

# Review

## Employment



### “Having a sickly time. Weather awful...”

The recent European Court of Justice decision in *Pereda v Madrid Movilidad SA* – that a worker who is sick during his statutory annual leave is entitled to take a replacement period of leave at a later date (even outside the current leave year) – has caused much consternation amongst employers and HR teams in particular, not the least because of the potential for abuse and the additional cost implications.

In reaching its decision, the ECJ noted that the purpose of the entitlement to paid annual leave is to enable the worker to rest and enjoy a period of rest and relaxation (best leave the kids behind, then) and that the purpose of sick leave is obviously different, i.e. to allow the worker to recover from being ill. It therefore follows that a worker who is on sick leave during a period of previously scheduled annual leave cannot at the same time be on leave. Therefore, said the ECJ, he has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave i.e. at a later date. This should ensure that the worker has the period of actual rest deemed necessary for the protection of his health and safety.

Until now, most employers have exercised their discretion when faced with an employee claiming to have been sick whilst on holiday and asking for the relevant period of holiday to be re-credited (“Tough luck, I didn’t enjoy my holiday either” being the response that traditionally springs to mind). The ECJ’s decision seems to bring an end to such discretion and raises a number of difficult practical issues for employers:

- How do you verify the claimed sickness?
- What if the sickness is self-inflicted (one sambuca too many perhaps or some ill-advised dance moves) and how do you establish that?
- What if the employee elects to indulge in a known “high risk” holiday activity such as skiing, bungee jumping or eating unidentified meat or unwashed salad?
- Should the sick leave falling within holiday be at full pay?
- When should the replacement holiday be taken? Who decides?

As the ECJ’s decision will initially only impact public sector workers (the principles of ‘direct effect’ mean that only such workers can rely on it directly), private sector employers may wish to await the outcome of any subsequent case law in the UK courts interpreting the Working Time Regulations in the light of *Pereda* and/or any consequent amendments to the WTR by the Government. For many private sector employers, adopting a ‘do nothing’ approach may be preferable to highlighting the issue unnecessarily in the consciousness of their workforces.

Some employers may wish, however, to take a more pro-active approach and consider ‘beefing up’ their sickness and/or holiday policies now to reduce the risk of some employees abusing the situation. At a minimum, these policy amendments could include:

- **Reporting.** Employees should be required to report any periods of sickness during annual leave for which they intend to claim replacement leave as soon as reasonably practicable. Employers could set up a designated telephone line to facilitate this.
- **Evidence.** Employees in receipt of contractual sick pay should be required to provide medical evidence (at their own expense) of sickness absence whilst on holiday from day one of the absence, i.e. no self-certification. Whilst this is likely to lead to a “two-tier” sickness policy, this can be justified by the evidential difficulties surrounding claimed sickness on holiday. Employers could also take the opportunity to specify in the sickness policy – if they do not already – that any periods of sickness absence immediately before or following annual leave are also subject to the stricter documentation requirements and/or always unpaid.
- **Pay.** Any pay for periods of illness during annual leave should be limited to Statutory Sick Pay if replacement holiday leave is to be sought.

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## • Replacement holiday.

- (a) The Working Time Regulations provide that full-time employees are entitled to a minimum 28 days' paid annual leave - 8 days of which may be carried forward by agreement to the following leave year. The good news for employers is that the WTR also allow them to give notice to employees of when those staff can (or cannot) take their annual leave (such notice must be twice as many days as the proposed leave period). As a result, employers can specify that any replacement leave "created" by earlier sickness must be taken at a time that is convenient to them, not the employee. This is unattractive from the industrial relations perspective but if it became clear to staff that any replacement leave they could obtain by claiming to be sick while on holiday would have to be taken at times inconvenient to them (e.g. in single days, or expressly not over half-term, etc.) then perhaps the temptation to seek replacement leave would be lessened.
- (b) Although in *Stringer* (a case concerning the right to receive paid holiday during long-term absence) earlier this year, the House of Lords did not deal with carry-over of untaken holiday, in *Pereda* the ECJ makes it clear that the replacement leave can be carried over to the following leave year. As a way of limiting the amount of carried-over holiday, employers may wish to consider specifying in their annual leave policies that any holiday taken during a particular leave year is firstly set off against the first 20 days' entitlement under the WTR before taking into account the remaining 8 WTR days and any non-WTR contractual leave.

### STOP PRESS: AGENCY WORKERS DIRECTIVE IMPLEMENTATION DEFERRED

As part of its second consultation on the implementation of the Agency Workers Directive, the Government has announced that the necessary UK Regulations will come into force in October 2011 (rather than during 2010 as previously suggested) in order to give hirers and temping agencies time to prepare. The Directive must be implemented by December 2011 at the latest in any event.

The consultation closes on 11 December and the consultation document can be downloaded from the Department for Business Innovation and Skills' website.

<http://www.berr.gov.uk/consultations/page53060.html>

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