

Holiday pay for workers on long-term sick leave

The Advocate-General has recently handed down his opinion on the case *Stringer v HMRC* (which was known in the English courts as *Commissioners of Inland Revenue v Ainsworth and Others*). This is likely to have a significant impact on the way in which holidays are accrued and taken by workers on long-term sick and also on redundancy payments to those on long-term sick leave.

The case concerns two different situations. Mrs Khan was on indefinite sick leave and asked for 20 days' paid holiday during her sick leave, claiming that she was entitled to this under the Working Time Regulations 1998. The second situation concerns Mr Ainsworth, Mrs Kilic and Mr Thwaites who were dismissed while they were on sick leave. They were absent throughout the leave year in which they were dismissed. They claimed that the Working Time Regulations 1998 allowed them to receive an allowance in lieu of the holiday that they had accrued but that they had not taken.

The House of Lords decided to refer the case to the European Court of Justice (ECJ) as the case raised issues surrounding the interpretation of the Working Time Directive. The Advocate-General has now given his opinion in advance of the ECJ decision and has suggested that in his opinion the existence of the right to paid annual leave should not depend on a worker's fitness for work. Therefore a worker on long-term sick does accrue paid holiday whilst absent. Furthermore, the Advocate-General has stated that the worker should be allowed to designate a future period of paid annual leave although they are not able to take this leave whilst they are on sick leave.

In relation to a payment on termination, the Advocate-General said that a worker is entitled to a compensatory payment as a replacement for leave that has been acquired but not taken due to ill health. This is also the case when the worker is on sick leave for all or part of the leave year in question. In assessing the amount of the entitlement, it is necessary to ensure that the amount of allowance paid in lieu must be the equivalent to that of their normal pay.

In summary the Advocate-Generals opinion is that:

- employees entitlement to paid holiday does accrue whilst the employee is on sick leave;
- however, the affected employee may not take their holiday whilst they are on sick leave;
- after termination of the contract, employees are entitled to receive a payment to reflect the accrued but unused holiday leave, even when they have been absent for the holiday leave year in question.

Whilst the Advocate-General's opinion is not binding, it is often followed by the ECJ and a decision from the ECJ is expected in late 2008.

If you wish to discuss this further with our HR Consultancy team please call 01332 295 544 or email [Clare Johnson on clarej@cooperparry.com](mailto:clarej@cooperparry.com).