

Employment Legal Update

Employers have been grappling with difficult issues regarding sick pay and annual leave. There have been a number of recent cases on this at a European and national level. Readers may recall the email alert we sent in October last year, on the European Court of Justice ruling in *Pereda v Madrid Movilidad SA*. We now report on a recent employment tribunal decision, *Shah v First West Yorkshire Ltd*, which considered the issues raised in the *Pereda* case.

Although *Shah* is only an employment tribunal decision, and therefore not legally binding on other tribunals, it is likely that other tribunals will apply this decision. Going forward, it seems likely that employers will be obliged to allow their employees to carry holiday entitlement into the next holiday year, if the employee has been prevented by ill-health from taking it in the current year.

Facts

Mr Shah broke his ankle and was absent from work for three months. During this period, he had booked 12 days annual leave which he was unable to take due to his injury. He eventually returned to work in the next holiday year.

During his absence, he received contractual sick pay but was also paid holiday pay at a higher rate for those days which he had booked as annual leave. Shortly before his scheduled return, Mr Shah wrote to his employer and asked to reclaim the holiday which he had been unable to take as a result of his sickness. The employer responded by saying that the holiday could not be reclaimed as it related to the previous year's holiday entitlement and as such had been "lost". He submitted a claim to the employment tribunal for loss of holiday under the Working Time Regulations.

The tribunal upheld Mr Shah's claim and made a declaration that the employer had refused to permit Mr Shah to exercise his rights under the WTR by refusing to allow him to take his accrued holiday in the following holiday year, when he had been prevented from taking it in the current leave year because of sickness.

Tribunal bound to make legislation compatible with European ruling

In coming to its decision, the tribunal considered itself bound to follow the decision in *Pereda*. In order to comply with the Working Time Directive, the national law of member states must permit an employee who falls sick during a period of annual leave to take that annual leave subsequently within the current leave year, or, if time does not permit, within the following leave year.

The WTR provide that at least four weeks' of a worker's annual leave entitlement must be taken in the leave year to which it relates (subject to any provision for carry over in a relevant agreement). In this case, the tribunal was required to read additional wording into the WTR, to render it compatible with the ECJ's ruling in *Pereda*.

Impact

This is the first case in which an employment tribunal has given effect to the ECJ's decision in *Pereda*. As Mr Shah's position was essentially the same as Mr Pereda's (a fact which was acknowledged by the tribunal) it would have been very surprising if the tribunal had not considered itself bound by the ECJ case. The decision, however, indicates that tribunals are increasingly emboldened to apply principles of EU law, even if they conflict with current UK legislation.

Although the tribunal's decision here is not binding, an amendment to the WTR in a similar form to that

contemplated by this tribunal is inevitable. In the meantime, we expect that either tribunals will apply this decision going forward or a similar approach will be endorsed by the Employment Appeal Tribunal (which will then be binding on tribunals), so as to resolve the current incompatibility of the WTR with European law.

Recommendations

Given the impact above, it is recommended that employers consider amending their sick leave procedures (suggestions below). However, one option that is probably no longer available is providing in a holiday procedure that an employee can only take annual leave lost through sickness *in the current holiday year*.

1. If an employee is taken ill during a period of annual leave, or if a pre-booked period of leave coincides with a period of illness, and the employee wishes to treat that as sick leave, s/he should be required to follow normal notification procedures on the first day of sickness.
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.
3. An employee who elects to take sick leave in lieu of annual leave could be paid SSP only.
4. An employee does not have to treat a period of annual leave as sick leave in these circumstances, so the employer can treat the period as annual leave unless the employee requests otherwise.
5. An employee cannot be paid in lieu of annual leave other than in the year their employment terminates.

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