

**In This Issue:**

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The European Court of Justice has determined that workers who are on long-term sick leave do not lose their entitlement to annual leave and must be paid any annual leave that was accrued, but not taken due to illness, when their employment terminates.

## European Court of Justice Clarifies Interplay of Sick Leave and Annual Leave Entitlements Under the Working Time Directive

By John C. Kloosterman and Anita S. Vadgama

Under Article 7 of the Working Time Directive 2003/88, member states of the European Community must take appropriate measures to ensure that every worker<sup>1</sup> receives at least four weeks' paid annual leave (*i.e.*, vacation)<sup>2</sup>. For many years, however, it has been an open issue whether a worker on sick leave is still entitled to accrue annual leave, even though for all intents and purposes that worker is unfit to work. On January 20, 2009, the European Court of Justice (ECJ) delivered its judgment in co-joined cases *Stringer, formerly Ainsworth, & Others v. Her Majesty's Revenue and Customs*, Case No. C-350/06, and *Gerhard Schultz-Hoff v. Deutsche Rentenversicherung Bund*, Case No. C-520/06. The ECJ reinforced the European Community's governing principle that the right to annual leave is a fundamental social right and cannot be taken away from any worker, whether or not the worker is on sick leave.

The UK *Stringer* case involved two categories of plaintiffs: One made up of workers who wanted to take paid annual leave while on long-term sick leave; the other made up of workers who were on sick leave immediately before their dismissal, and who had asked their employer to pay their accrued statutory annual leave entitlement on termination. In both situations, the employer refused the workers' requests. In the German *Schultz-Hoff* case, Mr. Schultz-Hoff's employer refused him an allowance in lieu of paid annual leave not taken while he was on long-term sick leave.

As a result, the ECJ was asked by the UK and German courts to decide two questions: (1) whether a worker on indefinite sick leave could exercise the right to take annual leave; and (2) whether a worker who had been sick for an entire leave year was entitled to payment of untaken annual leave on termination of employment.

On the first question, the ECJ held that under the Working Time Directive, national law could either permit a worker to take leave while he or she was on sick leave or could deny the entitlement to take leave while on sick leave. More importantly, however, the ECJ added that if national law prevented a worker who was on sick leave from taking annual leave, the worker must have the opportunity to take his or her annual leave at another time, because the right to accrued annual leave under the Working Time

Directive is not dependent on the worker being “healthy and capable of working.”

Currently, under UK law, there is no right to carry over annual leave to the following year<sup>3</sup>. As a result employers have been allowed to operate a “use it or lose it” policy, under which a worker on sick leave who is not allowed to take leave in a particular leave year loses his or her right to annual leave at the end of the leave year. It is now up to the House of Lords to deal with the fine points of *Stringer* and determine the ultimate outcome. The House of Lords may construe the Working Time Regulations so as to allow employees on indefinite sick leave to take annual leave while they are sick. Alternatively, the House of Lords could hold that the Working Time Regulations are incompatible with the Working Time Directive, in which case the UK government will need to amend the Working Time Regulations.

On the second question, concerning the right to a payment on termination, the ECJ ruled that the right to annual leave is not lost because a worker happens to be sick for the entire leave year prior to termination and has not been able to take his or her annual leave. Accordingly, in the UK, reading this judgment together with the Employment Appeal Tribunal decision in *Canada Life Ltd v. Gray and Farrar* [2004] ICR 673, leads to the conclusion that a worker in this situation must receive a payment in lieu of annual leave on termination of employment. Further, in determining the amount of that payment, employers have to ignore sickness-based absences. In addition, a worker could potentially raise claims based on the ECJ’s ruling extending as far back as 1998, when the Working Time Regulations 1998 came into existence. It is unlikely, however, that a worker can make a claim while his or her employment is continuing.

The ECJ’s ruling is a disappointing development for most employers. Prudent employers should not wait for European national courts to interpret this ECJ judgment before taking action. Employers should review their employment practices to ensure that all workers on sick leave are given the opportunity to either (1) take paid annual leave during any given leave year or (2) take the annual leave at an alternative time. Employers also should evaluate their exposure to claims from both present and past workers who are or have been on sick leave and did not receive paid annual leave entitlement. As a result of this judgment, it is anticipated that an avalanche of claims will ensue.

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<sup>1</sup> *Worker* is defined more broadly than an employee. In the UK, under Regulation 2 (1) of the Working Time Regulations 1998 (as amended), a *worker* is defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.

<sup>2</sup> This entitlement is in addition to member states’ public and bank holidays.

<sup>3</sup> Regulation 13(9) of the Working Time Regulations 1998 (as amended).