

# Briefing on ...

## The Right to Paid Annual Leave

### CASE LAW UPDATE May 2010

#### Introduction

In June 2009 the House of Lords issued its long awaited decision in the case of *Revenue and Customs Commissioners v Stringer and others* giving effect to the European Court of Justice ruling on entitlement to statutory paid annual leave.

(See Briefing 203 at <http://www.unison-scotland.org.uk/briefings/203AnnualLeaveWorkingTimeRest.pdf>)

A year later some employers have yet to implement the changes to UK law and in addition, the Courts have made further decisions on the right to paid leave. This briefing sets out the position following *Stringer* and other decisions since.

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#### What is the statutory entitlement to paid annual leave?

Under the Working Time Directive all workers were given the right to 4 weeks paid annual leave.

As a result of some employers interpreting the right as including public holidays the UK Government amended the domestic legislation in 2007.

Under Regulations 13 and 13A of the Working Time Regulations 1998, all workers are entitled to 5.6 weeks paid annual leave up a maximum of 28 days a year, including public holidays.

Payment while on annual leave must be at the worker's normal rate.

#### The effect of *Stringer*

As a result of the decision in *Stringer* employees continue to accrue entitlement to statutory annual leave while absent from work, even if they are absent for the whole of the leave year. If the employee returns to work after the end of the leave year, they can carry over their untaken leave into the next leave year.

If the employee is unable to return to work and their employment is terminated, they

are entitled to payment in respect of any untaken leave.

The House of Lords clarified that a refusal to pay holiday pay under this ruling could be challenged either as a breach of the Working Time Regulations or as an unlawful deduction of wages under the Employment Rights Act. This has important implications for time limits as an unlawful deduction can be brought in respect of a series of deductions at any time within 3 months of the last deduction.

### **The Timing of Leave**

In *Pereda v Madrid Movilidad SA* the claimant had been due to go on a period of annual leave when he was involved in an accident and was unfit for work for a period which coincided with his planned leave. The ECJ ruled that if an employee is due

to go on annual leave but then becomes sick, they have the right to take the annual leave at a later date. As with *Stringer*, the Court confirmed that this included the right to carry the leave forward into the next leave year if necessary.

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### **Use it or Lose it?**

In both *Stringer* and *Pereda* the employee was unable to take their annual leave due to sickness absence. However, what happens if an employee fails to arrange annual leave within the leave year in accordance with his contractual obligations?

In *Lyons v Mitie Security Ltd* the claimant was required to give 4 weeks notice of any request for annual leave. At the end of the leave year Mr Lyons had 9 days left untaken and requested payment for these

days. When the employer refused he complained to the Employment Tribunal that they were in breach of the Working Time Regulations.

However, the Employment Appeal Tribunal held that where the employer has set out the requirements for taking annual leave and these have not been followed, the employee may lose their entitlement. This decision does not sit easily with European Law and it remains to be seen if further decisions follow this line.

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### **Action for Branches**

Branches should review the employers existing policies on annual leave abatement and carry over. Where any member is refused annual leave in accordance with the decisions in

this briefing, further advice should be sought from the Regional Organiser in the first instance through the CASE referral system.

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### **Further Information**

The Government has produced its own guidance on the decision in *Stringer* and *Pereda* at this web address:

<http://www.bis.gov.uk/policies/employment-matters/rights/working-time/case-law>