

HOLIDAY PAY: THE IMPLICATIONS OF THE ‘STRINGER’ AND ‘PEREDA’ DECISIONS

Talk by Susan Chan at 13 King’s Bench Walk on 22 October 2009

All references in this talk to male workers, should be understood as including reference to female workers.

A. The “Stringer decision”

Schultz-Hoff v Deutsche and Stringer v HMRC [2009] EUECJ C-350/06 [2009] 2 CMLR 27, [2009] EUECJ C-350/06, [2009] ICR 932, [2009] IRLR 214

1. Prior to this ECJ decision, there had been a lot of longstanding uncertainty, certainly in the UK, about how precisely sick leave interacted with holiday pay under the Working Time Directive (2003/88/EC). In particular, it was unclear whether holiday pay continued to accrue during sickness absence. In *Stringer*, the European Court of Justice (ECJ) sought to clarify the position.

Holiday leave continues to accrue during sickness

2. The ECJ considered whether the right to paid holiday leave continues to accrue during sickness absence. The Court found that as the Directive does not make any distinction between workers who are absent from work and those that have worked during the leave year, the right to paid holiday leave extended to all workers. So even those that have not worked at all during the whole year are entitled to the minimum 4 weeks’ paid holiday leave laid down in the Directive.¹

Holiday can be taken during sickness or at another time – worker can choose

3. The ECJ also considered how that would work in practice. Can holiday be taken during a period of sickness absence? The answer was yes, workers can choose to do this. The ECJ found that the Directive does not preclude national legislation providing that a worker can take annual leave during sickness leave.² But most importantly, it must have been a voluntary choice – the worker must have been given the opportunity to take his paid holiday during a period when he wasn’t sick.³

4. Similarly, nor does the Directive prevent national legislation from stipulating that the worker can’t take annual leave during sickness leave – as long as the worker has an opportunity to take the annual leave at another time.⁴

5. The net effect is that the worker can choose. If he wishes to take holiday during sick leave, he can do so. However, he cannot be forced to do so if he does not wish and must be given the opportunity to take his holiday at a time that does not coincide with sickness.

¹ Paras 39-41 of Stringer decision

² Para 31 Stringer

³ Paras 45-48 Stringer

⁴ Para 29 Stringer

Holiday not taken because of sickness, can be carried-over to next leave year

6. The next question was what would happen in respect of workers who were off sick for either the whole leave year or during the end of the leave year? Because sickness is unforeseeable, these workers who still had untaken holiday leave when they fell sick, would not have had the chance to take the rest of their holiday leave at a time not marred by illness.

7. The ECJ considered that the way to get round this necessarily involved allowing workers who had been unable to take holiday due to sickness, to carry over untaken leave to the next leave year.⁵

8. But this has significant consequences for our domestic legislation. In terms of the minimum four weeks' holiday leave conferred by the Directive, the Working Time Regulations 1998 (WTR) had stated that untaken leave could only be taken in the leave year and could not be carried over.⁶ In 2007, by amendment to the WTR⁷, an additional period of 1.6 weeks was added to the minimum 4 weeks conferred by the Directive (subject to a maximum of 28 days) and although the WTR had provided that this extra 1.6 weeks *could* be carried-over into the next leave year⁸, this only applied to the additional 1.6 weeks - not to the minimum 4-week period.⁹

9. Yet *Stringer* makes clear that employers cannot refuse to let workers who have been unable to take their minimum 4-week holiday entitlement **because of sickness**, carry it over to the next leave year. There is therefore a clear conflict with the WTR – regulation 13(9) of the WTR is inconsistent with the Directive, as interpreted by the ECJ.

