

Holiday Masterclass

WELCOME TO CLARITY

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2022 – The return of proper holidays (maybe)...

- Planning annual leave - taking/accruing holidays and refusals
 - Calculating holiday entitlement
 - Calculating holiday pay
 - Holiday pay claims – update
 - Sickness and holidays
 - Discrimination and holidays
 - Future developments
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But first....a reminder of statutory basic rights

- Working Time Regs 1998 – statutory right to 5.6 weeks paid annual leave for workers, made up of:-
 - 4 weeks per year under European WT Directive
 - 1.6 weeks per year additional leave under domestic law, representing public holidays. No need to use these on public holidays.
 - No minimum qualifying service
 - Leave year chosen by employer to be set out in a “relevant agreement “
(handbook/contract/collective agreement)
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Statutory basic rights cont'd

- In first year, leave accrues at 1/12 of annual entitlement at the beginning of each month
 - If calculating leave accrued in first year, fractions of days are rounded up
 - Designed to allow employers to control leave taken in first year
 - Can over-ride these with more generous terms in a relevant agreement
 - Accrual after first year – no provisions in WTR
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Planning annual leave

- Handbook/contract/collective agreement requires to set out any limitations if the employer wishes such
 - If none, WTR provide that notice to take holidays must = (length of holiday) x 2
 - Employer may refuse leave by counter-notice equal to no. of days holiday - Reg 15 WTR
 - Employer may require holiday to be taken – notice to be given = (length of holiday) x 2
 - Employer may also require holiday not to be taken – notice equal to no. of days holiday
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Planning annual leave - carry over

- 4 weeks leave may only be taken in the leave year in which it falls due
 - Cannot compel a worker to carry it over
 - If you agree to allow carry over, worker can change their mind & exercise right to take leave instead
 - Additional 1.6 weeks leave may be carried forward in accordance with a relevant agreement
 - Can be contract/handbook, but an exchange of email would suffice
 - Exceptions – maternity leave; sickness (lost after 18 months after end of leave year in which it accrued); where employees told it will be unpaid
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Covid-19 relaxation of rules

- Emergency legislation - 26 March 2020 relaxed the restriction on carrying over annual leave where “not reasonably practicable for worker to take some or all of leave entitlement as a result of effects of coronavirus”
 - May be taken in the two leave years immediately following. Need “good reason” to refuse.
 - ACAS guidance – “not reasonably practicable” examples = self-isolating, sickness, furlough, lay-off, need to continue working
 - BEIS guidance differed
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Usual practice

- Default provisions normally disapplied by relevant agreement stating that holidays must be requested and approved by line manager
 - Many employers require annual leave to be taken during a shutdown period or at particular times of year
 - Allow carry-over of leave but limited to a max no. of days
 - Post-Covid:-
 - 2020 - many employers asked staff to take annual leave and topped up furlough pay
 - 2021 – employers asking staff to take proportions of annual leave during the year and not leave it to accrue because of longer-term effect on business/recovery
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Calculating holiday entitlement

- May be altered by “relevant agreement”
 - Otherwise, is $(A \times B) - C$ where
 - A = whole leave year entitlement
 - B = proportion of leave year expired at termination
 - C = leave already taken on termination
 - Calculate B using number of days expired from start of leave year to finish, divided by 365
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Calculating holiday entitlement

- In the first year, don't confuse "accrual" provisions with entitlement provisions
 - Holiday "entitlement" still calculated using period of time from day 1 to termination date
 - May have "accrued" (and therefore taken) more than "entitlement" because "accrual" happens in advance
 - Deduct from final pay if too much holiday taken
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Calculating holiday pay

- A week's pay for a week's leave – WT Regs
 - Distinction between workers with “normal working hours” and those with “no normal working hours” – Employment Right Act 1996
 - ERA96 not compatible with WT Directive - must receive “normal remuneration” – Bear Scotland case. Must interpret legislation accordingly.
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Calculating holiday pay

- **Normal working hours with fixed salary** - week's pay by reference to those hours and that salary
 - **Normal working hours but variable pay** – calculate average weekly pay
 - From 6 April 2020 – 52 week reference period
 - **No normal working hours** – average over last 52 weeks
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Calculating holiday pay:-

