

THE RIGHT TO ANNUAL LEAVE

Issue 184, January 2008

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THE RIGHT TO ANNUAL LEAVE

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INTRODUCTION

Fixed, defined, periods of work and holidays are probably a recent development. As late as the twentieth century, in some Yorkshire mines there was a custom to toss a coin on sunny Sunday mornings to decide whether or not to work, a modern echo of St Monday's day. The growth of highly organised forms of production and the protection of rights by means of collective bargaining, coupled with the increased contractualisation of the work relationship, led to the replacement of such irregular work with the paradigm of the full-time worker who was given a specified amount of annual leave, often paid. Now statute lays down minimum rules.

In this *Employment Law Bulletin* we consider the social right to paid annual leave now found in the Working Time Directive 2003/88/EC (the Directive) and how it is given effect in UK law by the **Working Time Regulations 1998** (WTR). We examine the main provisions on annual leave in the Directive and the WTR before looking at some of the practical issues that commonly arise in this context.

While the Directive and the WTR build on the model of the full-time worker in regular employment, we shall see that their application to working relationships that fall outside that paradigm is often problematic. The relationship between a worker who is off sick and his or her employer is one example, an issue which has arisen in the ongoing *Ainsworth/Stringer* litigation, discussed on pages 10, 11, and — particularly — under *Long-term sick leave*, page 12). Another example is how the rights to annual leave apply to the increasing body of workers who owe no obligation to work, and whose employer owes them no obligation to provide work, for any future period.

THE WORKING TIME DIRECTIVE

The **Working Time Regulations 1998** (WTR) implemented the Working Time Directive 93/104/EC, now codified in the Working Time Directive 2003/88/EC. The Directive was introduced as a health and safety measure under the former Article 118A of the EC Treaty. Health and safety in this context has been defined broadly: it means a “state of complete physical, mental and social well being that does not consist only in the absence of illness or infirmity”: *United Kingdom of Great Britain v Council of the European Union, Case C-84/94* [1996] ECR I-5755 (at paragraph 15).

The Directive deals with the question of annual leave quite shortly, providing in Article 7(1) that “Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.” Article 7(2) goes on to provide that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

Article 15 of the Directive leaves it open to individual Member States to introduce laws or facilitate collective agreements that are *more* favourable to the protection of the safety and health of workers.

THE WORKING TIME REGULATIONS

Basic entitlement

Implementing the basic right in Article 7(1) of the Directive, regulation 13(1) of the WTR provides that “a worker is entitled to four weeks’ annual leave in each leave year”. The right does not apply to certain excluded sectors set out in regulation 18 (notably: seafarers and those working in civil aviation), and there are special provisions in relation to agricultural workers.

There is no qualifying period of continuous employment, and the right arises from the first day of a worker's employment. There is, however, a restriction on how much leave may be taken in the first leave year (under regulation 15A — see *Amount of Leave That May Be Taken*, on page 7).

An employer may fix the start date of the leave year by means of a relevant agreement. A "relevant agreement" is defined in regulation 2(1) as:

- a workforce agreement which fulfils the conditions set out in schedule 1 to the regulations (see below)
- any provision of a collective agreement which forms part of a contract between the worker and the employer
- any other agreement in writing that is legally enforceable as between the parties (typically, a contract of employment).

Schedule 1 provides that a workforce agreement must:

- be in writing
- have effect for a specified period not exceeding five years
- apply either to all of the relevant members of the workforce, or to all those who belong to a particular group (defined by reference to their function, workplace, department or unit)
- be signed by the workforce representatives (elected in accordance with requirements set out in schedule 1 paragraph 3) or, alternatively, if the employer employed 20 or fewer workers on the date when the agreement was first made available for signature, by the majority of the workers employed by it.

Before a workforce agreement is made available for signature, the employer must provide all the workers to whom it is intended to apply with copies of the agreement and such guidance as they might reasonably require to understand it fully.

Where the employment begins part of the way through a leave year fixed by a relevant agreement, regulation 13(5) provides that the worker's leave entitlement for that year is calculated proportionately to the part of the leave year remaining.

In the absence of a relevant agreement, the leave year runs from:

- the date on which the employment began (if later than 1 October 1998) and each subsequent anniversary of that date, or

- 1 October each year, if the employment began on or before 1 October 1998.

Additional leave

In October 2007, the Government increased the basic four-week statutory leave entitlement by granting a period of “additional leave”. The **Working Time (Amendment) Regulations 2007** (SI 2007 No. 2079) inserted a new regulation 13A into the WTR, giving a worker the right to four days’ additional leave (0.8 weeks) from 1 October 2007 and a further four days’ leave from 1 April 2009 — a total overall increase of 1.6 weeks.

