PRESTATYN! PERSONIFICATION OF PLEASURE

With great joy and enthusiasm, the current Mrs Shepherd bustled into the parlour clutching my morning tea and toast, lashings of foie gras, slippers and smoking jacket, nothing unusual there then. But she also clasped in her other hand the 'Pearl of Prestatyn' 2010 'Summer Escapes' brochure. As we marvelled at the opportunities for cultural exploration such a trip would afford us, my mind began to wander as to how I'd squeeze in a long weekend into my busy court diary. I was especially concerned as my Clerk had previously and graciously allowed me a week off to treat a particularly troublesome bout of gout.

I immediately checked with my Clerk, nervous as to his reaction to my requesting a long weekend away and how he would manage my diary in my absence. His response, after furious headscratching and detailed analysis of the diary, a small smirk and then - "*anytime you like, you're always free*" - as an afterthought he kindly added "*Sir*", then turned away from me shaking his head.

However, the lack of diary pressure, though Prestatyn's gain, led me to wonder whether a summary of holiday entitlement and pay, incorporating the developments of the last couple of years, would be useful to you, dear readers, in this run up to the main holiday season. Whether that wondering is accurate or not, here it is anyway.

ESTABLISHED POSITION

Without teaching Norma Speakman, nee Royle to suck eggs, it may be useful to briefly recap what the standard position is in relation to pay and entitlement, prior to reviewing recent case law in the area.

DAY ENTITLEMENT

Most workers are 'entitled', (and we will return to that word later) to a minimum number of days of paid holiday per year - the statutory paid holiday entitlement. The calculation depends on how many days an employee normally works per week. Of course, the self employed are not entitled to such wondrous rewards but neither are the police, the armed services and some civil protection services.

Once we have ascertained the normal days per week worked, we then use the statutory multiplier of 5.6. For example, an individual working 5 days per week would accrue 28 days per year, whilst an employee doing 2 ½ days, would have the benefit of 14 days. *Simples*. However, a statutory maximum applies of 28 days (Working Time Regs, 1998, as amended) therefore those workers toiling for 6 and 7 days, will not see the benefit in terms of holiday days accrued (please note, if the 'leave year' began before 1st April 2009, the maximum is 24 days). Also note that 4 weeks holiday is still the EU's minimum, whilst the UK has given an extra factor of 1.6.

Space within this newsletter prohibits a review of 'leave year' as a legal term, but in short, if it's not agreed or in the contract, look it up, there are prescribed dates, depending on circumstances.

As with the majority of UK employment law, contractual terms can increase but not decrease that 'entitlement' (that word again, keep it in mind).

BANK HOLIDAYS

Moving on, bar those in their first year of employment, like young Anthony in his tracksuit bottoms and earring (for whom particular rules apply), the 8 statutory bank and public holidays in England and Wales, if given off from work, are ordinarily knocked off the calculated entitlement, unless the contract provides for a more generous view. For ease of reference, those 8 days are as follows; New Year's Day, Good Friday, Easter Monday, Early May Bank Holiday, Spring Bank Holiday, Summer Bank Holiday, Christmas Day and Boxing Day

ROLLING UP

In terms of holiday pay, some commentators suggest that this can simply be calculated at the standard rate. Though this may be correct, it is not quite as clear cut as the statement may suggest. In practice, some employers add a worker's holiday pay to their hourly rate and expect the worker to 'save' this up themselves, or in common parlance, 'rolling up' the holiday pay.

Certainly in the Scottish EAT and the Court of Sessions, this 'rolling up' method has been found to be unlawful, predominantly on the basis that the absence of payment during a holiday period would discourage employees from taking their holiday entitlement (it keeps cropping up) at all.

However, back here, south of the border, the position is less draconian, but it should be remembered that 'rolled up' holiday pay should be on top of an employees standard hourly rate, not included in it, and it would be very good practice that this should be clearly set out on a payslip - a percentage or fraction would probably be sufficient.