The employers and workers affected

10. So on whom does this impact? In the short-term, probably not private sector employees, for whom European case-law does not have direct effect. Unless the words of the WTR can be interpreted in a way which is consistent with the ECJ decisions - which seems unlikely - the WTR will have to be amended and until such amendment, the *Stringer* and *Pereda* decisions will not take precedence over the clear words of the Regulations. But for public sector workers, European law does have 'direct effect' so that the part of the WTR which provide that untaken leave cannot be carried over, must be disregarded. What will worry public-sector employers is that employees who were prevented from taking holiday in the past because of sickness, may well have built up a significant reserve of untaken holiday from past years. Private employers can expect domestic legislation to follow shortly, putting *Stringer* and *Pereda* into effect through amendments to the WTR.

⁵ Para 52 *Stringer*

⁶ Regulation 13(9)(a) WTR

⁷ By the Working Time (Amendment) Regulations 2007

⁸ Regulation 13A(7) WTR (as amended)

⁹ If the employment contract gives leave in excess of 5.6 weeks, the employer is essentially free to make that "extra" leave subject to such conditions as the employer wishes, including whether it can be carried over or not – see regulation 26A(2) WTR.

Pay in lieu of untaken holiday for workers who have been dismissed

11. The principle of “carry-over” of untaken holiday, applies equally to workers who have been dismissed and wish to be paid in lieu of untaken holiday. As the ECJ said (at para 56):-

“56. On termination of the employment relationship, it is in fact no longer possible to take annual leave. In order to avoid that, as a result the right in question cannot be enjoyed by the worker, even in pecuniary form, article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu.”

12. As to the calculation of that allowance:-

“61.... the workers’ normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship.”

13 From this, it follows that untaken holiday which has accrued over several years for those workers who were on long-term sickness absence, will, if they were then dismissed, be entitled to a payment in lieu. Contrary to what was previously believed, this could go back several years for public sector workers.

B. Stringer in the House of Lords [2009] UKHL 31

Time limits

14 The next question was, what time limits apply to ex-workers wishing to claim back unpaid holiday pay? Could employers avoid a significant liability for accumulated untaken holiday pay in respect of ex-workers, by relying on statutory time limits to bar ‘older’ claims? That depended upon which legislation the claims for pay in lieu of untaken holiday could be made under. Once the ECJ had given its answers to the questions referred, *Stringer* went back before the House of Lords to consider whether claims for payments in lieu of holiday had to be claimed:

- i) under regulation 30 of the WTR, in which case a 3-month time limit applied, or
- ii) alternatively, could be brought as an unlawful “deductions from pay” claim under section 13 of the Employment Rights Act 1996, in which a 3-month time limit also applied, but where there had been a series of deductions or payments, the period ran from the last deduction/payment in the series.

15 The latter provision would clearly be more favourable for workers as the 3-month period would run from the last of the deductions, with the effect that all earlier failures to pay holiday pay or payments in lieu if the worker has been dismissed, could be included in the claim.

16 The Lords decided that the definition of “wages” in section 27 of the Employment Rights Act 1996 was a wide one. It expressly included “holiday pay”

which, as a matter of ordinary language, could also refer to payments in lieu of untaken holiday.¹⁰ There was therefore no justification for preventing workers from bringing claims for allowances in lieu of untaken holiday, as an ‘unlawful deduction of wages’ under the Employment Rights Act 1996. The upshot is that payments in lieu of untaken holiday can be claimed under either the WTR or ERA.

17. Lord Neuberger also pointed out that contractual holiday pay could in fact be the subject of an even more favourable time limit for the worker. Contractual holiday pay could be sued for not just in the employment tribunal, but alternatively, in the civil courts as a breach of contract. In the County Court or High Court, a 6-year limitation period would apply. However, the reality is that the civil courts are likely to be a far less attractive forum than the employment tribunal. Employment tribunals are more informal, require no issue fee and generally there is little risk of having to bear the other party’s costs if unsuccessful.

