



briefing

Employment, Pensions and Benefits - February 2010

Guidance at last on sick leave and holiday entitlement

Two decisions of the European Court of Justice (ECJ) in 2009 relating to sick leave and holiday entitlement probably caused more concern for employers than any other case law developments last year.

Background

The decision in the first case, [Stringer v HMRC](#) (January 2009) established the principle that a worker continues to accrue paid statutory annual leave whilst on long-term sick leave and must be permitted to take that leave on their return even if this is not until the following leave year. In the subsequent House of Lords hearing, it was held that a failure to pay annual leave or to make a payment in lieu on termination of employment could constitute an unauthorised deduction from 'wages'.

In the second case, [Pereda v Madrid Movilidad SA](#) the ECJ (September 2009) held that where sick leave coincides with a period of scheduled annual leave the individual must be given the right to take annual leave at a later date that does not coincide with the period of sick leave.

There were a number of practical difficulties arising out of the [Stringer](#) and [Pereda](#) decisions. For instance, some organisations expressly prevent people from re-arranging their holiday if they have been taken ill whilst on holiday or beforehand. The key problem however was in relation to the carry over of accrued but untaken holiday. The [Stringer](#) decision provides that the right to accrued statutory annual leave is not lost at the end of the leave year but this conflicts with the Working Time Regulations 1998 which allow only for a limited right to carry over untaken holidays (no more than 8 days).

Following these decisions the Department for Business Innovation and Skills (BIS) stated that its guidance on the Regulations would be amended in due course and at long last that guidance for employers is now available.

The Guidance

This states the following:

- a worker continues to accrue their statutory annual leave as normal while absent from work due to sickness, however long the period of sickness lasts
- a worker on sick leave is entitled to take statutory annual leave at the same time and if they do, they must be paid their normal holiday pay rather than company sick pay for the days taken as annual leave but, if the company sick pay period has ended, they must be paid normal holiday pay rather than no pay
- if the worker qualifies for statutory sick pay (SSP), this will continue to be paid during the annual leave but would count towards any holiday pay that is paid
- in the [Pereda](#) scenario, a worker can choose to have annual leave changed into sick leave if they become sick while on annual leave or just before they are due to take annual leave and can arrange to take the annual leave at another time. The guidance advises that in those circumstances the employee would be on sick leave. As such employers may want to consider requiring evidence of their absence in line with their usual company sickness-absence procedures.

For those workers with generous contractual sick pay entitlements, there is little incentive to take annual leave whilst on sick leave as either type of leave would be at the same rate of pay. Where there is no entitlement to contractual sick pay or it is for a relatively short period or at a reduced rate of pay, then a worker may prefer to take annual leave instead of sick leave as this will be at the normal rate of pay. Depending on the size of the organization and the number of workers on sick leave, moving from one leave to another could become quite an administrative burden and maintaining up to date records and payroll details will be essential.

It is important to remember that **Stringer** applies only to the accrual of statutory annual leave but some contracts of employment may provide that any additional contractual annual leave also accrues during sick leave.

Significantly, the government has now confirmed that it will carry out a consultation exercise 'later in 2010' on possible amendments to the Regulations. Rather unhelpfully, it has not stated when that will start. In the light of the **Stringer** and **Pereda** decisions and the unresolved issue of the carry over of leave, (which the Guidance does not refer to) it is increasingly likely that the Regulations will be amended in due course. In the meantime, employers should continue to manage sickness absence proactively especially in the current economic climate.

More information

If you would like further information, or would like to discuss the potential impact of these decisions on your organisation, please call Debra Gers, or your regular Morgan Cole contact.



Debra Gers, Associate

T: 02920 385 487

E: debra.gers@morgan-cole.com

This publication is © Morgan Cole and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole. Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.