NOTICE

An employee can request to take their holiday whenever they want to, however, an employer does not have to agree to the request if the dates are unsuitable. An employee must give their employer notice of their intended holiday period, the notice period should be double the length of holiday the employee wishes to take. Conversely, if the employer refuses a request, it must give equal notice as the length of the holiday requested. Further, if the employer wishes to 'force' employees to take holiday at a specific date or dates (factory shut

downs at Christmas spring to mind), the employer must give double the notice period than the period of holiday imposed.

OUTSTANDING HOLS & LEAVING EMPLOYMENT
The previously mentioned developments in the case law (on which we will come to shortly) predominantly stem from these two areas. Traditionally, the WTRs (on strict reading) made no provision for carrying unused holiday into the next leave year. However, an employer can choose to allow an employee to carry it over by writing it into the contract. On the other hand an employer cannot make an employee carry over holiday into the following year.

In addition, if an employee leaves their position before using up their entitlement, payment must be made for any holiday pay owed to them. Contract terms may, of course, agree an enhanced level of payment to be made instead of the untaken holiday, but the statutory position is as set out above.

RECENT DEVELOPMENTS – HOLIDAY PAY & SICKNESS
The case of *Stringer & others v HMRC*, a ECJ case that went half the world away from mid-Wales, before returning to the oasis of the House of Lords, becoming *HMRC v Stringer & others*, clarified, or some may say, stretched, an area of law that had some commentators, particularly on the side of employees, a little hot under the collar.

The case centred on two key questions: are workers entitled to take paid statutory holiday while they are off sick? And are employees who have been off sick for the part or whole of a leave year entitled to be paid in lieu of accrued statutory holiday if their employment terminates?

As a little background; as set out above the basic position of the WTRs specifically prescribe that at least the first four weeks leave must be taken in the current holiday year, so conversely, cannot be carried forward to the next holiday year (those days over the statutory minimum do not fall within this). As a result, how does this affect an individual who is on long term sick, throughout that year who then leaves or is dismissed?

The ECJ decided that the right to be paid annual leave arises from the very first day of employment until date termination (this followed an earlier decision of *Pereda v Madrid Movilidad SA* the ECJ considered whether employees who are sick during scheduled annual leave should be allowed to take the holiday on another occasion, (NB, the *Pereda* decision does not have direct effect for the majority of workers in England & Wales)).

As a result of the primary decision, an employee/worker continues to accrue holiday days during periods of sickness absence. The ECJ

went on to leave the question to each member state as to whether annual leave can actually be taken during sickness absence. Therefore if the converse stance is adopted, i.e., leave can't be taken during sickness absence, inevitably, an employee/worker must be permitted to carry that leave over to avoid infringing the WT Directive.

In the HoL, the HMRC conceded that following the ECJ's decision the WTRs must be interpreted as allowing annual leave to be taken during sick leave where a worker is off sick for the remainder of the holiday year. Implicitly, the HoL accepted this position and so it became law.

TIME LIMITS

There was still one outstanding issue for the HoL to rule on; whether or not claims in relation to statutory holiday pay can be brought as a claim for unlawful deductions from wages under the Employment Rights Act 1996 (s.13 ERA) or whether they have to be brought under the self contained mechanism provided for by the WTRs?

The importance of this lies in the time limits applicable to each claim. Under the ERA, claimants are required to bring a claim within three months of a deduction, or of the last in a series of deductions. This is more favourable than claims under the WTR mechanism, which must be brought within three months of each failure to pay in respect of the worker's holiday entitlement. The HoL decided that the former interpretation should be preferred. The effect? well, a claim could go back for years, or, more specifically, for 6 years, adopting the normal rules of limitation.

The HoL decided that statutory holiday pay falls within the definition of "wages" and therefore such claims can be brought as an unlawful deduction claim via the ERA. The net result is that where an employee has been repeatedly denied the right to be paid in respect of leave during a period of sickness, can institute a single claim, covering all breaches.

