



13<sup>th</sup> March 2009.

**To: Each Affiliated Organisation**

**Re: ECJ decision in Stringer/Schultz-Hoff and the entitlement to statutory holidays**

Dear Colleagues,

The European Court of Justice recently (20<sup>th</sup> January 2009) delivered its decision in respect of two references on the correct interpretation of the Working Time Directive. The British reference (Stringer v HMRC C-520/06) and the German reference (Schultz-Hoff v Deutsche Rentenversicherung Bund C-350/06) both deal with the proper interpretation of the annual leave provisions in Article 7 of the Working Time Directive. Article 7(1) requires that Member States ensure that every worker is entitled to be paid annual leave of at least four weeks "in accordance with the conditions of entitlement to and granting of such leave laid down by national legislation and practice". While Article 7(2) provides that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

Congress' standpoint is that the ECJ judgment ends any question that workers who are on sick leave continue to accrue their statutory entitlement to annual leave (i.e. 4 weeks per year + public holidays). The ruling further confirms that workers must be allowed to carry over their entitlement to paid annual leave after they return to work, even where they do not work at all due to illness during the year and there is no limit on the carry forward period. The main points of the ECJ judgment are, in summary, that:

- Workers on long term sick leave continue to accrue their statutory entitlement to annual leave throughout any periods of sickness absence;
- Workers must be allowed to take this holiday entitlement on their return to work;
- Workers have the right to carry forward unused holidays if they have been unable to take their leave entitlement due to authorised sickness absence;
- Workers who did not have the opportunity to exercise their entitlement to paid annual leave by reason of illness are entitled to receive payment in lieu if their employment terminates;
- Holiday pay is calculated at the worker's normal salary rate they would have enjoyed had they not been off sick.

In the Republic of Ireland statutory annual leave is provided for under the Organisation of Working Time Act 1997. This Act provides that entitlement to paid annual leave is linked with hours worked. Specifically Section 19 of the Act provides an entitlement to a) four working weeks leave, in any leave year in which he/she works at least 1,365 hours: or b) One third of a working week for each month in the leave year in which he/she works at least 117 hours: or c) 3.8% of the hours he/she actually worked in a leave year up to a maximum of four working weeks.

This means that when an employee is sick for the entirety of the leave year, they are not entitled to statutory annual leave, as they do not qualify under any of the criteria listed in the Act. Minimum work requirements do not fit with the ECJ decision. The ECJ clearly determined that workers who are absent from work, as a result of ill health, are entitled to statutory holidays, even if they have not worked at all during the holiday year.

In addition while the ECJ has found that while it is lawful to extinguish the untaken leave, they limit this by the following, "provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive". This means that an employee who has not had to opportunity to take the leave cannot have the leave extinguished, even if any carry forward period has expired. So the limit of six months carry over is incompatible with EU law at least when dealing with those who have been on sickness related absence.

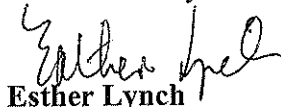
This ECJ judgment will be binding on all employers in the EU. The principle of Direct Effect means that it is immediately binding on public sector employers. Disappointingly, private sector employers are raising doubts about what their responsibilities are and are claiming to be bound by the (unlawful) minimum work requirements in the Organisation of Working Time Act 1997 (in particular those set out in Section 19 of the Act). Of grave concern are the arguments being advanced by some employers about the impact of employment rights on competitiveness. Member States in Europe cannot be allowed to compete by reducing employment rights and the protection of workers. Rivalry in Europe, arising out of disparity in labour conditions, would have disastrous consequences, that is why there are agreed standards to apply throughout the EU such as those dealt with in this Directive.

To ensure that all workers receive their entitlements, I have contacted the Minister for Labour Affairs, Mr Billy Kelleher, TD and requested that he immediately issue guidance to employers outlining that he expects them to review the operation of their annual leave policies and sick leave policies to ensure compliance with the ECJ's decision and further that they ensure that holiday, sickness absence and maternity/adoptive leave policies deal appropriately and clearly with workers' statutory and contractual holiday entitlements.

We have also asked him to introduce as a matter of urgency amending legislation to ensure that the Organisation of Working Time legislation properly respects workers entitlements in accordance with the ECJ judgments.

I will keep you informed on developments in the mean time if you have any questions on this please do not hesitate to contact me.

Yours sincerely



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Legislation and Social Affairs Officer