



Fountain Court

Stringer v. HMRC [2009] UKHL 31; [2009] IRLR 677

Adam Tolley, Fountain Court

- **An outline**

- The Directive (2003/99, formerly 93/104/EC) – Article 7
- Implemented in UK by the Working Time Regulations 1998, regs 13-16
- The EAT decisions in *Kigass*, *List Design* and *Canada Life*
 - *Kigass* decided that workers could take annual leave even if already off on sick leave (the point being that the pay regime was more favourable if on annual leave)
 - *List Design* and *Canada Life* decided that a claim for unpaid holiday pay under the WTR could be brought as a claim for unlawful deduction from wages (thereby taking advantage of more generous limitation rules)
- The CA decision in *Ainsworth*
 - All of the above EAT decisions overturned
 - No right to annual leave if worker already on leave for another reason and no compensation for leave untaken when sick
 - Claim under WTR could not be brought as unlawful deductions claim
- Appealed to HL, but then referred to ECJ [note: the case became known as *Stringer* in the HL, for reasons unknown]
- The ECJ decision in *Stringer* and *Schultz-Hoff* (a German case referred shortly before *Ainsworth*)
 - Member states *could* implement the Directive by refusing to allow workers on sick leave to take annual leave **but if so** it was necessary to permit the worker to take the accumulated annual leave on his return to work or compensate him in lieu if his employment was terminated without ever returning
 - Equally, member states *could* implement the Directive by permitting workers on sick leave to take annual leave
 - Workers entitled to compensation on termination for annual leave not taken because off sick
- The case was then referred back to the HL
 - The parties agreed that the ECJ's first alternative solution was not possible within the WTR, because reg 13(9) blocked "carry-over" from one leave year to the next
 - So agreed that the only way to implement the ECJ decision was to accept that workers could take annual leave even if already off on sick leave



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- **The issues**

- Did *Stringer* actually resolve the issue whether workers can take annual leave while on sick leave?
 - Most commentators seem to think not, but the point is effectively decided by the ECJ/HL and is essentially unarguable
- Does the same rule apply to other kinds of leave, eg. career breaks, additional unpaid maternity leave?
- How does the decision interact with PHI (Permanent Health Insurance) schemes?
- Regulation 15 requires a notice to be served by the worker in order to take annual leave under the WTR. Can there be a claim for failure to allow holiday to be taken or pay for holiday in fact taken where no regulation 15 notice has been served?
 - Conflicting decisions in the EAT: *Kigass* (“no”, unless employer has given pre-emptive indication of refusal; cf. *List Design* and *Canada Life* (“yes”))
 - This issue bound to reach CA at some point
- Can an employer serve a regulation 15 notice to require an employee to take annual leave during a period previously notified as sick leave?
- Is regulation 15 compatible with the Directive?
- Can a claim for compensation for failure/refusal to permit leave be brought under the unlawful deductions regime?

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