EFFECTS

Stringer was applied in the domestic courts in the Sheffield Tribunal case of *Rawlings v The Direct Garage Door Co*, a case stayed pending the outcome of *Stringer*. Rawlings, was off sick for the entirety of 2005, and up to his eventually leaving date in 2006. The Tribunal found, as it must, that he was entitled to claim for monies in lieu of his accrued holiday days. In short, an individual with a dismal attendance record (due to sickness) will be entitled to exactly the same level of holiday (and pay) as an individual with a perfect attendance card, on leaving.

LIMITATIONS OF STRINGER

However, those matters set out above are the extent of the decision in *Stringer* and this is where our language of 'entitlement' becomes

important. The WTRs treat holidays as an entitlement. Therefore imagine our employee, for the sake of the scenario, lets call him 'Twiggy', is beavering away during the year but fails to exercise his statutory entitlement. It is fair to argue (and the majority of commentators support this view) that an employer would not therefore be liable for the fact that holiday had not been taken within the year.

I simply pose the question, should this same logic not also apply to an employee or worker, let's call him 'Jim', who is off sick during the same period? On the above analysis, a worker or employee may have had to have requested those holidays, in order to trigger an entitlement to claim under *Stringer* (expect in termination/leaving cases). Similarly, 'Jim' may be entitled to holiday pay, for those periods of enforced shut down (i.e. Christmas) even though he was absent during the period. Though this type of analysis, set out immediately above, may find favour with those who prefer clean rules, I suspect that in due course, this stark line will be eroded.

In addition, under the WTRs there is no mechanism to pay monies in lieu of untaken holidays, except in the case of termination (eg, the case of *Stringer*). Therefore, taking 'Jim' once again, on long term sick, is an employer required to pay the 'in lieu monies' at the end of each 'leave year'? *Stringer* does not seem to go this far. Similarly, as stated above, the WTRs specifically prohibit the statutory minimum holidays from rolling over to the next leave year. Therefore if Jim is off sick how can he 'roll over' the 2010 holidays into 2011? It seems that he cannot.

It may well be the case that the UK's law, as currently interpreted, stretched and constituted, may not comply with the EC Working Time Directive and as a result UK employees may not be given their full armoury of rights. However, as the law currently stands, private sector workers will be stuck with what they've got, whilst public sector workers may have remedy in reference to EU law, within domestic tribunals. I expect litigation on this point fairly shortly.

CONCLUSIONS

I've now booked a luxury static mobile home, with built in chip-pan, sky TV, and I've paying a supplement to be close to the washing facilities. The owners of our site, 'The Pearl of Prestatyn' say that if you stand on the third step down, lean to the left and dislocate the neck, you can almost see the sea! I'm told, two couples will be next door, a Father, Mother, Daughter and Son-in-law. I hope they're active and want to go on long walks, away from the TV. I hear they're from Manchester.

Looking at the less important conclusions of today's endeavours however, it is clear that the case of *Stringer* will expose employers to a greater degree of liability, <u>if a long term sick employee's employment</u>

ends. However, on close reading, it appears that the extent of the judgment may be narrower than hoped by some commentators.

It may well be the case that it is preferable (i.e. cheaper) for employers to maintain a long term sick employee's employment with the organisation so as to avoid exposure to a substantial backdated holiday pay claim under s.13 ERA. The circumstances of an individual's case will necessarily dictate the outcome of this balancing exercise.

Further, whether a Tribunal (or the higher courts) will 'buy' the argument that the rules as construed require the employee to activate his entitlement/activate the employer's liability, by requesting holidays within the currency of the leave year, is yet to be seen. If anyone fancies a trip to London, rather than mid-Wales, let me know, though I suspect the higher courts would look for a way around this artificial approach.

In any event, the interplay of *Stringer,* previous domestic authorities and our statutory framework is likely to take a little time to be resolved, with redrafts and tortuous interpretations likely to follow. Little is settled after *Stringer* but what can be stated, with some certainty, is that the law has taken a step in the direction of the employee.

Bon Voyage

RICHARD SHEPHERD
ALBION CHAMBERS