

Welcome

Welcome to the August e-newsletter in which Barry Hutchinson deals with the 'hot off the press' issue of holiday pay for sick employees. The recent House of Lords decision CHANGES the law as was understood so please take note of the comments he makes.

This issue will be explored in more detail at our forthcoming breakfast seminar on 30 September 2009 at The Great North Museum. In addition we shall be providing a general update on employment law. Invites will be issued in due course but for more information or to book your place on line please go to www.gordonbrown.co.uk

Jonathon Stokes

Head of Dispute Resolution

On Holiday or Sick Leave

The House of Lords has recently given its decision in the long running saga of holiday pay and sick leave.

In the case of *HM Revenue and Customs v Stringer and ors*, which originally started life as the *Commissioners of Inland Revenue v Ainsworth and ors* back in 2004, five claimants brought employment tribunal proceedings against HMRC under the Working Time Regulations (WTR) 1998. Two issues arose for consideration:

- (1) whether an employee is entitled to holiday pay under the WTR even if they are on long-term sick leave and no longer receiving pay because they had exhausted their sick pay entitlement; and
- (2) whether a failure to make such payments constituted an unauthorised deduction from wages under the Employment Rights Act (ERA) 1996.

The employment tribunal found for the claimants on both points and this was upheld by the Employment Appeal Tribunal. However, the Court of Appeal reversed those decisions and the claimants appealed to the House of Lords.

With regards to the entitlement claim, the House of Lords referred certain questions to the European Court of Justice for preliminary ruling. On return to the House of Lords, the parties agreed that the EAT's decision should be reinstated in light of the ECJ's ruling and only the unlawful deductions issue remained to be decided by the House of Lords. Their Lordships overturned the Court of Appeal.

The key outcomes of the proceedings are that

- an employee is entitled to claim paid holiday under the WTR whilst he is absent on sick leave,
- an employee is entitled to a payment in lieu of holiday accrued but not taken on termination of employment, even if he has been on sick leave for the whole of the holiday year up to the point of termination,
- failure to pay holiday pay under the WTR can constitute an unauthorised deduction from wages under the ERA 1996.

However, this is not the end of the matter. The House of Lords did not have an opportunity to consider other aspects of the ECJ decision namely that an employee who does not receive holiday pay when on sick leave the right to carry his annual leave over to a subsequent leave year.

We await the next round of litigation.

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