



HR Briefing

March 2010

EMPLOYMENT LAW UPDATE – SICKNESS AND HOLIDAY LEAVE

Key recommendations

This month we take a look at the recent court rulings in relation to sickness and holiday leave.

We previously reported on two cases (Stringer and Pereda) in relation to this issue. Both of these cases have recently been tested in the Employment Tribunal providing further confirmation of the position when it comes to employees on sick leave and their entitlement to holidays.

Shah v First West Yorkshire Limited

Mr Shah booked 4 weeks' holiday leave from 22 February to 21 March 2009. In January 2009, he broke his ankle and went on sick leave until 18 April with his sickness absence overlapping with his booked holiday leave.

During this period he received contractual sick pay and holiday pay for the days of holiday booked. On 4 April, he wrote to reclaim his holiday but his employers refused saying it related to a previous leave year and was therefore lost.

Mr Shah submitted a claim for loss of holiday under the Working Time Regulations 1998 (WTR).

The Tribunal upheld Mr Shah's claim ruling that an employee whose pre-arranged holiday coincided with a period of sick leave should be allowed to carry that leave entitlement to the following leave year.

This is the first case to give effect to the decision in 'Pereda', which held that a worker who was incapacitated during a previously planned holiday should have the right to reschedule the holiday to a later date.

Although not binding on other Tribunals, it provides an indication that it is now likely that they will continue to apply the 'Pereda' decision further and employers should ensure they address this issue in their contractual sick leave policy.

Rawlings v The Direct Garage Door Company

Mr Rawlings was off work on long term sick leave from 2004 until he resigned in 2006. His employer refused to pay him holiday pay for 2005 and 2006.

The Tribunal held that Mr Rawlings was entitled to be paid his full holiday entitlement being holiday pay wrongly deducted from wages under the Employment Rights Act 1996 (ERA) because his absence had prevented him from taking his leave.

This case reaffirms the House of Lords' judgment in 'Stringer' that workers can accrue holiday pay while on sick leave and can bring a claim for holiday pay under the unlawful deduction from wages provisions of the ERA instead of under the WTR.

There is potentially no limit in back dating claims under the ERA and claims can be made going back at least 6 years provided the claim is presented to a Tribunal within 3 months of the last deduction.

Following this decision, employers could now face backdated claims from staff who have been off sick for a number of years and subsequently leave the company and

- Staff who are off sick and therefore unable to take their leave are entitled to their full holiday entitlement.

- An employee whose pre-arranged holiday coincides with a period of sick leave should be allowed to carry over that leave entitlement to the following leave year.

- Employers may now face backdated claims from staff who have been off sick for a number of years and believe holiday pay is owed to them.

- The right to carry over annual leave may apply where a worker becomes sick whilst on annual leave and not only where the illness begins beforehand.

- There is potentially no limit in backdating claims of unlawful deduction of wages under the ERA 1996.

- The Department for Business, Innovation and Skills has published guidance on its website for

believe they have holiday pay owed to them.

Impact on Employers

The effect of the 'Stringer' case appears to be that an employee on termination can bring a claim for payment in lieu of holiday pay going back over previous leave years as a series of unlawful deductions.

Following termination on the employment, employers should ensure they pay staff their full holiday entitlement if they are off sick and unable to take their leave and an employee whose pre-arranged holiday coincides with a period of sick leave should be permitted to reschedule the holiday to a later date and carry over that leave entitlement to the following leave year.

These cases provide a clear indication of the approach the tribunals will take when questions of sickness and holiday leave arise and highlights the importance for employers to pro-actively manage sickness.

If you have any queries on any of the above please contact **Alison Loveday** at alisonl@berg.co.uk to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**.

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employers to consult on this issue.

- **Employers can seek to limit the impact of these rulings by seeking medical certificates as evidence of illness and requiring normal illness reporting procedures to be followed.**
- **Employers can consider applying normal sick pay rules to any day of annual leave that they permit to be reclassified as sick leave.**