deprived of the right to annual leave when he or she has not had the opportunity to exercise it. A worker who has been absent for the whole of the employer's holiday year and any carry-over period has been denied the opportunity to exercise his or her right to paid holiday. As such, the right to holiday pay is not extinguished at the end of the holiday year or carry-over period. The Court concluded that the same rationale must apply to the annual leave entitlement of a worker who has been absent for part of the holiday year.

The ECJ distinguished between the purposes of paid annual leave and sick leave: the former is intended to enable the worker to rest and enjoy a period of relaxation and leisure; the latter is to allow the worker to recover from being ill. One type of leave cannot displace the worker's entitlement to another type of leave, therefore there is nothing to prevent national legislation that stops workers from taking holiday during a period of sick leave. However, if so then holiday must be allowed at a later date. For those workers whose employment ends before they have been able to return from sick leave and take their full entitlement are entitled to payment in lieu on termination. It therefore appears that workers returning from sick leave in a new holiday year would be entitled to take holiday that accrued during their period of sickness absence.

The case now will return to the House of Lords, which will give a ruling in the light of the ECJ's judgment, no doubt overturning the decision of the Court of Appeal.

In addressing these types of situations, it is always important to consider the contractual position. There is a right to a certain amount of holidays in a leave year. There is usually nothing in NHS contracts of employment to state that employees do not continue to accrue holidays during a period of absence. However, there is usually a restriction in carrying them over into a new holiday year. This is a matter for local agreement by Boards, but in practice most Boards fall back on the General Whitley Council position of a maximum of 5 days carry over at the discretion of the employer. It is now very likely that this position will require to change once the House of Lords issues a ruling in light of the ECJ judgment: this would mean that an employee would have a right to accrue his whole WTR entitlement in a year he was off sick and carry all those days forward, possibly indefinitely. At the end of employment, if any of those days remained untaken then he would have to be paid in lieu. In relation to a contractual entitlement in excess of the WTR entitlement, we understand that the position would continue to be as regulated by the contract of employment.

The position will become clearer when the House of Lords' judgment is published. In the meantime, NHS employers should be aware that the Working Time Directive has direct effect, which means that workers of public authorities, (such as civil servants and NHS employees) may attempt to raise legal proceedings against a Board based not on the Regulations but on the original European Directive. This means that, if NHS employers continue with their current practices in respect of payment of annual leave entitlement, there is a risk of legal action on the basis of the ECJ's recent judgment and the Directive itself. However, our view is that the NHS in Scotland requires to come to a considered joint view about this matter before any change in practice is instituted, and so Boards should await the House of Lords' judgment and any further guidance in relation to this issue that may become available from the Scottish Government Health Department/Management Steering Group/NHS Employers in due course.

**Further resources and Information**  
***HM Revenue and Customs .v. Stringer***

Company details and info

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