

Interrelationship between Sickness Absence & Holiday

by Philip Douglas



There has been a lot of interest this year in European Court of Justice (ECJ) cases on sickness and holiday. There is now a new case on which it may be necessary to take action, described below.

The HM Revenue and Customs v Stringer case granted employees on long-term sickness absence the right to take paid holiday each year during their sickness absence. It also appears to permit long-term sick employees to carry untaken holiday entitlements forward from year to year so that upon termination they will be due payment for all the holiday they have missed during their period of sickness absence. I say "appears" because the UK Working Time Regulations currently make no allowance for the carry forward of holiday so carry forward is permitted only if it is allowed for in the contract of employment.

As a result, the ECJ's ruling in the Stringer case is not yet fully incorporated into UK employment law applicable in the Private Sector. (Public Sector employment law is different because of a concept in European law of "direct effect", which I will not go into here). The Government may well amend the Working Time Regulations, possibly retrospectively, so I recommend that you make provision in your accounts for four weeks holiday pay for each holiday year that an employee is absent on long-term sickness absence. However I suggest that you do not pay that sum to employees until the law in the UK is clearer.

We now have a new ECJ case on the same lines which makes an even dafter ruling:
Pereda v Madrid Movilidad SA.

Señor Pereda was scheduled to take holiday from 16 July to 14 August 2007, but on 3 July he suffered a (genuine) accident at work which laid him up for 6 weeks. Those 6 weeks expired on 13 August. Señor Pereda asked to be allowed to take his holiday later in the year, but his employers refused. He took them through the Spanish courts and then the ECJ, and has now won.

I think that most employers would agree that on the facts of this case, Señor Pereda should have been allowed to take some holiday at a later date. It has long been the rule that if an employee suffers an injury or genuinely falls ill prior to a period of booked holiday, so that they are unable to take that holiday, the employer should regard the time off as sickness absence and generally allow that employee to take another period of holiday at a later date.

By contrast, if an employee falls ill during a period of holiday, up until now it has been regarded as bad luck and that there is no obligation on the employer to grant a further period of paid holiday to compensate.

Señor Pereda's accident occurred prior to his holiday, but when giving their judgment, the ECJ not only ruled that employees must be permitted to retake holiday if they are incapacitated beforehand, it also ruled that **the European Working Time Directive gives a worker who is sick during a period of holiday the right to choose to take the holiday at a later date, and if needs be to carry it forward into a subsequent holiday year.** The ECJ held that holiday and sick leave serve two different purposes: holiday is

for relaxation and leisure and sick leave is for recovery, and they said that two should not overlap or coincide.

The Pereda case therefore runs a coach and horses through the normal practices described above and opens up the serious possibility of abuse. It could be easy for dishonest employees to claim that they fell ill during a holiday and claim additional paid holiday at a later date.

We must therefore consider revising sickness notification procedures in order to deter such abuse. However, before doing so, we must be careful: if we introduce new notification requirements, this would draw attention to this new "right" which employees may not otherwise have become aware of. In many cases it may be better to let sleeping dogs lie for the time being.

When action is needed, I would recommend amending Company rules and procedures so that if an employee falls sick while on holiday:

1. The employee MUST telephone his/her line manager on each day that s/he is unwell or injured to state that s/he would not be fit to work that day (unless the manager excuses him/her). This is reasonable because accurate dates are vital: if the employee wishes to claim additional holiday at a later date, s/he must be paid Sick Pay rather than Holiday Pay during the period of incapacity.
2. Employees should be asked to obtain a diagnosis from a local doctor and provide the Company with the name and address of that doctor so that you can make direct enquiries.
3. You can also ask employees to bring home a doctor's note or letter giving the cause and period of the incapacity. This can be a request only. Doctors in the UK will object to signing a medical note for short periods of illness as they are not required to do so until an employee has been sick for more than seven days. (Of course, doctors abroad may have no similar restriction.) Nevertheless I still recommend that you ask the question as some UK doctors may comply voluntarily. A doctor's note is essential anyway if the employee wishes to claim for seven days sickness or more.
4. On the employee's return, s/he should be required to complete a Self-Certificate and attend a return to work interview.
5. The employee should be required to take the 'replacement leave' within that holiday year unless there are very particular circumstances which prevent it. Where the Company permits the carry forward of a certain amount of holiday from one year to the next within the contract of employment, this 'replacement leave' should where possible be included within that.

Where employers pay Company Sick Pay, I would also like to talk through the idea of introducing a special rule for sickness absence while an employee is on holiday under which the employee is entitled to Statutory Sick Pay only. You will recall that under the SSP rules, the first three days of a period of incapacity are unpaid, and the remainder is paid at the rate of (currently) £79.15 per week. Granting extra holiday in these circumstances is (arguably) a new employment benefit, so it could be introduced on an SSP only basis.

Finally, a small piece of good news. The Pereda ruling applies only in respect of the four weeks of paid holiday, including bank/public holidays, granted under the European Working Time Directive. It does not (yet!) apply during the additional 1.6 weeks' holiday under the UK Working Time Regulations or any additional Company contractual holiday entitlements. So if an employee has already taken four weeks holiday in a holiday year, including bank/public holidays, this new holiday right does not arise.

Source:

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