For someone working a five-day week, this represents an increase from 20 to 24 days’ annual leave since October 2007, with an overall increase to 28 days’ leave in April 2009.

Note: The maximum aggregate entitlement under the new provisions is 28 days, even for workers who work more than a five-day week.

Although the additional eight days are intended to reflect the eight public holidays in England and Wales, there is no obligation on an employer to allow workers to take their statutory leave on public holidays.

The increased holiday entitlement is calculated proportionately depending on when the worker’s leave year starts — regulation 13A(2).

Regulation 26A provides that the additional leave entitlement does not apply to an employer who, by virtue of a relevant agreement, already granted workers an annual entitlement of 28 days’ paid leave (or the *pro rata* equivalent) before 1 October 2007, and who has continued to do so since that date. In order to fall within this provision, an employer must:

- give all workers employed by it at least 28 days’ paid leave (or the *pro rata* equivalent for part-time workers)
- allow payment in lieu of such leave only on termination of employment
- restrict any carry-over of the additional eight days’ leave to the following leave year
- calculate payment for the additional leave in accordance with ss.221–224 of the **Employment Rights Act 1996** (ERA) (see *Payment During Leave*, on page 8).

The regulations thus envisage:

(a) workers with an entitlement under the WTR to the additional period of leave, and

(b) workers entitled under contract to the additional period of leave.

This distinction is important in practice because it affects the remedies available to workers who seek to enforce their right to additional leave (see *Contractual rights*, on page 10).

Exercising the right to annual leave

To exercise the entitlement to annual leave under regulation 13 or 13A, a worker is required to give prior notice to his or her employer in compliance with regulation 15. The period of notice must be at least twice as long as the period of leave requested. Thus, a worker who wishes to take five days' statutory leave must give the employer at least 10 days' clear notice.

The employer may refuse a request to take statutory leave, or require the worker to take leave on particular dates (whether or not the worker has made a request), by issuing a regulation 15 notice. If the employer wishes to specify dates on which leave must be taken, the notice period is the same as for a leave request by the worker (see above). If the employer is simply refusing a worker's request, the period of notice must be at least as long as the period of leave requested.

These notice rules may be varied or excluded by a relevant agreement.

Amount of leave that may be taken

In the first year of an individual's employment, the amount of statutory leave that may be taken at any time is limited by regulation 15A. The worker is deemed to accrue the right to take leave over the course of the year at the rate of one twelfth of his or her annual entitlement on the first day of each month. After that, the worker has the right to take his or her full statutory leave entitlement from the first day of each leave year.

Regulation 15A was introduced following the decision in *R (BECTU) v Secretary of State for Trade and Industry* [2001] ICR 1152, in which the European Court of Justice (ECJ) held that the then requirement of 13 weeks' continuous employment before the entitlement to four weeks' annual leave arose was incompatible with Article 7 of the Directive.

The basic four-week period of statutory leave due under regulation 13 may only be taken in the leave year in respect of which it is due. It cannot be carried over into subsequent leave years. However, the additional statutory leave due under regulation 13A may be carried over into the subsequent leave year (but not beyond) if a relevant agreement so provides.

Payment during leave

By virtue of regulation 16(1), a “worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week’s pay in respect of each week of leave”. For this purpose, a week’s pay is calculated by reference to ss.221–224 of the ERA (the general provisions for calculating a week’s pay for the whole gamut of statutory employment rights, including redundancy payments and unfair dismissal basic awards). There is no maximum applicable to payment for annual leave.

The amount of a week’s pay is not necessarily identical to the contractual rate for a week’s pay, or the amount which would in fact have been paid during the week of leave if the employee had been working. If there are no normal working hours, or there are normal working hours, but the remuneration payable varies with the amount of work done, a week’s pay is calculated on the basis of average pay received during the previous 12 working weeks. There are special provisions governing the treatment of overtime payments and commission.

Regulation 13(9) provides that the basic four-week period of annual leave under regulation 13 may not be replaced by a payment in lieu, except where the worker’s employment is terminated (see below). However, the additional leave entitlement under regulation 13A may be replaced by a payment in lieu during the initial transitional phase prior to 1 April 2009.

Payment on termination

Where a worker’s employment is terminated during the course of the leave year, and the worker has taken less than his or her statutory leave entitlement (which for these purposes is calculated proportionately according to

the part of the leave year which has expired), he or she is entitled under regulation 14(1)–(3) to a payment in lieu of unused leave.

