
The HR Forum

Can workers now defer holiday if they are sick during holidays?

Pereda v Madrid Movilidad – 1st October 2009

The Headlines

1. In the Stringer v HMRC Case the European Court of Justice (“ECJ”) ruled on the effect of long term sick leave and a worker’s right to annual leave under the directive.
2. The ECJ confirmed that a worker on sick leave accrues annual leave despite not working, but held that it is for member states to determine whether a worker can take their annual leave during a period of sick leave.
3. The ECJ has now turned it’s attention to the circumstances where an employee is sick during a period of holiday leave.
4. In Pereda v Madrid Movilidad the ECJ held that, where a worker’s pre-arranged annual leave coincides with a period of sick leave, the worker must have the option to designate an alternative period for annual leave.
5. The ECJ set out that a worker on sick leave who has been unable to take annual leave must be allowed to take it following their return to work, even if this means carrying it over to another year (something which is currently not permitted in the UK by the Working Time Regulations 1998).
6. It seems unlikely that the Working Time Regulations can be interpreted as fully implementing the directive in this regard, and therefore workers in the private sector may not be able to benefit from this decision unless the Working Time Regulations are amended. However, the decision is directly effective on the public sector.
7. Following the Stringer case, this case signals another move in favour of the employee in relation to holiday entitlement/sickness absence.

Background

8. Article 7 of the EC Working Time Directive 2003/88/EC provides that member states must “*ensure that every worker is entitled to paid annual leave of at least 4 weeks*”.

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
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9. These provisions are implemented in the UK by regulations 13 to 16 of the Working Time Regulations, which give workers the right to 5.6 weeks leave per year. Regulation 15 contains notice provisions by which either the employer or the worker can give notice of the taking of annual leave. These may be varied or excluded by an Employment Contract or other relevant agreement. In the absence of such an agreement, Regulation 15 gives the employer ultimate discretion as to when a worker may take leave. At least four weeks of that leave can only be taken in the leave year to which it relates (Regulation 13(9)(a)).

Facts of the Pereda Case

10. The system for organising annual leave at Madrid Movilidad SA (the employer in the Pereda case) was set out in a collective agreement with the works council. In order to ensure that there were sufficient workers to carry out the work, annual leave rotas were proposed in advance by the works council and then approved by the employer, subject to any necessary changes. Further changes could normally only be made with 45 days notice.
11. According to the rota for 2007, Mr Pereda was due to take annual leave from 16th July to 14th August. However, following an accident on 3rd July, he took sick leave until 13th August, with the result that all but two days of his annual leave coincided with his sick leave. Because of this, he asked the employer to grant him an alternative period of annual leave from November to December. However, the employer refused without giving valid reasons.
12. Mr Pereda challenged the decision before the Labour Court in Madrid. The Court then referred the matter to the ECJ to establish whether it is contrary to the directive for a worker who is on sick leave during a scheduled period of annual leave to be denied the right, following his recovery, to take the annual leave another time, if necessary after the end of corresponding leave year.

The Decision

13. The ECJ held that the directive requires workers on sick leave during a period of scheduled annual leave to be given the right to take annual leave at a later date.
14. The Court held that the entitlement to four weeks paid annual leave under the directive is a "*particularly important principle of community social law from which there could be no derogations*". National laws which impose conditions for the exercise of the right to annual leave, including even the loss of the right at the end of a leave year are only permitted provided the worker has actually had the opportunity to exercise the right. Therefore, the right is not extinguished at the end of the year where the worker has been on sick leave for the whole or part of the year and has not had the opportunity to take their leave.

Is being absent due to illness "losing the opportunity to take leave"?

15. The Court noted that the purpose of annual leave (which is to enable the worker to enjoy a period of relaxation and leisure) is different to the purpose of sick leave (which is to allow the worker to recover from being ill). It follows that "a worker who is on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period that does not actually coincide with the period of sick leave".

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16. Therefore, whilst a worker may be allowed to take annual leave during sick leave (Stringer), if the worker does not wish to take annual leave during that time, it must be granted at a different time (Pereda).

