

## Holiday Pay and Sick Leave

The legal position on a worker's right to holiday pay during long-term sickness absence has been uncertain in UK law for some time. A recent decision of the European Court of Justice (ECJ) has addressed this issue, although not perhaps resolved matters conclusively.

### Background

In 2002, the Court of Appeal in *Commissioners of Inland Revenue v Ainsworth & others* (now known as *Stringer*) ruled that under the Working Time Regulations 1998:

- a worker cannot take paid annual leave during a period of sick leave absence;
- a worker who was absent for the whole leave year had no right to paid annual leave or a payment in lieu on termination.

This decision was appealed to the House of Lords, who referred the matter on to the ECJ. The ECJ has recently held that if a worker is on sick leave and is prevented from taking annual leave, national law must enable the worker to take their holiday at a later date, even after the end of the leave year. Furthermore, accrued annual leave must be paid in lieu on termination, regardless of whether the employee has been on sick leave for the whole or part of the leave year.

The ECJ also commented that the European Working Time Directive did not preclude national laws which would allow a worker to take holiday during a period of sick leave.

### Comment

The case of *Stringer* is now referred back to the House of Lords for a decision on whether current UK laws can be interpreted to allow holiday to be taken during sick leave or indeed, whether sick workers should be allowed to carry over holiday entitlement at the end of a holiday year. This may necessitate legislative change in the UK as the current Working Time Regulations only allow for holiday to be taken in the year in which it accrues (ie no right to carry forward to the next holiday year).

The ECJ's approach might have significant cost implications for employers, particularly those that have traditionally been happy to leave long-term sick employees sat "on the books". Such employees could now accrue extensive holiday entitlement which would need to be paid out in the future.

For details of the ECJ ruling: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0350:EN:HTML>

## On the Horizon....

### Holiday Entitlement

The next phase of the increase in statutory holiday entitlement will take place in April 2009.

Amendments to the Working Time rules mean that employees will now be entitled to a maximum of 5.6 weeks' paid holiday (or 28 days for a full-timer) per year. This can be inclusive of bank and public holidays.

Part-time workers have a pro-rata entitlement – this is not affected by whether or not they normally work on bank holidays.

BERR has a holiday calculator:

<http://www.berr.gov.uk/whatwedo/employment/holidays/index.html>

### Flexible Working

The right to request flexible working will be extended to parents of children up to the age of 16 in April 2009.

### Compensation limits

Compensation limits increased in February 2009:

- a "week's pay" cap increased from £330 to £350;
- maximum statutory redundancy payment increased from £9,900 to £10,500;
- maximum compensatory award for unfair dismissal rose from £63,000 to £66,200.

## Making clear dismissal is a possible outcome

The case of *Brezan v Zimmer Ltd* underlines the importance of clear communication with employees facing disciplinary allegations, particularly where dismissal is a possible outcome.

### Background

Mr Brezan was employed by Zimmer Limited as a Regional Sales Manager, whose territory covered much of the south of England. He was allowed to use his own car for business purposes and to claim for mileage used for those purposes and for other expenses verified by receipts. Late in 2006, Brezan was selected for promotion to an office-based role. He raised concerns that, in his new role, he would lose his entitlement, *inter alia*, to mileage payments, in particular for travel to and from his home. As a result, the Company decided to look at Mr Brezan's mileage and expense claims, which seemed higher than those by others in similar jobs. Following some investigation, Brezan was invited by letter to a disciplinary hearing and sent a copy of the employer's disciplinary procedure. After further meetings, Brezan was eventually dismissed for misconduct. Brezan brought a Tribunal complaint alleging automatically unfair dismissal, on the basis that his employer had failed to comply with Step 1 of the statutory Standard Dismissal Procedure.

### Statutory Dismissal Procedures (Employment Act 2002 – Schedule 2)

#### Step 1: Statement of grounds for action and invitation to meeting

1. The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.
2. The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

### Outcome

The Tribunal held that the employer was in breach of Step 1 of the Statutory Procedure - it found that the invitation to the disciplinary hearing did not make clear that the allegation was a potential case of gross misconduct and therefore did not indicate that dismissal was a risk of the meeting. The letter simply invited Brezan to a disciplinary meeting to discuss "mileage and expense claims that have been submitted". It also wrongly set out the right to be accompanied and gave less than 48 hours' notice of the hearing. The Tribunal stressed that the right to be accompanied and giving sufficient time to prepare were most important to an employee who understands that his job is at risk. The Tribunal made a finding of automatic unfair dismissal.

The employer's appeal was unsuccessful. The Employment Appeal Tribunal (EAT) agreed that the purpose of a Step 1 letter in a dismissal case cannot be properly achieved unless the employee is able to understand from the Step 1 letter that he is at risk of dismissal.

### Comment

Despite the forthcoming repeal of the statutory rules, this case is still relevant. The Tribunal noted that, even with the statutory disciplinary procedures not in force, it would have found the employer's approach unfair. Employers should ensure in cases of possible dismissal that the disciplinary invitation letter is sufficiently detailed about the nature of the allegations and the possible outcomes, that the right to be accompanied is correctly expressed and sufficient notice of a hearing is given. (***Brezan v Zimmer Limited, EAT, October 2008***)

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