

Partnership

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EXPECT EXCELLENCE

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## Belfast Employment Group Bulletin

# Employment Alert

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### Focus on... Stringer

The law relating to holiday rights for employees on sick leave has been in a state of uncertainty for some years. The issues were to a large extent resolved by the European Court of Justice in *Stringer and others v HM Revenue & Customs (and a related German case)*.

In this case, the European Court of Justice ruled on the effect of long-term sick leave on a worker's right to four weeks' annual leave under the (European) Working Time Directive. Its main points were that:

1. A worker on sick leave accrues annual leave under the Working Time Directive despite not working.
2. It is permissible for a worker to take annual leave when off sick.
3. At the end of a leave year, a worker on sick leave who has not had the opportunity to exercise his or her right to paid annual leave (i.e. who has been prevented from taking annual leave), must be allowed to carry it over and take it at a later date.
4. The right to be paid in lieu of accrued holiday on termination applies even if the worker has been on sick leave for the whole or part of the leave year (which captures any leave under point 3 above).

The *Stringer* case then returned to the House of Lords to consider the Working Time Regulations in light of the European Court of Justice's ruling. The House of Lords delivered its judgment in this case on 10 June 2009. It had been hoped that this judgment would clarify this area of law significantly and provide certainty for employers who had concerns over potential claims from employees. Unfortunately, many questions remain unanswered.

#### What's the position following the House of Lord's judgment?

Following the European Court of Justice's ruling, HM Revenue & Customs conceded that the previous UK position on *Stringer* (reached by the GB Court of Appeal, with a conclusion contrary to the European Court of Justice's decision),

*This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.*

could not stand. No further argument was therefore heard on *Stringer* and its points (as above) hold good.

### **What claims can a worker bring about being denied holiday?**

A worker who has been denied the right to take paid holiday leave can bring a claim under the Working Time Regulations and/or bring a claim for unlawful deduction of wages under the Employment Rights (NI) Order 1996.

This latter claim means that a claim can be brought for a series of deductions, provided the last deduction in the series is in the three month time limit. As there is no limit in the legislation on how far a claim can go back, in theory, a claim could be brought for a series of deductions stretching back until 1998 (the year the Working Time Regulations were introduced).

A tribunal may allow a claim to proceed if it was “not reasonably practicable” for the claim to be presented before the end of three months.

An employee is required to present a written grievance to his or her employer and wait 28 days before bringing a claim in the Industrial Tribunal for an alleged breach of the Working Time Regulations and/or for an unlawful deduction of wages claim.

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### **What remains unclear?**

#### **Can a worker on long-term sick leave carry over paid holiday entitlement into a subsequent leave year?**

The European Court of Justice has held that carry over must be allowed where a worker has “*not had the opportunity to exercise his or her right to paid annual leave*” due to being on sick leave. This effectively applies when a worker has been prevented from taking annual leave.

It seems likely that cases will arise where a worker claims that he or she was too sick to derive any meaningful benefit from taking holiday leave during a

particular holiday year and should therefore be allowed to carry it over. A recent European Court of Justice Spanish case (reached in September 2009), *Pereda v Movilidad*, indicates that this may be the direction the courts head, although this case related to sickness during a period of annual shut down (see below) and not to long term sickness absence.

While this may be the European position, it doesn't sit with our Working Time Regulations, which expressly preclude statutory annual leave being carried over from one year to the next (subject to some limited exceptions regarding the additional annual statutory annual leave introduced over recent years).

Therefore, as the law currently stands, employers (particularly private sector employers) may have some leverage in arguing against leave being carried forward, especially if they have no policies in place preventing a worker from taking his or her annual leave. It is possible, however, that tribunals will try to facilitate holiday being carried forward.

#### **Does a worker have to request holiday leave?**

The European Court of Justice, in the German case related to *Stringer*, held that the Working Time Directive contains no condition that a worker must request and actually take leave by the end of a holiday year (or carry over period) or face losing the entitlement.

Conversely, under the Working Time Regulations, a worker must give appropriate notice that they intend to take paid holiday leave. There appears to be no reason why this should not also apply to workers on long term sick leave.

Therefore, provided an employer has not expressly stated to its workers that they are not entitled to take holiday leave while on long term sick, it is arguable (at least for private sector employers) that workers should be prevented from bringing a claim for annual leave (under the unlawful deduction of wages regime or otherwise) if they have not attempted to exercise their rights to request paid leave.

