

## WORKERS CAN RECLAIM HOLIDAYS LOST TO SICKNESS

The holiday rights of employees and how these rights relate to sick leave have been the source of much legal debate in recent years. As we have reported in previous email updates, the “Stringer” case has resolved some uncertainty in relation to this area and confirmed that statutory holiday **does** accrue during periods of sick leave and that employees can decide whether to elect to take “holiday” during their sick leave (and consequently be paid, for example, full pay rather than statutory sick pay).

However, the House of Lords in the Stringer case failed to consider:

- 1 Whether annual leave accrued by a worker whilst on sick leave is extinguished at the end of the holiday year or whether it must be carried over to the next holiday year (which is not currently permitted by the Working Time Regulations 1998); and
- 2 Whether employers have the right to force workers to use their annual leave instead of taking paid sick leave, which could be useful if the worker is being paid full sick pay and the employer wishes them to take annual leave instead, in order to save money.

Some light has been shed on these issues by the recent ECJ case of **Pereda v Madrid Movilidad SA**. In this case, in order to ensure adequate staff cover, workers were allocated annual leave in accordance with an agreed rota and Mr Pereda was due to take annual leave from 16 July to 14 August. However, he had an accident on 3 July which meant that he was on sick leave until 13 August, with the result that almost all of his annual leave coincided with his sick leave. Mr Pereda asked his employer to grant him an alternative period of annual leave but this was refused. He challenged this decision and the case was referred to the ECJ.

The ECJ ruled that workers who are off sick during a scheduled period of annual leave must be given the right to take annual leave at a later date. The Court referred to the Stringer case and stated that national laws are only allowed to impose conditions on the taking of annual leave if the worker has actually had the opportunity to exercise his or her holiday rights. The Court emphasised that the purpose of annual leave (i.e. relaxation and leisure) is different from the purpose of sick leave (i.e. to recover from being ill). Therefore, the ECJ ruled that **a worker who is on sick leave during a period of scheduled annual leave has the right to take that annual leave at another time, if he so requests it**, in order that he might actually use his annual leave for the purpose for which it is intended (i.e. rest and relaxation).

We now have the position that although a worker is **allowed** to take annual leave during sick leave if he or she wants to (as established in the Stringer case), if the worker **does not wish** to take annual leave during that time, then it must be granted at a different time. Therefore, the case of Pereda strongly suggests that an employer will **not** be able to force a worker to take his or her annual leave during sick leave (potentially saving the employer money if it is paying full sick pay), unless the worker agrees. This seemingly contradicts Regulation 15 of the Working Time Regulations which, subject to alternative agreement, gives the employer ultimate discretion as to when a worker may take annual leave.

The Pereda case has also reinforced the principle that, in some cases, the carrying over of holiday into the next holiday year may be necessary in order to preserve the worker’s holiday rights under the European Working Time Directive. Therefore, as we have stated previously, the safest option for employers is likely to be to allow employees who have been off sick and therefore unable to take

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holiday to carry over untaken holiday at the end of the holiday year (even though this is not currently permitted by the Working Time Regulations).

Although some employers (especially in the public sector) do allow their workers to reschedule holidays which coincide with periods of sickness, no doubt this decision will leave many employers concerned regarding the practicalities of how to deal with employees who have been sick or injured whilst off work on holiday. There will be concerns about possible abuse by employees who return to work after a period of annual leave, appearing to be in good health, but claiming that, in fact, they were ill for the entire period and therefore should be allowed to take their holiday at a later date.

A further question that remains unanswered at this stage is whether the rules established in the Stringer and Pereda cases apply only to the 4 weeks' statutory annual leave provided for under the European Directive or whether they also apply to the 5.6 weeks' annual leave under the Working Time Regulations.

All these matters need to be considered by the legislators and the Working Time Regulations will need to be amended in line with the changing law in this area. Even then, we suspect that these matters will only be cleared up gradually as and when relevant cases are heard by the Courts.

## **NEED SOME GUIDANCE? PLEASE CONTACT US ...**

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