

## HOLIDAY DURING SICKNESS CAN BE CARRIED OVER TO NEXT HOLIDAY YEAR

Shah v First West Yorkshire Limited is the first case before a Tribunal which has given thought to the decision in Pereda, the ECJ decision in which it was held that a worker who is incapacitated during a period of previously scheduled statutory holiday should have the right to re-schedule the holiday to a later date. It further stated that the EC Law required the worker to be allowed to re-schedule that holiday in the next holiday year.

Mr Shah had booked four week's holiday from 22<sup>nd</sup> February to 21<sup>st</sup> March 2009. His holiday year ended on 31<sup>st</sup> March 2009. He broke his ankle in January and was absent from work from 15<sup>th</sup> January to 18<sup>th</sup> April 2009. His sickness therefore overlapped with his booked period of holiday. During his absence Mr Shah received contractual sick pay together with holiday pay at a higher rate for the holiday days he had booked off. When Mr Shah tried to re-claim his holiday days his employer told him that they could not be reclaimed as they related to a previous holiday year and had therefore been lost.

The Tribunal found that the employer had refused to permit Mr Shah to exercise his rights under the Working Time Regulations as it had refused him from taking his accrued holiday in the following holiday year when he was prevented from taking it in the current leave year. It found that if there is insufficient time within the current holiday year to take the missed holiday, then that holiday should be taken in the following leave year. It stated that the purpose of the Working Time Regulations was to give workers paid holidays regularly throughout the year and to prevent them from storing it up. It therefore found that workers who had fallen sick during their pre-booked holiday should subsequently be able to take their holiday at the later date, if necessary in the following leave year.

To allow this, the Tribunal construed the Working Time Regulations by adding the following words to the end of Regulation 13 (9) "*save where a worker has been prevented by illness in taking a period of holiday leave and returns from sick leave, covering that period of holiday leave, with insufficient time to take that holiday leave in the relevant leave year; in which case, they must be given the opportunity of taking that holiday leave in the following leave year*".

### Practical Tips

Where an employee has pre-arranged holiday and falls sick during this time then they should be allowed to re-claim that holiday time during the current leave year or, if this is not possible, in the following leave year.

To avoid abuse of the system consider:

- Only paying SSP when an employee is ill during a pre-booked holiday
- Oblige employees to report sickness to their manager on the first day as they normally would do on non-holiday days, and continue to report in if sickness occurs during holiday

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- Withhold contractual sick pay during the holiday unless medical evidence over and above self-certification is provided – difficulties may arise however where the employee is abroad and this requirement may raise an issue of breach of trust and confidence
- Record and monitor sickness absence properly to identify abuse of the system
- Refuse to pay contractual sick pay unless the employee is unable to do their actual job

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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