However, this issue has not been resolved by the House of Lords and it is unclear if this is the position that will be taken.

#### **How does this affect leave which is set by an employer?**

If a worker is receiving sick pay, he may prefer to postpone taking any accrued holiday entitlement until after his sick pay has run out. However, can an



aside for managing those on long term sick and an employer should be careful to keep in contact with those employees on long term sick.

- Rather than keeping employees who are on long term sick leave but whose sick leave entitlement has run out on the company books, now may be the time to begin the procedure of dismissing these employees where appropriate.
- Employers may also wish to review employment contracts to ensure that annual leave over the statutory minimum does not accrue during sick leave. However, as this latter option could potentially give rise to disability discrimination claims, it would need to be considered carefully.

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## Decisions on....

### Retirement age

On 25 September 2009, the High Court in England made its long awaited decision in the much discussed "Heyday" litigation, deciding that allowing employers to impose a compulsory retirement age of 65 does not breach European Regulations.

For those not aware, Heyday (which forms part of the charity Age Concern), has been engaged in a high profile legal battle over the ability of employers in the UK to impose a compulsory retirement age of 65.

Under the current Age Regulations, employers are permitted to impose a default retirement age of 65 and retire employees at this age, provided they first follow a statutory retirement procedure. Heyday claimed that compulsory retirement at 65 was in direct conflict with European law and was discriminatory on the grounds of age.

The Heyday case was initially sent to the European Court of Justice to clarify whether our Age Regulations were in conflict with European law. The European

Court of Justice found that if compulsory retirement provisions (such as those contained in our Age Regulations) could be objectively justified, then they would not be in breach of European law.

Following the European decision, the case was sent back to the English High Court to determine whether the retirement of workers at the age of 65 could be objectively justified. The High Court held that it could and that the compulsory retirement at the age of 65 could remain.

The hundreds of retirement claims that have been put on hold pending the outcome of this decision will now be able to recommence on the basis that the implementation of mandatory retirement at 65 is permissible. However, employers' sighs of relief may be short lived as the Government is due to review the default retirement age in 2010 with many believing that the inevitable outcome of this review will be the end of compulsory retirement at 65.

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### Termination Dates

In *Gisda Cyf v Barratt*, the Court of Appeal in GB held that the effective date of termination of an employee who was dismissed for gross misconduct was the date on which she opened and read the letter from her employer informing her of her summary dismissal and not the date on which the letter was written, posted or delivered by the employer.

Gisda decided to dismiss Ms Barratt for gross misconduct but she only read the letter notifying her of her dismissal five days after it was sent, as she had been away from home. Ms Barratt entered a claim against her dismissal over 3 months after the date her dismissal letter was sent but less than 3 months after she read the letter.

Gisda contended that the claim was out of time as the EDT was the date upon which the termination letter was sent.

The Court of Appeal disagreed and held that the letter of dismissal must have been read by the employee in order to become effective, or at least the employee must have had reasonable opportunity to have read it. The Court held that it might have been different if Ms Barratt had deliberately gone away from home to avoid receiving the dismissal letter, or if she had avoided opening it.

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### Disability - meaning of “likely to recur”

We reported on the case of *SCA Packaging v Boyle* when it last appeared in the Northern Irish Court of Appeal. The case has now been heard in the House of Lords in reference to the statutory definition of “likely to recur” when talking about a latent disability.

You may recall this involved the employee who had suffered from hoarseness and vocal nodes. Following operations, Ms Boyle had been advised to follow certain procedures so as to avoid a relapse of her condition, including avoiding exposure to background noise. Her claim arose when the Company sought to place her in an open plan office.

The Company did not accept that Ms Boyle’s condition fell within the definition of disability under the DDA 1995. The Tribunal and the Court of Appeal disagreed and held that her condition did indeed fall within the definition of a disability.

SCA appealed on the basis of the Court of Appeal’s interpretation of the statutory definition. The House of Lords held that the NI Court of Appeal’s interpretation of “likely” meaning “could well happen” was the correct interpretation to be used. It was noted that doctors are not in the business of prescribing unnecessary treatment and paragraph 6(1) of Schedule 1 of the Disability Discrimination Act 1995 was intended to apply where the risk of an impairment recurring makes

it worthwhile for a doctor or other medical specialist to prescribe a continuing course of treatment to prevent it.