C. Pereda v Madrid Movilidad SA (10 September 2009)

18. The ECJ decision of *Pereda v Madrid* took the ‘Stringer’ decision a step further and was a logical extension to that decision. *Stringer* had stressed the sanctity of holiday leave, such that even if a worker was off work but sick, he was entitled to take his holiday at a time that was not marred by sickness. In *Pereda*, the ECJ considered the case of a parking enforcement officer who had been allocated particular period on which he was to take a month’s annual leave, by his employer. He had an accident at work two weeks before he was meant to start his planned leave, which meant that there were only 2 days during the leave period when he was not sick. Mr Pereda asked for his leave to be re-allocated but his employers refused.

19. The ECJ was asked whether such a worker had the right to take annual leave at a time other than scheduled, if necessary outside the leave year? The ECJ said:

- there can be no derogation from the Directive right to paid leave of at least 4 weeks (para 18 judgment)
- there is nothing impermissible about losing the right to untaken leave at the end of a leave year **as long as the worker has actually had the opportunity to exercise that right** (para 19)
- the purpose of annual leave is entirely different from that of sick leave (para 21). The former is for rest and relaxation, the latter is for recuperation from sickness. This gets round the argument that one is still “resting” and “off work” during sickness leave.
- So someone who is on sick leave during a period of previously scheduled annual leave, has the right, on request, to take annual leave at a time when he is not sick, subject to the interests of all involved, including overriding reasons relating to the interests of the undertaking (para 22)
- if the employer’s interests preclude the worker from taking that ‘new’ period during the leave year, the employer is obliged to grant the worker a different period of annual leave, even if that’s outside the leave year (para 23).

¹⁰ Para 69 of judgment per Lord Neuberger

20. Although *Pereda* concerned a worker who fell sick just **before** a period of pre-booked annual leave, there would appear no logical rationale for distinguishing the case of a worker who fell sick **during** a period of booked annual leave.

Practical consequences for employers of the ‘Stringer’ and ‘Pereda’ decisions

21. Employers and workers alike will wish to know what the practical consequences of these two decisions are for them. At present, the impact is mainly on public sector employers or ‘emanations of the state’. These were defined in the ECJ case of *Foster and others v British Gas*, Case C-199/89 [1990] as:-

“a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals.”

These will include government bodies and departments, local authorities, health authorities, police, the defence forces, prisons and state schools.

22. The main consequences of the ECJ cases for public-sector employers would appear to be as follows:

i) Workers may have built up a reserve of past untaken holiday if they were off sick during leave years and were therefore unable to take their full leave. Each leave year for each worker should be separately scrutinised to see where in the leave year any period of sickness absence occurred. It will be much harder for workers who were only sick during the beginning or middle of the leave year, to argue that they were “unable” to take annual leave during the relevant leave year because of sickness. Although the ECJ and Lords did not define what was meant by workers being “unable” to take holiday, I would suggest that what would be required, is that a worker who had not exhausted their annual leave entitlement by the time they were off sick should fall sick and either:

- remain off sick until the end of the leave year; or
- come back to work before the leave year ends and expressly request to take the remainder of his annual leave before the end of the leave year, which is refused due to the employer’s business needs. If the worker had not actually asked for the remainder of his annual leave despite being back at work, it is arguable that he has been “able” to take the annual leave but has chosen not to.

It is possible that if the sickness absence is foreseen (because for instance, it is a pre-planned operation which the worker knew about a significant time in advance), the employer could argue that the worker was still “able” to take his holiday during the leave year, so that the worker should not be entitled to carry-over holiday untaken at the time of the operation - even if the operation and recovery period straddled the end of the leave year. However, this remains to be decided by the courts.

ii) If there is untaken annual leave satisfying the above conditions, the worker should be entitled to carry it over from one leave year to the next if they wish to do so. They may, alternatively, wish to elect to take annual leave during their sickness absence

(for more on this, see later). One question arising is whether the right to carry over holiday applies only to the 4-week minimum period conferred by the Directive, or also to the additional 1.6 week period granted by the WTR. I would expect that it only applies to the 4-week minimum period given by the Directive.