- Must include any payments “intrinsically linked” to work. Includes
 - Commission and bonus linked to performance
 - Overtime, including voluntary overtime
 - Out of hours standby payments, call-out payments if sufficiently regular to be “normal” remuneration
 - Shift premiums/allowances
 - Travel allowances treated as taxable remuneration
 - Cannot pay in lieu instead during employment
 - Calculate a day’s pay using working days (so if 5 days a week, $52 \times 5 = 260$ working days pa.)
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Holiday pay claims...the latest

- Recap:-
 - Multiple claims for series of deductions where holiday pay not paid/not calculated correctly
 - Bear Scotland case – EAT held that any 3 month gap in a series of deductions broke the series
 - Government introduced 2 year limitation back from date of claim – section 23(4A) ERA for claims lodged after 1 July 2015 – only applies to unlawful deductions claims, not WTR claims
 - Separate from an unlawful deductions claim, worker can bring a claim under WTR that the employer has refused to permit the exercise of statutory leave; has failed to pay all or part of holiday pay due; has failed to pay in lieu on termination
 - Pimlico Plumbers case – decided by Supreme Court last week
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Smith v Pimlico Plumbers

- Mr Smith had taken some leave but was not paid for it as he was wrongly considered not to be a “worker” – question – did he lose right to take it at end of leave year?
 - Held, if a worker takes unpaid leave when the employer disputes the right to holiday pay, then the worker is not exercising his right to paid leave.
 - Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD
 - As a result, the right carries over and accumulates until termination of employment
 - Suggests (non-binding) that the NI case of Agnew (which held that a series of deductions was not ended by a gap of over 3 months) was correct and Bear Scotland case was wrongly decided
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Smith v Pimlico Plumbers (para 100)

- “A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.”
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Sickness and holidays: rescheduling sickness-affected statutory holiday

- In what circumstances can workers who fall sick during their statutory holiday cancel and choose to take it at a later date?
 - *Pereda* case – where a worker becomes incapacitated before a period of leave
 - *ANGED* case – where a worker becomes sick during a period of leave
 - What is "sickness-affected" holiday?
 - *Plumb v Duncan Print Group Ltd* – no requirement to demonstrate physically unable to take annual leave
 - Unfit to enjoy holiday but could have carried out role – consider the 'purpose' of annual leave
 - What are the options for employers and what steps can employers take to prevent abuse?
 - Reporting obligations and medical evidence
 - Record-keeping
 - Conditional enhanced sick pay
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Sickness and holidays: taking holiday during sick leave

- In what circumstances are workers permitted to take holiday during sick leave?
 - *Stringer* case
 - Workers on long-term sick leave can take holiday, and be paid for it, whether or not they have exhausted their right to statutory and/or contractual sick pay
 - Could an employer prevent holidays being taken?
 - Deploying counter-notice under Reg 15 WTR
 - Risks: practical implications, constructive dismissal and possible discrimination
 - Could an employer require holidays to be taken?
 - Relying on Reg 15(2)
 - Risks: breach of WTR, constructive dismissal and possible discrimination
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Sickness and holidays: carry-over

- In what circumstances are employers required to permit carry-over of holidays?
 - Does the worker need to have made a request?
 - Does the worker need to demonstrate that they couldn't take the holiday?
 - Are there any limits to this?
 - No requirement for unlimited carry over
 - 18 months has become the norm
 - What about those employees who are off sick long-term, potentially spanning years?
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Sickness and holidays: tricky areas

- PHI and holiday pay
 - Workers in receipt of permanent health insurance continue to accrue statutory holiday (5.6 weeks per year)
 - Employer not permitted to make payment in lieu and cannot compel the worker to take holidays – although the worker may ask
 - Entitlement on termination subject to limits on carry-over
 - What should the rate of pay be?
 - Zero hours/casual working arrangements
 - Casual/zero hours workers continue to accrue statutory holiday during sick leave (5.6 weeks per year)
 - Implications of not offering work assignments where incapacitated – discrimination risk if underlying disability
 - Umbrella contracts
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Discrimination and holidays

- Disability discrimination
 - Family leave and holidays
 - What are the rules around carry-over where leave spans two holiday years?
 - Contractual and statutory holidays may be treated differently
 - Religious holidays
 - Indirect discrimination risk of enhanced holiday entitlements tied to length of service
 - The 5 year approach
 - Aim of rewarding experience
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Future developments

- How to deal with the Jubilee holiday this year – it all depends on the wording of the contract
 - Pandemic carry-over - what are we likely to see in 2022?
 - Fallout within gig economy following decision in Pimlico Plumbers case – potentially claims back as far as 1998?
 - Agnew case in the Supreme Court (or settlement)?
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Q&A

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