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Sick leave v annual leave: how to stop employees stringing you along

Just as the dust was beginning to settle following the *Stringer* decision along comes the case of *Pereda v Madrid Movilidad SA* to cause yet more confusion to employers struggling to make sense of two European decisions that do not sit easily with the UK's Working Time Regulations (**"the Regulations"**).

Whereas *Stringer* decided that a worker accrues annual leave whilst on sick leave, *Pereda* had to decide the question of what happens where a period of sick leave coincides with a period of pre-booked annual leave. The case had to decide whether the purpose of the leave (i.e. "to enable the worker to rest and to enjoy a period of relaxation and leisure") is defeated.

The facts

Mr Pereda had the misfortune of suffering a workplace injury shortly before a pre-booked period of leave. By the time he had recovered, he had only two days of leave remaining. His employer had a collective agreement which provided that the works council would produce rotas for annual leave which were subject to the approval of the employer. Any changes to that rota had to be made on 45 days' notice. Mr Pereda asked his employer if he could rearrange his annual leave but his request was declined.

The decision

The ECJ, clearly influenced by the fact that the right to a minimum period of annual leave is a fundamental Community right, ruled that an employee in Mr Pereda's position must be given the opportunity, at his request, to take his leave at a later date (which did not coincide with sick leave) even if that had the consequence of leave being carried over into another leave year. The same principle would apply to an employee who falls ill whilst on annual leave. This decision conflicts with the Regulations which give the employer the right to give notice to an employee to take leave on particular dates or to cancel or re-arrange a period of leave requested by an employee. *Pereda* essentially gives an employee the right to elect not to take annual leave at a particular time, if it would coincide with a period of illness.

Impact

Prior to *Pereda*, if an employer was faced with an employee returning from two weeks, claiming to have been ill in bed for the entire duration of the holiday, the employer would have been well within its rights to advise the employee that he was not entitled to any further leave (although some may have adopted a less robust approach). Now, if the employee requests that the two week period be treated as sick leave rather than annual leave, the employer will, arguably, have to consider that request. There has been concern following Pereda that this could be open to abuse by employees trying to extend their annual leave allowance. However, with the correct procedures in place, employers should be able to prevent fabricated claims.

The Regulations provide that at least four weeks' annual leave must be taken in the leave year in question (subject to any provision for carry over in a relevant agreement). For private sector employees this remains the law, despite what was said in *Pereda*. Therefore, if an employee elects to defer annual leave in the *Pereda* situation, the employer can require that leave to be taken in the relevant holiday year, subject to any carry over that is permitted by the employer. That will remain the case until such time as the Regulations are amended.

Next steps

Some employers may dig their heels in and continue to deal with annual leave requests in accordance with the Regulations. However, it is likely that most employees will be familiar with the *Pereda* decision and will urge their employers to comply with it.

Given that an amendment to the Regulations is inevitable, we would advise employers to amend their sick leave procedures (whether set out in the contract of employment or a handbook) to provide as follows:-

1. If an employee is taken ill during a period of annual leave or a pre-booked period of leave coincides with a period of illness, and the employee wishes to treat the period of illness as sick leave rather than annual leave, s/he will be required to follow normal notification procedures on the first day of sickness (even if abroad). It will be insufficient to notify the employer of the illness on return from annual leave.
2. The employee may also be required to produce a medical certificate to verify the illness, if s/he wishes to reclassify holiday as sick leave. Whilst it is not generally permitted to require employees to obtain a certificate to demonstrate entitlement to statutory sick pay in the first seven days of any absence, we do not see any reason why an employer could not require a doctor's note substantiating the illness in order to reclassify holiday as sick leave.
3. An employee who elects to take sick leave in lieu of annual leave will be paid SSP only. This is the obvious route to take where company sick pay is discretionary. If company sick pay is contractual then it may be a case of renegotiating a change in contract, and altering the standard terms for any new recruits.
4. An employee is not obliged to treat a period of annual leave as sick leave in these circumstances and the employer will treat the period as annual leave unless the employee makes a request to the contrary.
5. The relevant period of annual leave may be taken at a later date (in the same year) with the prior approval of the manager (subject to any carry-over provisions).
6. An employee cannot be paid in lieu of annual leave other than on termination.

If employers take these simple steps, we believe that the ramifications of *Pereda* should be relatively minor.

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