In the absence of a relevant agreement, the payment in lieu is calculated according to the formula $(A \times B) - C$ where:

- A is the period of leave to which the worker is entitled under regulation 13 and 13A
- B is the proportion of the worker's leave year which expired before the termination date
- C is the period of leave taken by the worker between the start of the leave year and the termination date.

Thus, a worker entitled to 24 days' statutory leave (20 days under regulation 13 and four days under regulation 13A) whose employment terminated half way through the leave year, and who had taken five days' leave at that date, would be entitled to a payment in respect of seven days' unused leave, ie: $(24 \times 0.5) - 5$.

The parties may set out their own method of calculating the sum due on termination by means of a relevant agreement. While there is nothing to prevent such an agreement from providing for the payment of a nominal sum — eg on dismissal for gross misconduct — it has been held that a relevant agreement cannot exclude the right to payment altogether (*Witley and District Men's Club v Mackay* [2001] IRLR 595, EAT).

Where the worker has taken more than his or her due proportion of paid leave at the date of termination, a relevant agreement may require him or her to compensate the employer, whether by a payment, by undertaking additional work, or in some other way. In the absence of such an agreement, the employer will be unable to recover compensation.

Remedies

Regulation 30 of the WTR provides that a worker may present a complaint to an employment tribunal alleging that the employer has refused him or her statutory leave or has failed to make a payment in respect of such leave.

The worker must present the complaint to the tribunal before the end of a three-month period that begins with the date on which it is alleged that the exercise of the right should have been permitted or, as the case may be, the

payment should have been made. (This is subject to the modified rules on time limits that apply in the context of the statutory grievance procedures — see regulation 15 of the **Employment Act 2002 (Dispute Resolution) Regulations 2004** (SI 2004 No. 752).) The tribunal may allow an extension of time where it was not reasonably practicable for the complaint to be presented before the end of the relevant period.

In *Commissioners of Inland Revenue v Ainsworth and others* [2005] ICR 1149 (see *Long-term sick leave*, on page 12), the Court of Appeal held that a claim for statutory holiday pay can only be pursued under regulation 30 of the WTR and cannot be framed as a deduction from wages claim under s.13 of the ERA. If this is correct (the litigation is still ongoing and this issue will be considered by the House of Lords in due course), it means that a claim must be brought within three months of each relevant deduction (cf: s.23 of the ERA, which allows a claim under s.13 to be brought in respect of a series of non-payments provided it is made within three months of the last deduction in the series).

PRACTICAL ISSUES

Contractual rights

Regulation 17 provides for the position where a worker “is entitled to... annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract)”. In this situation the worker may “take advantage of whichever right is, in any particular respect, the more favourable”.

It is unlikely that the rights to take and be paid for annual leave laid down in the WTR operate as implied terms of the contract of employment (cf: *Barber v RJB Mining (UK) Ltd* [1999] ICR 679, High Court — implied term that a worker should work no more than 48 hours on average). In some cases, however, the particulars of employment or the contractual documents may, depending upon their proper interpretation, give rise to separate and overlapping contractual rights, which may be more favourable to the worker.

There is no generally implied contractual right to time off on public holidays. In *Campbell and Smith Construction Group Ltd v Greenwood and others* [2001] IRLR 588, workers were contractually entitled to seven working days' winter holiday, which in practice included 31 December each year, plus Christmas Day, Boxing Day and New Year's Day. The Government announced an additional bank holiday on 31 December 1999 (for the Millennium), and the workers claimed they were entitled to another working day off as a result. The EAT concluded that, in the absence of a change to the contract, the Government declaration had no effect in relation to 31 December, which therefore remained a working day. But everything turns on the provisions of the contract: a contract that refers to a right to "public holidays", for example, may mean such holidays as varied from time to time.

Contractual rights as to payment for annual leave depend upon a proper interpretation of the contract or upon implied terms (cf: the provisions for calculating a week's pay in ss.221–224 of the ERA, which apply for the purpose of the WTR). There is no automatic right to compensation for untaken contractual (as distinct from statutory) holiday on termination of employment. This would require an express or implied term to that effect (*Morley v Heritage plc* [1993] IRLR 400, CA).

The distinction, which in practice is often unclear, between contractual rights to paid holiday and rights derived from the WTR has practical importance. A contractual right to holiday pay falls within the definition of "wages" in s.27 of the ERA. A claim for unpaid contractual holiday pay may therefore be framed as an unauthorised deduction from wages complaint under s.23 of the ERA, and/or as a breach of contract claim. A claim for statutory holiday pay, however, can only be pursued under regulation 30 of the WTR (according to the Court of Appeal's decision in *Commissioners of Inland Revenue v Ainsworth and others* [2005] ICR 1149, which may be overturned when the case returns to the House of Lords — see *Long-term sick leave*, on page 12).