iii) For workers who are still working, untaken holiday should be taken as actual paid leave, as “payments in lieu” cannot be made to those who remain working.¹¹ Only workers whose employment has been terminated, can be paid in lieu of untaken holiday. It would be prudent for employers to do a review of how much holiday may potentially be owing to workers who have been off on sickness absence, particularly long-term sickness absence. Workers could be asked to assist by indicating how much holiday they considered they had been unable to take in the past due to sickness. This will then provide a good starting point for employers to assess their potential liability for past untaken holiday pay. Furthermore, at the end of each future leave year, employers should be careful to ascertain precisely how much leave is to be carried over. Workers should be asked to indicate how much leave they believe should be carried over, because it could not be taken due to sickness. Some form of process may be required to resolve any disputes over the amount of untaken leave.

iv) Employer’s procedures which have in the past indicated that holiday cannot continue to accrue whilst an employee is off sick, will have to be changed. Similarly, procedures which have indicated that the minimum 4 weeks cannot be carried over from year to year will have to be amended, to stress that workers who were unable to take their annual leave due to sickness, can carry over that leave from one leave year to the next, if they choose to do so. The right to carry over annual leave that was untaken because of sickness should apply equally to annual leave that was not started due to sickness, and situations where the worker fell sick during the period of pre-booked annual leave.

v) Another important point is that whether a worker wants to take annual leave during a time when he is sick, is still for the worker to choose. He still has the option of choosing to take annual leave during a time when he is also off sick; the employer just cannot force him to do so.

vi) This leads to another question: should employers who presently give full contractual pay during sickness absence, reduce their sick pay entitlement to the statutory minimum or a sum less than full pay? This is because if a worker falls sick during pre-booked annual leave and is entitled to full pay during sickness, it is clearly in his financial interests to elect a new period of annual leave. In contrast, if he is entitled to only statutory sickness pay or sickness pay falling short of full pay, there is far less incentive to elect a new period for his annual leave. But although there is probably less potential for abuse if pay during sickness is less than at full pay, for employers to reduce sickness pay entitlement for that reason could well be a retrograde step. However, employers should review their sickness policy entitlement to be aware of the implications of workers having both an entitlement to full sickness pay and a separate entitlement to paid holiday which can be carried over from one year to the next.

¹¹ Regulation 13(9)(b) WTR

vii) Problems of proof: Employers will probably be most worried about the potential for abuse during pre-booked holidays. A worker may book some annual leave, be off for the whole period, then assert that they were ill during their holiday, which would entitle the worker to elect another period of annual leave. Many employers allow self-certification of illness during the first 7 days, after which the worker is required to provide medical certificates. But what if the worker was abroad on holiday at the time? My personal view is that employers' concern regarding the potential for abuse, is probably misplaced. After all, the potential for abuse of the sickness absence procedures has always existed - irrespective of whether someone is abroad on holiday or not, and I am not convinced that the fact that a worker can fraudulently claim to have been ill whilst on holiday, makes much difference. An employer can also provide in their procedures that if a worker is ill whilst on annual leave, the worker should comply with the same procedures that would normally apply in respect of sickness absence occurring on a normal working day, if they wish to then designate that period as sickness leave instead. This could include an obligation to directly contact the employer by phone to notify the employer of the illness during the annual leave. Also, the employer could apply the same requirements of proof, regarding the need to get a doctor's certificate for illness in excess of seven days – it should not be that difficult to get doctor's certificates whilst abroad, whether through the travel company, hotel or otherwise. Workers should also beware that there is quite a lot of potential for exposure of their fraud. The common practice of putting holiday snaps on social networking sites could result in a worker's dismissal, if it became evident from the photos that at a time when the worker was purporting to be ill, there were numerous snaps of them ski-ing, dancing around with a sangria or or scuba diving!

23. What is certain is that over the 1-2 years pending amendment of the WTR, we can expect quite a few decisions from the higher courts, resolving the detail of how the Stringer and Pereda decisions impact in practical terms upon employers and workers.

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SUSAN CHAN