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## On the Horizon...

### National Minimum Wage increases

The hourly NMW rates that apply from 1 October 2009 are as follows:

- > the “adult” rate, for workers aged 22 and over: £5.80 (currently £5.73);
- > the “youth” rate, for workers aged 18-21: £4.83 (currently £4.77); and
- > for workers aged 16-17 (provided they are above compulsory schooling age): £3.57 (currently £3.53).

These increased rates are in line with the recommendations of the Low Pay Commission to acknowledge the difficult economic climate. For those readers in the hospitality sector, it is also worth noting that employers are now banned from using tips, gratuities and cover charges to count towards meeting NMW. Further on the horizon, from October 2010 the adult NMW rate will apply to those aged 21 and over.

### Agency workers consultation

In our last Employment Alert we updated readers about the progress of the European Temporary (Agency) Workers Directive. This Directive must now be implemented by late autumn 2011.

As a reminder, this Directive includes rights to equal treatment for temporary agency workers in terms of pay, maternity leave, holiday leave and working hours. These equal rights will only apply where agency workers receive statutory minimum entitlements and not where an employer offers enhanced schemes.

According to its consultation paper, the Government suggests that the new regulations should apply to workers who find temporary work through an “employment business” but not individuals who find permanent employment through an “employment

agency". Individuals contracted to an "umbrella company" would be included but workers who are genuinely self-employed, those working through their own limited company, or employed on "managed service contracts" would be excluded.

The definition of "worker" will be the same as in the Working Time Regulations (NI) 1998 but will be appropriately adjusted to reflect the triangular relationship between the agency worker, employment business and hirer.

An agency worker will be able to compare their position with their position "as if they had been recruited directly by the hirer to occupy the same job". The comparator will therefore normally be a worker doing broadly similar work in the same organisation.

Primary liability for compliance will rest with the employment business, however, if the employment business has been provided with inaccurate or incomplete information, then liability would pass to the hirer.

As part of the consultation the Government is seeking opinions on the implementation date of this directive, particularly in the light of current economic difficulties.

### Right to request training

The Apprenticeships, Skills, Children and Learning Bill 2008-09 is currently being reviewed by the House of Lords and the Committee stage is to continue on 12 October 2009, where further amendments will be discussed. It is expected that the Bill will become operational in Great Britain in 2010.

Amongst other things the bill introduces a right for employees to request time away from their duties to undertake training and places a corresponding duty on employers to consider such requests seriously and to be able to refuse them only for specified business reasons.

Employers in Great Britain will be able to reject a request for one or more acceptable business reasons similar to those available to employers under the flexible working regime.

Consultation relating to the introduction of similar legislation in Northern Ireland commenced on 3 August 2009. The Department for Employment and Learning is seeking responses to the consultation on both proposals by 23 October 2009.

### Single Equality Bill for Northern Ireland?

The introduction of the Equality Bill in Great Britain will introduce some entirely new dimensions to equality law and make further additions to existing legislation. It is planned to be in effect by autumn 2010, but will apply only in England, Wales and Scotland.

Rather than pushing for an adaptation of the Single Equality Bill to be passed in Northern Ireland, the NI Equality Commission has recently written to Ministers putting forward proposals for specific changes in a number of individual measures. The proposal to have a single Equality Bill for Northern Ireland has been extensively debated for many years, however it would appear that there is no immediate indication that such legislation will be introduced in the near future.

### Extension of paternity leave

The Government has announced its plans to introduce "additional paternity leave" for fathers of babies due on or after 3 April 2011. Under the proposals, mothers with maternity leave outstanding in the second six months of a child's life will be able to transfer up to six months of maternity leave to the father. Up to three months of that leave will be paid at the same rate as SMP if the leave is taken during the mother's 39-week maternity pay period.

Consultation on implementing regulations will begin shortly. The proposal to increase statutory maternity pay from 39 to 52 weeks, which the Government originally hoped to implement at the same time as the new paternity right, is believed to be still on hold. As regards administering the new system, parents will be required to 'self certify' by providing details of their eligibility to their employer. However, employers and HMRC will both be able to carry out further checks on entitlement if necessary.

## Contacts

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