The significance is that the time limits are different for the different types of claim. A complaint of unauthorised deductions from wages must be brought within three months of the date of payment or within three months of the last in a series of deductions, which in practice means that a worker

may be able to claim in respect of non-payments going back over several years (s.23(3) of the ERA), whereas a claim under regulation 30 of the WTR must be brought within three months of each relevant deduction.

The limitation period for a breach of contract claim is six years in the ordinary civil courts or, in relation to claims arising or outstanding on termination of employment, which may be brought in the employment tribunal under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** (SI 1994 No. 1623), three months after termination of the contract.

Finally, a claim for breach of contractual holiday rights brought in the civil courts or in the employment tribunal under the 1994 Order is not subject to a bar on bringing proceedings if the employee fails to send a written grievance to the employer in advance, whereas a claim under s.23 of the ERA, or regulation 30 of the WTR, is barred.

Long-term sick leave

The case of *Commissioners of Inland Revenue v Ainsworth and others* (now known as *Her Majesty's Revenue and Customs v Stringer and others*) concerns three main issues.

1. The circumstances in which workers off sick can take and be paid for holidays under regulations 13 and 16 of the WTR.
2. How compensation for untaken holiday is to be calculated under regulation 14 of the WTR, in circumstances in which workers are sick for all or part of the leave year prior to termination.
3. Whether a claim for holiday pay under regulation 16 and/or regulation 14 of the WTR can be brought as a claim for unlawful deductions from wages under s.23 of the ERA (see *Contractual rights*, above).

The facts of the claims are important. They fall into two distinct categories. The first category concerns Mrs Khan, an employee of the Revenue who was absent on indefinite sick leave for several months and was in receipt of sick pay. She wished to exercise her right to take annual leave under the WTR. She gave due notice to the Revenue that she wished to take 20 days' paid annual leave but the Revenue refused her request. An employment tribunal upheld her claim under regulations 13 and 16.

Three other individuals, Mr Ainsworth, Mr Kilic and Mr Thwaites, fall into a second category. Each was dismissed by the Revenue. Each had been absent on sick leave throughout the leave year in which his employment was terminated. None had taken any annual leave in that leave year. Employment tribunals upheld the claims and calculated the compensation due in accordance with the formula in regulation 14(3) of the WTR. In the claim brought by Mr Ainsworth, the tribunal ordered the sum to be paid as an unlawful deduction from wages (even though he also claimed under the WTR).

The EAT dismissed the Revenue's appeals without hearing full argument, because of an earlier EAT authority: *Kigass Components v Brown* [2002] ICR 697. The Court of Appeal allowed the Revenue's further appeal, holding (in summary) as follows.

- In relation to Mrs Khan, the Court of Appeal accepted the Revenue's argument that a worker cannot take paid annual leave under the WTR during a period in which the worker is absent on sick leave. According to the Court of Appeal, "leave" for these purposes means release from an obligation to work.
- In the cases of Mr Ainsworth, Mr Kilic and Mr Thwaites, the court held that if a worker had no entitlement to take annual leave prior to termination — which it held the workers did not, for the reason given above — then he had no entitlement to compensation on termination.

The House of Lords gave permission for the workers to appeal. At the outset of the hearing on 30 October 2006 the House of Lords decided to make a reference to the ECJ on the interpretation of the Directive. Only issues (1) and (2), identified in the second paragraph of this section (on page 12), have been referred to the ECJ, and issue (2) may well not be dealt with in much detail. Issue (3), together with the effect of the ECJ decision, will be dealt with by the House of Lords when the matter is returned from the ECJ. The oral hearing before the ECJ took place on 20 November 2007. The Advocate General's opinion, which the court does not always follow, is due on 24 January 2008, with the judgment likely to follow several months later.

The arguments in *Ainsworth* are wide-ranging on both sides. The workers contend that the right to annual leave is a fundamental social right which

automatically attaches to every worker. There is no restriction or derogation from that right in the Directive, and if sickness were to affect the right the Directive would say so expressly. Since the social right to annual leave in Article 7 cannot be reduced by the exercise of separate rights to leave guaranteed by Community law, it cannot be reduced by a contractual right to be off sick. The workers also argue that leave cannot mean leave from work because many “casual” workers in the UK, who are entitled to the right, owe no obligation to work in any future period.