Some Legal Observations

17. The Pereda case follows on from the recent decision in Stringer v HMRC which states that workers must be allowed to take annual leave during a period of sick leave if they wish. Pereda extends this principle by allowing workers who do not wish to take annual leave during that period to take the leave at a different time.
18. **Public sector** workers can gain the benefit of Pereda by way of adoption of direct effect.
19. Workers in the **private sector** with no such equivalent right may have to await the amendment of the Working Time Regulations, unless they can persuade a Tribunal to come up with a creative interpretation of the current wording.
20. In the Stringer case, the ECJ had seemed to suggest that, because sick leave is not regulated by EU law, it is entirely a matter for national law whether sick leave and annual leave are allowed to coincide. As previously discussed, this left a number of questions unanswered in relation to the UK's implementation of the directive.
21. It now seems that the Working Time Regulations are inadequate in two respects:-
- (a) Regulation 15 gives the worker no right to object to the employer's notice to take leave on particular dates, or to cancel and re-arrange a period of annual leave which the worker has recently requested. Regulation 15 could be deviated from by a relevant agreement, whereas Pereda makes it clear that a sick employee should, in effect, have a right to choose not to take their holiday, regardless of the employer's agreement.
 - (b) Regulation 13(9) of the Working Time Regulations makes it clear that four weeks of the statutory annual leave entitlement can only be taken in the leave year to which it relates. Pereda has reinforced the principle that, in some cases, carry over may be necessary in order to preserve the worker's rights under the directive.
22. One further issue which remains unclear is whether the worker's rights as set out in Pereda (and Stringer) are limited to the four week's leave under the directive, or would also apply to the 5.6 weeks under the Working Time Regulations. On the face of it, the ruling is limited to the directive right, but the ECJ has made clear in other cases that its rulings apply not only to the minimum periods of leave guaranteed by a directive, but to the more generous provisions provided by national law that implements it!

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Further Observations/Practical Considerations for Employers

23. Some employers, (particularly in the public sector) already allow workers to reschedule their annual leave if it coincides with a period of sickness that would have otherwise qualified for sick leave.
24. This decision will no doubt come as a shock to those employers who currently view these unfortunate coincidences as something which must be borne by the employee.
25. It will also lead to concern about possible abuse by employees who return from holiday in apparent good health but claim to have spent the last 7 days in bed with flu (or indeed have enjoyed a particularly good night out!).
26. The ECJ has not restricted its decision to cases where the employee has fallen ill or suffered an injury prior to leave commencing. This means employees could report in sick at any time during their period of leave.
27. Employers generally only request a sick note after 7 days. It would therefore be prudent for Employers to require employees to follow the terms of their sickness absence policies before recognising sick leave – specifically, reporting sickness to an appropriate line manager within specific timeframes and, where appropriate, requesting sick notes.
28. Employers should therefore review their sickness absence policies to minimise the risk of abuse. By introducing specific procedures for employees to follow when sick during a period of annual leave, employees may be deterred from being less than honest!
29. If an employee has been ill whilst on holiday, and until the European or UK courts say otherwise, IT MAY BE that employers are still entitled to require workers to produce convincing evidence of their illness while on holiday and that it would have rendered them unfit for work before allowing workers to “reallocate holidays”. While the requirement for a sick note may create additional costs for staff required to obtain sick notes abroad, as with normal sickness absence, employers are arguably not obliged to pay the employee’s costs in obtaining the sick note.
30. The extent of abuse is likely to correspond to an employee’s entitlement to paid sick leave. For example, an employee entitled to statutory sick pay is less likely to raise the issue than an employee with generous contractual terms.
31. Employers could therefore be forced to downgrade enhanced sick pay benefits to statutory levels.
32. For employers, the ruling will potentially have significant ramifications in terms of both absence levels and cost. Implications for overall absence levels could be felt widely. In particular for employers that have shut down periods. In that case, an employer will be required to accommodate additional holidays outside the shut down periods and, depending on cover, may need to engage additional overtime to cover the absences.
33. In addition, employers may be faced with the need to provide additional manpower to cover for those employees that are entitled to more holiday days over the course of a year.

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55 King Street, Manchester M2 4LQ
0161 836 8800

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7-8 Chapel Street, Preston PR1 8AN
01772 823921



If you would like any further information on the topics covered in these notes please contact Andrew Cross, Head of Employment Law, Brabners Chaffe Street, on 0151 600 3062 or andrew.cross@brabnerscs.com

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