The principal focus of the Revenue’s argument is the meaning of the word “leave”. It contends that the ordinary meaning of “leave” is leave from an obligation to work, so that a worker who already owes no such obligation for a future period has nothing to be given leave from. It adds that the health and safety purpose behind the Directive in relation to annual leave is to give a worker a period of rest from work; an employee who is not required to work during that period has no need of such rest. If the workers are right in their argument, the Revenue contends that this will have the undesirable effect of encouraging employers to terminate the employment of workers who are off sick, in order to avoid the need to make annual leave payments.

The arguments relating to regulation 14 of the WTR are less central to the ECJ proceedings, because Article 7(2) says little about how the sum due on termination should be calculated and it may leave the matter to the discretion of Member States. The workers argue that if a worker who is off sick is denied the right to take annual leave, he or she should nonetheless be compensated for that loss on termination. They also contend that the formula in regulation 14 of the WTR can only sensibly operate if there is no discount on account of sickness. In reply, the Revenue argues that the payment under regulation 14 is “in lieu of leave” and thus presupposes that a worker had a right to take annual leave during the leave year.

At present, most employment tribunals appear to be staying claims which depend on the outcome of the *Ainsworth* proceedings. In the meantime, there are a number of practical difficulties. In particular, it is unclear how — if at all — the decision affects workers who have been off sick for only part of the leave year, and employers would be well advised to afford such workers full statutory leave entitlement until the issue is clarified.

The case does not affect the exercise of contractual rights to holiday, or the payment of contractual sums for holiday pay or untaken holiday on termination. Save, perhaps, from a small risk of claims under the **Disability Discrimination Act 1995**, there is nothing to prevent an employer from specifying that contractual (as opposed to statutory) annual leave ceases to accrue, or cannot be taken, during periods of sick leave.

Atypical workers

Part-time workers are entitled to statutory holidays on a *pro rata* basis. Thus, in the case of a worker contracted to work a three-day week, an entitlement to 4.8 weeks' statutory leave (four weeks under regulation 13 and an additional 0.8 of a week under regulation 13A) would equate to 14.4 days.

An increasing number of workers are engaged under "casual" arrangements whereby they are not required to be available for work, and their employer owes them no obligation to offer work, in respect of any future period. Such individuals are usually "workers" for the purposes of the WTR during periods when they are actually carrying out work for the employer, and are therefore entitled to take statutory leave during those periods.

A more difficult issue relates to the status of a casual worker when he or she is not actually working. A worker employed under a global or umbrella contract which spans the periods when he or she is not at work will be entitled to the full amount of statutory annual leave, which in practice may well be taken during those periods when he or she would not otherwise be working, and holiday pay will be calculated on the basis of the average wage or salary over the 12 working weeks prior to the holiday.

If, on the other hand, the worker is engaged on a series of discrete contracts with gaps in between, he or she will be entitled to take a proportionate amount of statutory leave under regulation 15A during the currency of each contract (assuming it lasts for less than a year), and/or be entitled to a payment in lieu of unused holiday under regulation 14 each time a contract comes to an end. This has the bizarre result that the worker may be entitled to a payment in lieu every few days, or even every day, depending on the length of each assignment.

Rolled-up holiday pay

Rolled-up holiday pay is an arrangement whereby the employer includes a sum in respect of statutory holidays in the worker's ordinary salary or wage, and makes no extra payment when the worker actually takes leave.

The long-standing issue of the lawfulness of rolled-up holiday pay has been partially resolved by the ECJ's decision in *Robinson-Steele v RD Retail Services Ltd* [2006] ICR 932. The ECJ held that the purpose of the holiday pay required by Article 7(1) of the Directive was to enable the worker actually to take annual leave and be in the same position as regards remuneration as if he or she were at work. It would undermine that purpose if the worker received part-payments staggered over the year and hence did not receive an additional payment during the period of annual leave. However, confusingly, the ECJ went on to hold that the Directive did not preclude setting off rolled-up sums already paid "transparently and comprehensibly" as holiday pay against payments for annual leave.

The Department for Business, Enterprise & Regulatory Reform (BERR, formerly the DTI) has amended its guidance several times since the *Robinson-Steele* judgment. The current version states that "employers are now required to ensure that payment for statutory annual leave is made at the time when the leave is taken" and appears to treat the possibility of set off as confined to a transitional period which has now expired. (However, the EAT in *Lyddon v Englefield Brickwork Ltd* EAT/0301/07, which applied the *Robinson-Steele* judgment, made no reference to a transitional period.)

FURTHER INFORMATION

Further guidance on statutory annual leave is available in your Croner's Employment Law loose-leaf. Croner's statutory leave ready reckoner is on the Croner website: www.croner.co.uk.

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